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ARTICLES

IS THE BAN ON PARTICIPATION IN POLITICAL CAMPAIGNS BY CHARITIES ESSENTIAL TO THEIR VITALITY AND DEMOCRACY? A REPLY TO PROFESSOR TOBIN

Johnny Rex Buckles *

INTRODUCTION

Shut up or pay up. Such is the decree governing religious, educational, scientific, and other charitable organizations desiring to engage in many forms of political speech. A charity which sails into the forbidden sea of political discourse incurs a two-fold income tax penalty: the forfeiture of its federal income tax exemption under section 501(c)(3) of the Internal Revenue Code (“Code”),¹ and the loss of its ability to receive donations that are

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1. See I.R.C. § 501(c)(3) (2000) (describing organizations exempt from federal income tax under Code section 501(a) by virtue of meeting the requirements of section 501(c)(3)). Section 501(c)(3) organizations include only the following:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the ac-

deductible by donors in computing their federal taxable income.² The penalty applies whenever a charitable organization participates in “any political campaign on behalf of (or in opposition to) any candidate for public office.”³ Because of its severity, the two-fold penalty effectively prohibits many charities from supporting or opposing candidates seeking election.⁴

tivities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

2. See I.R.C. § 170(a)(1), (c)(2)(D) (2000). Code section 170(a)(1) authorizes a deduction for a “charitable contribution,” as defined in Code section 170(c). I.R.C. § 170(a)(1). Under section 170(c)(2), a “charitable contribution” includes a gift to a “corporation, trust, or community chest, fund, or foundation” that satisfies certain requirements. I.R.C. § 170(c)(2). Requirements include those set forth in Code section 501(c)(3), including the prohibition of engaging in electoral politics. See I.R.C. § 170(c)(2)(A)–(D).

3. I.R.C. §§ 170(c)(2)(D), 501(c)(3). Excise tax penalties also apply when a charitable organization impermissibly participates in a political campaign. See I.R.C. § 4955 (2000). A public charity that violates the prohibition of participation in a political campaign is subject to a special tax. See I.R.C. § 4955(a). Code section 4955 imposes this tax on a charitable organization’s “political expenditures,” defined to include amounts paid or incurred while engaging in political activities prohibited by Code section 501(c)(3). See I.R.C. § 4955(d)(1) (stating that a political expenditure generally “means any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office”); I.R.C. § 4955(d)(2) (stating that political expenditures include expenses paid or incurred by an organization formed primarily for purposes of promoting someone’s candidacy for public office, or an organization a candidate effectively controls and that is availed of primarily for such purposes). Code section 4955 imposes a tax on both the organization and certain managers. See I.R.C. § 4955(a)(1) (imposing an entity-level tax of 10% of the amount of the political expenditure); I.R.C. § 4955(a)(2) (2000) (imposing a tax of 2½% of the amount of the political expenditure on a manager who knowingly agreed to make the expenditure). If the expenditure is not corrected within a specified period of time, the organization and certain managers must pay an additional tax. See I.R.C. § 4955(b)(1), (2).

If the charitable organization is a private foundation, rather than a public charity, the taxes imposed by Code section 4955 do not apply. Instead, political campaign expenditures are subject to the excise tax on a private foundation’s “taxable expenditures.” See I.R.C. § 4945(d)(2) (2000). In general, a “private foundation” is a tax-exempt charity (unaffiliated with any other) that is neither funded with contributions or other receipts from a broad segment of the public nor one of the traditional public charities, such as schools, hospitals and churches, described in Code sections 170(b)(1)(A)(i)–(iii). See I.R.C. § 509(a) (2000) (defining “private foundation”). This article refers to any organization described in Code section 501(c)(3) and not classified as a private foundation under Code section 509(a) as a public charity.

4. One may rightly question whether this two-fold penalty would impose a serious financial hardship on certain charities, especially churches, which likely receive only moderate benefits from Code sections 170 and 501(c)(3). See Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit Is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 155–61 (2006). The penalty is

Notwithstanding that transgressions of the ban on participation in electoral politics⁵ have been reported for decades,⁶ often with no apparent adverse tax consequences to offending institutions,⁷ a charitable entity operating today cannot afford to dismiss the hazards of supporting or opposing candidates for public office. Charitable institutions are facing heightened scrutiny by the Internal Revenue Service (“IRS”), the agency responsible for enforcing the ban.⁸ Headlines in leading news media reveal the

most significant for charities with income consisting of fees or investment earnings, and for charities that receive donations from donors (such as the wealthy) whose giving depends on the after-tax cost of contributions. For illustrations of this point, see *infra* Part I.C.1.

5. In describing Code sections 170 and 501(c)(3) as imposing a “ban” on electioneering by charities, this article does not suggest that the law forbids charities from engaging in electoral politics. As others have noted, charities may endorse and oppose political candidates if they are willing to sacrifice their tax-favored status. See, e.g., Hatfield, *supra* note 4, at 126. Because so many charities—as well as their legal advisors and commentators—believe that forfeiting section 501(c)(3) status is unacceptable, however, they understandably view the Code as imposing a ban on participation in electoral politics by charities. See Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code’s Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 404 (1986).

6. For reports of arguably prohibited electioneering by religious organizations spanning many years, including political activities conducted by churches in the 1980s and 1990s, see Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 559–63 (1999); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 220–27 (1992); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 394–99 (2000); Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 736–39 (2001).

7. See Dan Gilgoff, *Turning a Blind Eye, IRS Enables Church Politicking*, USA TODAY, Jan. 29, 2007, at 13A (reporting an IRS spokesperson’s estimate that only five churches have lost federal income tax exemption for violating the ban). Congress has expressed concern that the IRS has not enforced the ban effectively. See H.R. REP. NO. 100-391(I), at 1624 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1204, 2313-1205, (stating the committee’s concern “that there has not been sufficiently effective enforcement by the Internal Revenue Service” of the ban).

8. See Bruce D. Collins, *A Click Away*, INSIDE COUNSEL, June 1, 2007, at 79 (“The word is that these political activity rules are a priority at the IRS right now.”); Jocelyne Miller & Harvey Berger, *Problems at the Polls: It’s Nearly Election Time—Are You Ready?*, NON-PROFIT TIMES, Apr. 1, 2006, at 24 (“[T]he IRS continues to prioritize enforcing the ban on political intervention.”); Elizabeth Schwinn, *Election Ban Unclear, Congressional Report Says*, CHRON. PHILANTHROPY, Mar. 8, 2007, at 35 (stating that the IRS “began stricter enforcement of the ban” in 2004); Elizabeth Schwinn, *IRS Takes a Tougher Stance*, CHRON. PHILANTHROPY, Oct. 12, 2006, at 25 (reporting that the director of the Exempt Organizations Division of the IRS has stated that the agency “intends to be vigorous about investigating” political campaigning by charities, and that the Exempt Organizations Division has recently added 100 full-time employees and expanded its examinations of non-profit entities).

seriousness with which the IRS is pursuing its enforcement mandate,⁹ in part through its recent and ongoing compliance initiative.¹⁰ Charitable institutions and their legal advisors need not question whether the ban is real; it is. The question is whether the ban is justified.

In a recent article published in the Georgetown Law Journal, Professor Donald Tobin argues in favor of the ban on political campaign participation by churches and other charities.¹¹ Professor Tobin's "greatest concern" is the argument that the ban should be relaxed because charities serve an important function in political campaigns, or that government should support charities as they seek to fulfill a duty to express their political voice.¹²

9. See, e.g., Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005, at A1; Rob Boston, *Render unto Caesar . . . IRS Commissioner Tells Tax-Exempt Churches: Thou Shalt Not Electioneer*, CHURCH & ST., Apr. 1, 2006, at 4; Stephen Clark, *IRS Warns Churches to Stay Neutral on Politics*, L.A. TIMES, July 18, 2006, at B3; Alan Cooperman, *IRS Reviews Church's Status: 2004 Antiwar Sermon Sparked Look at Tax Exemption*, WASH. POST, Nov. 19, 2005, at A3; Editorial, *Is the IRS Policing Free Speech?*, CHI. TRIB., Nov. 6, 2004, at C28; Michael Janofsky, *Citing Speech, IRS Decides to Review NAACP*, N.Y. TIMES, Oct. 29, 2004, at A12; Michael Kranish, *IRS Scrutinizing Charities' Political Work*, BOSTON GLOBE, Apr. 29, 2006, at A1 (quoting former IRS Commissioner Mark Everson); Gail Perry, *IRS, Charities Clashing over Possible Political Activities*, ACCT. TODAY, Apr. 3, 2006, at 1, 3; Vincent J. Schodolski, *Political Sermons Stir up the IRS*, CHI. TRIB., Nov. 20, 2005, at C11; James Sterngold, *Unwanted Allies Back Liberal Church in IRS Fight: Anti-war Sermon Led to Investigation*, S.F. CHRON., Oct. 2, 2006, at A1; Stephanie Strom, *IRS Finds Sharp Increase in Illegal Political Activity*, N.Y. TIMES, Feb. 25, 2006, at A8; Editorial, *Taxing an Unfriendly Church*, N.Y. TIMES, Nov. 22, 2005, at A22.

Additional evidence of the importance to which the IRS has assigned enforcement of the ban is the agency's 2006–2007 Priority Guidance Plan. This document lists "[g]uidance on political activities by section 501(c)(3) organizations" as the IRS's first priority for exempt organizations for the plan year ending June 30, 2007. See DEPT OF THE TREASURY/INTERNAL REVENUE SERV., 2006–2007 PRIORITY GUIDANCE PLAN 9 (rev. ed. 2007), available at <http://www.irs.gov/pub/irs-utl/2006-2007pgp.pdf>.

10. See Peter Panepento, *IRS Investigates 350 Charities over Charges of Improper Politicking*, CHRON. PHILANTHROPY, June 14, 2007, at 48 (describing the investigations launched by the IRS of alleged electioneering by charities during the 2006 election cycle); INTERNAL REVENUE SERVICE, FINAL REPORT, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2006), http://www.irs.gov/pub/irs-tege/final_paci_report.pdf [hereinafter PACI FINAL REPORT] (describing the examination of numerous cases involving alleged electioneering by charities during the 2004 election cycle).

11. See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317–19 (2007). This article at times refers to churches and "other charities" because religious purposes are "charitable" under the common law of charitable trusts, see RESTATEMENT (SECOND) OF TRUSTS §§ 368(c), 371 (1959), and churches typically engage in both "religious" activities and those that are otherwise "charitable," such as feeding and clothing the poor. See *id.*, §§ 368(a), 369 (stating that the relief of poverty is a charitable purpose).

12. See Tobin, *supra* note 11, at 1317. Professor Tobin also rebuts the allegation that the ban is unconstitutional. See *id.* at 1342–49 (discussing Supreme Court cases in which

Professor Tobin's thesis is that removing the ban "poses a threat both to the democratic system in the United States and to the vitality of" section 501(c)(3) entities.¹³

Professor Tobin's thesis will likely strike a positive chord with many academics, judges, and other American citizens. Further, several of Professor Tobin's arguments are creative, as well as thought-provoking. I respect Professor Tobin's contribution to the legal literature analyzing the ban on political campaigning by charities. Indeed, his article merits extended, critical engagement.

groups engaged in political activity were not entitled to a government subsidy). In this article, I limit my response primarily to the policy arguments advanced by Professor Tobin. Although the constitutional issues discussed in Professor Tobin's article merit further analysis, the policy considerations raised present ample material for this article. For analysis of the constitutionality of the prohibition of political campaign activity by charities (in general, or specifically by religious organizations), see Ablin, *supra* note 6, at 566–70; Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 180–98 (1985); Carroll, *supra* note 6, at 254–59; Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 319–37 (1990); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 29–39 (1990); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 887–93 (2001); West, *supra* note 6, at 404–29; Joel E. Davidson, Comment, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397, 409–22 (1973).

For other perspectives on the ban, most of which predate Professor Tobin's analysis, see Ablin, *supra* note 6; Caron & Dessingue, *supra* note 12; Carroll, *supra* note 6; Chisolm, *supra* note 12; Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903 (2001); Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931 (2001); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145 (2006); Lee, *supra* note 6; Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003); O'Daniel, *supra* note 6; Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298 (2007); Joseph S. Klapach, Note, *Thou Shall Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999); Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536 (1981).

13. Tobin, *supra* note 11, at 1319. To be precise, Professor Tobin states that "subsidizing 501(c)(3) organizations that are involved in political campaigns" threatens democracy and the vitality of charitable institutions. *Id.* Professor Tobin thus equates the removal of the ban with subsidizing charities that participate in political campaigns. See *infra* text accompanying notes 22–35. Moreover, his argument often assumes that the ban itself is the best approach for limiting electioneering by charities. See, e.g., Tobin, *supra* note 11, at 1362 ("The political campaign ban contained in section 501(c)(3) is good for 501(c)(3) organizations and good for the country.").

This article responds to Professor Tobin's thesis.¹⁴ Specifically, it explains why his arguments do not establish that the ban on political campaign participation by charitable organizations is essential to protect the vitality of the charitable sector or to maintain a properly functioning democracy in the United States. This article also concludes, however, that certain concerns that Professor Tobin raises are valid. Although this article disagrees with many of Professor Tobin's arguments, it agrees that unfettered intervention in political campaigns by charities would pose some problems.¹⁵ This article concludes that some electioneering by charities is proper, and that alternatives to the ban would better address the most compelling concerns raised by Professor Tobin.

Part I of this article discusses the limitations of the theoretical framework in which Professor Tobin advances his case for the ban. This framework significantly affects much of his analysis, and therefore merits preliminary observation and comment.

Next, Parts II and III address Professor Tobin's specific arguments in favor of the ban on political campaign participation by churches and other charities, in the style of point and counterpoint. For ease of presentation, I reply to Professor Tobin's arguments in the order in which he presents them, and according to his two major sections: arguments applicable to churches specifically, and arguments applicable to charitable entities in general. Part II responds to Professor Tobin's argument that participation in political campaigns by churches harms churches and religion, and impairs the democratic process. Part III responds to Professor Tobin's argument that participation in political campaigns by charities in general threatens the positive character of charity in this country, and is structurally unsound. Parts II and III conclude that Professor Tobin's arguments do not justify the ban, as applied to churches in particular, and to charities in general. This article, however, concludes that Professor Tobin has successfully argued that some limitation on electioneering by charitable organizations is necessary.

14. In a recent article, I have addressed several arguments in favor of the ban, including those not advanced by Professor Tobin. See Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071, 1078-95 (2007) [hereinafter *Not Even a Peep?*].

15. See *infra* Part III.E.1; see also *Not Even a Peep?*, *supra* note 14, at 1085-89.

I. PRELIMINARY OBSERVATION: THE PROMINENCE AND
LIMITATIONS OF THE SUBSIDY THEORY IN
PROFESSOR TOBIN'S ARGUMENT

A. *Professor Tobin's Unequivocal Reliance on the Subsidy Theory*

The first notable element of Professor Tobin's argument is that it consistently relies on the subsidy theory of the charity income tax exemption and the charitable contributions deduction.¹⁶ He provides the following explanation of the exemption and the deduction:

Because of their charitable purposes, 501(c)(3) organizations are generally exempt from tax. In addition, the Internal Revenue Code provides that donations to 501(c)(3) organizations are tax deductible by the donor. Thus, 501(c)(3) organizations receive a dual tax subsidy. Their income is not taxed, and donations to them are deductible by donors. These tax benefits are considered a subsidy by society to 501(c)(3) organizations.¹⁷

This assumption with which Professor Tobin introduces his paper pervades his analysis. He understands the ban on political campaign activity by charities as necessary "to ensure that this subsidy is not abused or misused."¹⁸ In the context of hypothesizing the removal of the ban, he cautions against providing "subsidized campaign speech to 501(c)(3) organizations,"¹⁹ and states that such entities would "be the only organizations to receive a subsidy for campaign speech."²⁰ He argues "that taxpayer-subsidized 501(c)(3) organizations should not be permitted to intervene in political campaigns" and asserts that "providing these organizations with a subsidy to participate in political campaigns harms both 501(c)(3) organizations and our democratic process."²¹

Professor Tobin frames his discussion of the ban on political campaign participation by churches in terms of "whether reli-

16. See Tobin, *supra* note 11, at 1317.

17. *Id.* at 1317 (citing *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983)) (internal citations omitted).

18. *Id.* at 1317.

19. *Id.*

20. *Id.* at 1317-18 (stating that if Code section 501(c)(3) organizations can participate in political campaigns, they generally "will be the only organizations involved in political campaigns to receive a federal tax subsidy").

21. *Id.* at 1319.

gious institutions should be subsidized to engage in political campaigns.”²² He then asserts that “[s]ubsidizing the entry of churches into politics artificially increases the power of religious institutions . . . [and undermines] our current system of governance.”²³ Further, he argues that churches “do not have a constitutional right to both engage in candidate elections and receive a subsidy from the government.”²⁴

Turning to arguments concerning all charities, Professor Tobin avers that the common law does not “suggest that a charitable organization should receive a financial subsidy from the government *and* be allowed to invest that subsidy” in a candidate’s bid for election.²⁵ Moreover, he reasons that when charities “engage in partisan election activities, they are no longer independent, objective voices and a government subsidy is no longer appropriate.”²⁶ Further, as he introduces his argument that engaging in political campaigns is not “charitable,” Professor Tobin observes, “One reason for providing a subsidy to 501(c)(3) organizations . . . is that they are engaged in charitable functions.”²⁷ Yet again, as he develops his assertion that authorizing charities to participate in political campaigns is “structurally unsound,” Professor Tobin articulates his concern in the language of “subsidy.”²⁸ Even his conclusion bears the stamp of the subsidy theory.²⁹ Thus, from

22. *Id.* at 1320.

23. *Id.* at 1326.

24. *Id.* at 1330. Tobin also asserts that the ban is constitutional. *See also id.* at 1342–49.

25. *Id.* at 1336.

26. *Id.*

27. *Id.* at 1337.

28. *Id.* at 1339. Professor Tobin argues as follows:

The central question here is whether 501(c)(3) organizations, including religious institutions, should be provided a taxpayer *subsidy* to participate in and intervene in political campaigns. If the prohibition were lifted and such a subsidy were granted, 501(c)(3) charities would then enjoy a preferred position over all other campaign organizations, including a candidate’s campaign organization.

Id.

29. Professor Tobin summarizes the justifications for the ban on electioneering by charities as follows:

It protects taxpayer-subsidized 501(c)(3) organizations from being corrupted, co-opted or coerced. It protects the public treasury by ensuring that taxpayer subsidies are not used for political campaigns. And it protects democracy by keeping all groups on a level playing field. The government should not put its finger on the scale in favor of one group over another.

Id. at 1362–63.

the beginning of his analysis to his summation, Professor Tobin grounds his thesis on the assumption that federal income tax law bestows a dual subsidy on charitable organizations.

B. *Theoretical Alternatives to the Subsidy Theory*

Although Professor Tobin's endorsement of the subsidy theory pervades his article,³⁰ he never defends it. That Professor Tobin declines to defend the theory is hardly astonishing; the subsidy theory is a prominent, long-standing rationale for both the charity income tax exemption and the charitable contributions deduction.³¹ An uncritical acceptance of the subsidy theory, however, is problematic for several reasons articulated here and in Part I.C.

30. Professor Tobin articulates two versions of the subsidy theory:

Generally, the subsidy to 501(c)(3) organizations is justified on either a charitable trust principle or public welfare theory. The idea is that charitable organizations are involved in promoting the public welfare and that a subsidy from the government to 501(c)(3) organizations is thus appropriate. Some argue that the subsidy to 501(c)(3) organizations is just a recognition that they are engaged in activities that the government would otherwise have to fund—what I call a forgone responsibility rationale.

Id. at 1335–36 (citations omitted).

31. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) (“[G]overnment policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy”); Chisolm, *supra* note 12, at 320 (“It is nearly as settled, at least in Congress and the courts, that permitting a section 501(c)(3) organization to engage in election-related activity would be equivalent to granting a ‘subsidy’ of public funds for the activity.”); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (“[T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations.”); cf. Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 808 (2001) (“Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.”). Indeed, in upholding the constitutionality of the lobbying restriction on charitable organizations, the Supreme Court of the United States has relied on the theory that both federal income tax advantages enjoyed by charitable organizations are a form of governmental subsidy. See *Regan v. Taxation With Representation*, 461 U.S. 540, 544–51 (1983); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1988) (stating that “[e]very tax exemption constitutes a subsidy”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 587–88 (1983) (“[I]n enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”); H.R. REP. NO. 100-391 (I), at 1625 (1987), reprinted in 1987 U.S.C.A.N. 2313-1, 2313-1205 (stating that the ban on electioneering and the limitations on lobbying by charitable organizations “reflect Congressional policies that the U.S. Treasury should be neutral in political affairs,” and that substantial lobbying “should not be subsidized through the tax benefits accorded to charitable organizations and their contributors”).

The first problem with unconditionally relying on the subsidy theory is that it is hardly the only plausible theoretical justification for the charity income tax exemption and the charitable contributions deduction.³² One theory, advanced by Professor Boris Bittker and George Rahdert, posits that taxable income, a concept designed to apply to profit-seeking taxpayers, is virtually impossible (or at least impracticable) to determine in the case of many nonprofit entities, including charities.³³ The “receipts” of these organizations often do not derive from selling a product or service, and their “expenses” are not amounts paid to generate profits.³⁴ Although the theory is highly debatable,³⁵ it at least illus-

Although the Supreme Court relied upon the subsidy theory of the charity income tax exemption in *Regan* and observed it in dicta in *Bob Jones*, the Court’s jurisprudence hardly reflects an unqualified adoption of the theory. In *Walz v. Tax Comm’n of New York*, the Court held that the granting of property tax exemptions to religious organizations did not violate the Establishment Clause. 397 U.S. 664, 679–80 (1970). The *Walz* Court acknowledged that tax exemption conferred an “indirect economic benefit” on religious entities, *see id.* at 674, but distinguished this benefit from direct subsidies:

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees “on the public payroll.” There is no genuine nexus between tax exemption and establishment of religion The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Id. at 675–76.

32. For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 *FORDHAM L. REV.* 1243, 1284–96 (2002) [hereinafter *The Case for the Taxpaying Good Samaritan*]. *See generally* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 *B.C. L. REV.* 501 (1990); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L.J.* 299 (1976); Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 *J. CORP. L.* 585 (1998); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 *FLA. L. REV.* 419 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 *OHIO ST. L.J.* 1379 (1991); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 *YALE L.J.* 54 (1981).

33. *See* Bittker & Rahdert, *supra* note 32, at 307–08.

34. *See id.* at 308–14.

35. For example, Professor Henry Hansmann observes that (i) “many nonprofits receive little or no income from donations,” but rely instead on commercial operations as a source of funds; (ii) even donations to organizations providing services to third parties can be broadly viewed as “purchases” (that generate revenues to the nonprofit donees) of such services on behalf of the ultimate beneficiaries; and (iii) the costs of providing those ser-

trates that the subsidy theory is not the only way to justify the charity income tax exemption.

More compelling is the theory of Professor William Andrews, who has defended the charitable contributions deduction under income tax theory and policy.³⁶ In purported agreement with the classic formulation of income articulated by Henry Simons,³⁷ Professor Andrews posits that under an ideal income tax, each taxpayer is taxed on his or her "aggregate personal consumption and accumulation of real goods and services and claims thereto."³⁸ Professor Andrews argues that if income means consumption plus accumulation, a deduction is proper whenever a taxpayer expends money for whatever is not personal consumption or accumulation.³⁹ Andrews asserts that taxable personal consumption means only the consumption of "divisible, private goods and services," the consumption of which "by one household precludes enjoyment by others."⁴⁰ Taxable personal consumption, therefore, does not include a taxpayer's consumption of "collective goods whose enjoyment is nonpreclusive," nor does it include the "nonmaterial satisfactions" derived from a taxpayer's mere act of charitable giving.⁴¹ In the case of contributions to non-redistributive charitable donees, a deduction is proper because they generally produce public goods that are not enjoyed by contributors in proportion to their contributions.⁴² Further, in the case of contributions to a donee that redistributes donations to the poor, consumption

vices would be deductible "business-related" expenses of the charities. See Hansmann, *supra* note 32, at 58–62.

36. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 312 (1972) (stating that the ideal income tax must be "refined to reflect the intrinsic objectives of the tax," and that it is "imperative to consider carefully whether a provision can be defended by reference to intrinsic matters of tax policy before evaluating it as if it were something else"). For critiques of Professor Andrews' theory, see Colombo, *supra* note 31, at 679–82; Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 831–58 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 688–90 (1988).

37. Simons defines personal income as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938).

38. Andrews, *supra* note 36, at 313.

39. *Id.* at 325.

40. *Id.* at 314–15.

41. *Id.*

42. See *id.* at 358–60.

made possible by the funds, or accumulation resulting from receipt of the funds, is shifted from the donor to the impoverished recipients of funds donated to charity.⁴³ The ultimate distributees should not be taxed at the presumably higher rates of tax to which donors are subject.⁴⁴

Another alternative to the subsidy theory, which I initially advanced in a previous article, and which builds upon and expands the work of Professor Andrews, is the "community income theory" of the charitable contributions deduction and the charity income tax exemption.⁴⁵ The essential elements of the community income theory are as follows. The federal government justifiably does not attempt to subject to income taxation numerous forms of benefits (provided by government, business firms, charities, and even the environment) that individual members of the community enjoy.⁴⁶ The individual income tax base properly does not include these benefits because they are more appropriately attributed not to individual community members, but to the community itself, and the community is not an appropriate object of taxation.⁴⁷ The community is not taxable because government exists primarily to promote the welfare of the community, rather than the welfare of only selected individuals.⁴⁸

The community income theory justifies the charity income tax exemption.⁴⁹ Charities exist to benefit the community (i.e., to generate community income).⁵⁰ Thus, functioning properly, charities are best conceptualized as agents of the community. Under basic principles of federal income taxation, the income of an agent that is earned for its principal is properly attributed to the principal.⁵¹ Consequently, if the principal (the community) is not an

43. See *id.* at 347.

44. See *id.*

45. See Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005) [hereinafter *The Community Income Theory*].

46. See *id.* at 967–69.

47. See *id.* at 970–74.

48. *Id.* at 973–74.

49. See *id.* at 977–79.

50. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit"); *id.* at 590 n.16 ("The common-law requirement of public benefit is universally recognized by commentators on the law of trusts."); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990) ("An organization is not organized or operated exclusively for one or more . . . [exempt] purposes . . . unless it serves a public rather than a private interest.").

51. See *Poe v. Seaborn*, 282 U.S. 101, 113–18 (1930) (holding that a husband and wife

appropriate object of taxation, the income earned by the community's agent (a charity) is likewise not properly included in the tax base. A similar but more tentative analysis may justify the charitable contributions deduction.⁵²

The community income theory explains why so-called tax "preferences" to charities are misnamed. They are essential mechanisms to ensure that income is properly calculated. Rather than imparting a governmental subsidy, the charity income tax exemption and the charitable contributions deduction may simply ensure that the government refrains from taxing that which is properly not taxed—community income.

The community income theory of the charity income tax exemption and the charitable contributions deduction is distinct from, but nicely complements, Professor Evelyn Brody's theory of exemption based upon sovereignty.⁵³ Professor Brody argues that charities historically have been viewed as limited co-sovereigns with the state.⁵⁴ As qualified co-sovereigns,⁵⁵ charitable entities generally have been regarded as improper objects of taxation. The community income theory helps articulate why charitable organizations have been treated as co-sovereigns with the state. Just as government exists for the community, so do charitable entities. If community income is not properly included in the tax base, it is sensible to exclude from the tax base the income of those institutions that represent and embody the community—government and charities.

Because the community income theory relies heavily on the concept of income, it is an example of what Professor Brody calls a "base-defining" theory.⁵⁶ Professor Brody has properly recognized that, relative to subsidy theories of the charity tax exemption, "a sovereignty view is easier to see in a base-defining ap-

were entitled to file separate tax-returns for one-half of the community income, and that Congress had not intended to tax the husband alone in respect to the whole community income).

52. See *The Community Income Theory*, *supra* note 45, at 979–84.

53. *Id.* at 978.

54. See Brody, *supra* note 32, at 587–96.

55. I use the term "qualified" co-sovereigns because Professor Brody argues that the state treats charities with suspicion, and is unwilling to recognize their co-sovereignty consistently for tax purposes. See Brody, *supra* note 32, at 629.

56. See *id.* at 585–86.

proach.”⁵⁷ Although the recently advanced community income theory was not one of the base-defining theories considered by Professor Brody when she made this observation, the theory is compatible with the sovereignty perspective. The income of charity is generally treated like the income of government—it is excluded from the tax base.

The presence of theoretical explanations for the charity income tax exemption and the charitable contributions deduction other than the subsidy theory should give one pause.⁵⁸ If the charity income tax exemption and the charitable contributions deduction may plausibly be understood not to impart a governmental subsidy to charities, then they do not raise several of the concerns advanced by Professor Tobin in support of the ban on electioneering.

C. *Limited Force of the Subsidy Theory*

Another problem with reliance on the subsidy theory to justify the ban on political campaign activity by charities is that it ultimately fails to support, and even militates against, important elements of Professor Tobin’s analysis. Two major difficulties surface when Professor Tobin invokes the subsidy theory to support his justification of the ban: first, his willingness to accept political campaign activity by organizations receiving some subsidy undermines his argument for the ban; and second, his concern with parity actually compels a *rejection* of the ban.

As I have observed previously, Professor Tobin characterizes the income tax exemption of charities and their ability to receive tax-deductible donations as a dual subsidy.⁵⁹ His discussion of the precise nature of just what “subsidy” charitable organizations enjoy, however, belies the conclusion that charities, as a class, should be forbidden from participating in political campaigns on a partisan basis because they receive a governmental subsidy. The

57. *Id.* at 586.

58. A few other scholars have rejected the view that exemption is tantamount to a subsidy for purposes of constitutional law, at least in the context of religious organizations. See, e.g., DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 32–34 (1977) (discussing the distinctions between subsidy and tax exemption); Zelinsky, *supra* note 31, at 807 (“[I]t is most convincing to think of religious tax exemption as the acknowledgment of sectarian sovereignty (rather than the subsidization of religion)”); see *id.* at 836–41 (arguing that tax exemption for religious entities is best understood as base-defining).

59. See Tobin, *supra* note 11, at 1317.

difficulty surfaces when one analyzes the political campaign activities of other tax-exempt entities, including social welfare organizations. Social welfare organizations are exempt from federal income tax by virtue of Code section 501(c)(4),⁶⁰ but they are not entitled to receive donations, which are deductible by donors in computing their taxable income.⁶¹ These entities may support and oppose candidates in political campaigns without losing their tax exemption, as long as doing so is not their primary activity.⁶²

One would expect Professor Tobin to object to the partisan participation in a political campaign by any entity which receives a governmental subsidy. He apparently believes, however, that the subsidy provided by a federal income tax exemption is not itself sufficient to justify a ban on partisan political campaign activity by entities receiving this subsidy. After he acknowledges that a church can form a section 501(c)(4) entity that engages in electioneering, Professor Tobin recalls that contributions to a section 501(c)(4) entity are not deductible by donors, and surmises that "the public fisc is therefore not subsidizing the donations to the organization."⁶³ Similarly, he opines that a social welfare organization "still receives a tax subsidy because in many cases income of the organization is not taxed," but it "does not receive the additional subsidy provided to 501(c)(3) organizations" because contributions to a section 501(c)(4) organization are not deductible by donors.⁶⁴

60. Code section 501(c)(4) organizations include the following:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4)(A) (2000). In addition, no part of the net earnings of any such organization may inure to the benefit of any private shareholder or individual. I.R.C. § 501(c)(4)(B).

61. Code section 170(c), which describes entities to which deductible "charitable contributions" may be made, does not designate organizations described in Code section 501(c)(4) as permissible donees. See I.R.C. § 170(c) (2000).

62. See Rev. Rul. 81-95, 1981-1 C.B. 332. The Treasury regulations state that the promotion of social welfare does not include political campaign activity, see Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990), but a social welfare organization may engage in non-exempt activities (such as electoral politics) to some degree, as long as an organization is "primarily engaged" in promoting the general welfare of the community. See *id.* § 1.501(c)(4)-1(a)(2)(i).

63. Tobin, *supra* note 11, at 1325.

64. *Id.* at 1325 n.44.

Professor Tobin's explanation for why he accepts political campaigning by tax-exempt social welfare organizations is noteworthy. I respond to most of his analysis below,⁶⁵ but one of his justifications relies explicitly on the subsidy theory, and therefore merits treatment in this section of the article. The relevant portion of his argument is as follows:

Because a 501(c)(4) organization is a separate organization from the church, it cannot use a church's assets or resources to further its cause. It must be financially independent. It therefore is conducting its activities on par with those of the rest of society. Government is only minimally subsidizing the activity, and there is therefore no preference given to the 501(c)(4) organization over other similarly situated organizations.⁶⁶

I offer two observations of Professor Tobin's analysis. First, Professor Tobin believes that a social welfare organization should be permitted to participate in political campaigns because it receives only the "minimal" subsidy of federal income tax exemption.⁶⁷ Thus, he appears to argue that an entity which receives a "minimal" tax subsidy should not necessarily forfeit the right to support or oppose candidates for election (the "minimal subsidy rationale").

Second, and related to the first observation, Professor Tobin is willing to accept political campaign activity by a modestly subsidized entity because it receives "no preference" over other "similarly situated" organizations.⁶⁸ Therefore, he appears to argue that governmental tax policy should be neutral with respect to the political campaign activity of similarly situated organizations. In other words, government should not use the tax system to support the political campaign activity of a privileged class of entities (the "parity rationale"). I discuss each of these rationales in turn.

1. The "Minimal Subsidy Rationale"

The minimal subsidy rationale undermines the argument for the ban on electioneering by charities. If some "minimal" subsidy is consistent with an entity's engaging in political campaign activ-

65. See *infra* Part II.F.

66. Tobin, *supra* note 11, at 1325 (citations omitted).

67. See *id.*

68. See *id.*

ity, there is no obvious justification for Code section 501(c)(3)'s outright ban. It is far from clear that the perceived subsidy provided to many section 501(c)(3) entities is in excess of the "minimal" subsidy provided section 501(c)(4) entities. Consider the following four cases, each of which assumes, for simplicity, an average tax on income (both corporate and individual) at the rate of 35%. Each case also assumes that both charities and social welfare organizations may participate in political campaigns on a partisan basis.

Case 1. A section 501(c)(4) entity has gross receipts from membership dues of \$95,000 and investment earnings of \$5,000. It consistently expends \$50,000 directly for the promotion of social welfare, and \$30,000 to influence a public election. It invests the remaining \$20,000 at year-end in its portfolio of stocks. Assuming that the membership dues entitle the members to receive from the organization various benefits roughly corresponding to the amount of the dues, both the dues and the investment earnings would constitute gross income if incurred by a taxable entity. If the \$50,000 is analogized as trade or business expenses incurred by a taxable business entity, it would be deductible.⁶⁹ The political campaign-related expenses would be nondeductible, as would the investment in stock. That leaves \$50,000 of otherwise taxable income that a section 501(c)(4) entity avoids.⁷⁰ Under Professor Tobin's analysis, the subsidy provided the entity by tax exemption is presumably \$50,000 multiplied by the tax rate of 35%, or \$17,500. If the subsidy is allocated to exempt function expenditures, political campaign-related expenditures and investment expenditures pro rata, the government has subsidized \$5,250 of the \$30,000 of political expenditures.⁷¹

69. See I.R.C. § 162(a) (2000).

70. This illustration assumes that the entity avoids the tax imposed by Code section 527(f)(1) because it maintains a separate segregated fund from which it makes political expenditures. See I.R.C. § 527(f)(1), (f)(3). For an analysis of the tax logic of section 527 as it applies to political organizations, see Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773 (2007). *But cf.* Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 641-53 (2003) (discussing that section 527 may impart a tax subsidy). For a discussion of whether federal election campaign law may constitutionally regulate section 527 political organizations, see Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181 (2007); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1027-34 (2005).

71. Of the total outlays of \$100,000, political expenditures are \$30,000, or 30% of the

Case 2. A section 501(c)(3) entity has gross receipts from membership dues of \$100,000 and no other receipts. It consistently expends \$70,000 for the direct performance of charitable functions, and \$30,000 to influence a public election. Assuming that the membership dues entitle the members to receive various benefits roughly corresponding to the amount of the dues, the dues would constitute gross income if incurred by a taxable entity. If the \$70,000 is analogized as trade or business expenses incurred by a taxable business entity, it would be deductible. The political campaign-related expenses would be nondeductible. That leaves \$30,000 of otherwise taxable income that a section 501(c)(3) entity avoids. Under Professor Tobin's analysis, the subsidy provided the entity by tax exemption is presumably \$30,000 multiplied by the tax rate of 35%, or \$10,500. If the subsidy is allocated to exempt function expenditures and political campaign-related expenditures pro rata, the government has subsidized \$3,150 of the \$30,000 of political expenditures.⁷² Thus, this charity, with gross receipts and political campaign-related expenditures equal to those of the entity in *Case 1*, receives a smaller subsidy than the section 501(c)(4) entity.

Case 3. A section 501(c)(3) entity receives charitable contributions of \$100,000 and no other funds. It consistently expends \$70,000 for the direct performance of charitable functions, and \$30,000 to influence a public election. Because Code section 102 excludes from gross income amounts received as gifts, the better view is that section 501(c)(3) itself confers no subsidy with respect to the charity's receipts.⁷³ The charity, however, may well have received a smaller amount of donations in the absence of the charitable contributions deduction. Let us assume that donors of sums totaling one-half of the total contributions, or \$50,000, claim the charitable contributions deduction and would be willing to part with only \$32,500 were their donations non-deductible,

total. Thirty percent of the \$17,500 savings from tax exemption is \$5,250.

72. Of the total outlays of \$100,000, political expenditures are \$30,000, or 30% of the total. Thirty percent of the \$10,500 savings from tax exemption is \$3,150.

73. Although the issue is at least debatable, I agree with the analysis of Professor Michael Hatfield that receipts from charitable donations would constitute excludible gifts. See Hatfield, *supra* note 4, at 155-57. Further, as Professor Hatfield notes, at least one court has opined that donations to a charity would constitute gifts excludible from gross income under Code section 102. See *id.* at 155; see also *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000). The IRS has expressed the same view in at least one private letter ruling. See, e.g., I.R.S. Priv. Ltr. Rul. 6812121000A (Dec. 12, 1968).

because the effective after-tax cost of their donations in a world with the charitable contributions deduction is only \$32,500.⁷⁴ The remaining donations derive from those who, for some reason, do not claim the charitable contributions deduction (because, for example, they do not itemize deductions).⁷⁵ On these assumptions, in the absence of the charitable contributions deduction, the charity would receive \$50,000 from non-itemizers and \$32,500 from itemizers,⁷⁶ or a total of \$82,500. Thus, under Professor Tobin's view, the charity receives a \$17,500 subsidy from the government.⁷⁷ If this \$17,500 subsidy is allocated on a pro rata basis to exempt function expenditures and political expenditures, the government has subsidized \$5,250 of the latter.⁷⁸ Under these assumptions, the section 501(c)(3) entity with gross receipts and political campaign-related expenditures equal to those of the entity in *Case 1* receives the same subsidy as the section 501(c)(4) entity.

Case 4. The facts and assumptions are the same as in *Case 3*, except that the charity consistently expends \$80,000 for the direct performance of charitable functions, and \$20,000 to influence a public election. If the \$17,500 subsidy is allocated on a pro rata basis to exempt function expenditures and political expenditures, the government has subsidized \$3,500 of the latter.⁷⁹ Under these assumptions, the section 501(c)(3) entity receives a smaller subsidy than its section 501(c)(4) counterpart, attributable in part to the charity's more modest political campaign expenditures.

These four cases expose a weakness in the "minimal subsidy rationale." Even assuming that the tax benefits extended to a

74. Assuming the \$50,000 in contributions is fully deductible, at a tax rate of 35%, the donations save the donors \$17,500 in taxes. Thus, after taxes, the donations cost donors only \$32,500.

75. "Itemized" deductions are, in general, those which are allowed in computing a taxpayer's taxable income, other than deductions specifically treated as allowable in arriving at "adjusted gross income." See I.R.C. § 63(d) (2000). A taxpayer elects to itemize deductions. See I.R.C. § 63(e)(1). A taxpayer who does not itemize is entitled to claim a statutorily specified "standard deduction." See I.R.C. § 63(b)(1).

76. Donations of \$50,000 save the itemizers \$17,500 in taxes when the tax rate is 35%. The after-tax cost of the donations is therefore \$32,500.

77. The charity receives \$100,000 in a world with the charitable contributions deduction, and \$82,500 in a world without it. The "subsidy" is therefore \$17,500.

78. Of the \$100,000 in total expenditures, \$30,000 represents 30%. The subsidy of \$17,500, multiplied by 30%, is \$5,250.

79. Of the \$100,000 in total expenditures, \$20,000 represents 20%. The subsidy of \$17,500, multiplied by 20%, is \$3,500.

charity are, in general, properly considered an indirect governmental subsidy, any number of factors may converge to result in the receipt of a subsidy by a section 501(c)(3) organization that is no more than, or even less than, the subsidy received by some section 501(c)(4) entities. The amount of the subsidy, if any, received by the charity is a function of income tax rates, both individual and corporate, its types of receipts and the excludability (or non-excludability) of such receipts in its income under general federal income tax law, the deductibility of its expenditures under general federal income tax law, and the degree to which the charity's donors itemize their deductions and adjust the amount of their donations on account of their tax treatment. Thus, as between any given section 501(c)(3) entity and a section 501(c)(4) entity, without knowing all of these facts, one is hard-pressed to assert universally that a section 501(c)(4)'s subsidy is "minimal" and a section 501(c)(3)'s subsidy is not.

Of course, I readily acknowledge that many section 501(c)(4) entities (such as those that provide no significant benefits to members in exchange for dues and have no investments) may not be subsidized as much as many charitable organizations. This concession hardly undermines my point that, in any particular case, one must consider numerous factors before determining the amount of the subsidy—if any—received by a tax-exempt entity. Further, and probably more importantly, one should not limit the comparison to section 501(c)(3) entities and their section 501(c)(4) counterparts. Both section 501(c)(5) entities (including labor unions) and section 501(c)(6) entities (including trade associations and chambers of commerce) may engage in electioneering without forfeiting federal income tax exemption.⁸⁰ Veterans organizations, which are exempt from federal income tax under Code section 501(c)(19) and entitled to receive donations deductible by donors,⁸¹ apparently may do the same.⁸² Similarly, fraternal lodges, which are exempt from tax under Code section 501(c)(8) and entitled to receive contributions deductible by donors,⁸³ may make po-

80. See I.R.S. Gen. Couns. Mem. 34,233 (Dec. 30, 1969).

81. See I.R.C. § 170(c)(3) (2000).

82. See I.R.S. Priv. Ltr. Rul. 79-04-064 (Oct. 25, 1978).

83. See I.R.C. § 170(c)(4) (defining a "charitable contribution" to include a gift to domestic fraternal orders operating under the lodge system if the gift is used exclusively, in relevant part, "for religious, charitable, scientific, literary, or educational purposes").

litical campaign expenditures.⁸⁴ Indeed, the Congressional Research Service has concluded that no fewer than eighteen types of tax-exempt organizations may engage in partisan political campaign activity.⁸⁵ If it is sound policy for these tax-exempt organizations to enjoy a subsidy and still engage in electioneering, there is no compelling reason to deny this privilege to a charity receiving no greater subsidy. The ban on partisan participation in a political campaign by charities sweeps with a brush far too broad.

Moreover, apart from the point that many charities may receive no greater subsidy than that enjoyed by other tax-exempt organizations, the ban is hardly the only option for minimizing any subsidy imparted on charities that participate in political campaigns. As an alternative to the ban, federal tax law could permit charitable entities to engage in electioneering to the same degree that they may engage in lobbying—as an insubstantial part of their total activity.⁸⁶ Alternatively, charities could be permitted to make political campaign expenditures within certain dollar thresholds, similar to those applicable to charities electing to have Code section 501(h) apply with respect to their lobbying expenditures.⁸⁷ Finally, the government could impose an excise tax on political campaign expenditures to reduce or nullify any perceived subsidy that federal income tax law confers on a charitable entity.⁸⁸

My point is simply that the ban is not necessary to ensure that electioneering by the charitable sector is only minimally subsi-

84. See I.R.S. Priv. Ltr. Rul. 88-52-037 (Oct. 4, 1988); I.R.S. Priv. Ltr. Rul. 83-42-100 (July 20, 1983).

85. See ERIKA LUNDER, CONGRESSIONAL RESEARCH SERVICE, TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 19–20 (2006), <http://www.ombwatch.org/npadv/PDF/CRSReportonTaxexemptorganizationsRestrictions.pdf>.

86. See Ablin, *supra* note 6, at 584 (discussing the “substantial part” test). Code section 501(c)(3) deems organizations charitable if “no substantial part” of their activities consists of “carrying on propaganda, or otherwise attempting, to influence legislation.” I.R.C. § 501(c)(3) (2000). The upper limits of “insubstantial” lobbying are unknown. Some authority suggests that “substantiality” ought not be determined merely quantitatively, but under all of the facts and circumstances. See *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972).

87. In general, an organization electing to be governed by Code section 501(h) will not attempt to influence legislation as substantial part of its activities if its lobbying expenditures do not exceed ceilings calculated by reference to the organization’s expenditures for carrying out exempt purposes. See I.R.C. §§ 501(h)(1)–(2), 4911(c) (2000).

88. See *Not Even a Peep?*, *supra* note 14, at 1101–06 (discussing a proposed excise tax regime as an alternative to the ban).

dized. If one willingly tolerates “minimally” subsidized political campaign intervention, then there are alternatives to the ban that are consistent with a “minimal” subsidy. One need not choose between an absolute ban on partisan political campaign activity and unlimited electioneering.

2. The “Parity Rationale”

Although the preceding section identifies weaknesses of the minimum subsidy rationale, Professor Tobin’s parity rationale suggests that the ban actually promotes a policy that offends its supposed purpose. The parity rationale seeks to justify the ban on the basis that governmental tax policy must be neutral with respect to the political campaign activity of similarly situated organizations. *Cases 1–4* illustrate that the ban disserves the parity rationale, under the assumptions set forth therein, because the charities in these cases receive no greater subsidy—and sometimes a smaller subsidy—than their section 501(c)(4) counterparts. An even larger systemic problem exists, however—one that is also easily illustrated.

Consider *Case 3*, above. In this case, a charity receiving contributions of \$100,000 and expending \$30,000 to influence a public election receives a subsidy of \$17,500 in the form of increased donations facilitated by the charitable contributions deduction. If the charity allocates the \$17,500 subsidy to exempt function expenses and political expenditures pro rata, the government has subsidized only \$5,250 of political campaign-related expenditures. Under the ban, however, a charity that engages in electioneering forfeits both its federal income tax exemption and its ability to receive tax-deductible donations—a benefit of \$17,500—including the portion of those donations not expended to influence an election. The ban imposes a penalty that is disproportionate to the amount of the subsidy applied to political ends. Rather than merely leveling the playing field, the ban exacts a toll on charity in excess of the amount necessary to prevent government subsidization of political speech.

Imposition of this effective surtax on charities contrasts with the treatment of individuals and corporations that make political campaign expenditures in the ordinary course of business. A tax-

payer who makes such expenditures cannot deduct them for federal income tax purposes.⁸⁹ The making of such expenditures, however, does not result in a disallowance of all of the taxpayer's other business expenses. Only the political expenditures enter the tax base (through the disallowance of a deduction). Charities are therefore not treated on par with taxable entities with respect to their political campaign-related expenditures.⁹⁰

Similarly, the government treats charities more harshly than other tax-exempt membership organizations that receive dues deductible by members. Consider, for example, a trade association exempt from federal income tax as a "business league" described in Code section 501(c)(6).⁹¹ Let us assume that the entity has gross receipts from membership dues of \$100,000. It expends \$50,000 directly for improving the line of business in which its members operate, and \$30,000 to influence a public election. It invests the remaining \$20,000 at year-end in shares of corporate stock. Because an entity described in section 501(c)(6) is organized to promote the common business interests of its members,⁹² the entity's membership dues would not be excluded from its gross income as gifts under Code section 102 were the entity taxable.⁹³ Thus, the entity would have \$100,000 in gross income potentially subject to tax. Under Code section 162(e)(3), members of the entity may not deduct the portion of their dues allocable to the political campaign expenditures of the trade association.⁹⁴ The deduction disallowance therefore effectively subjects \$30,000 of the trade association's income to tax (although it is indirectly paid by its members). But the remainder of the trade association's income—\$70,000—is not taxed. Assuming that the trade associa-

89. See I.R.C. § 162(e)(1)(B) (2000).

90. I concede that a charity which expends funds in support of (or in opposition to) a candidate for public office is leveraging its tax exemption by invoking its own name and employing its associated goodwill, which has grown over time in part through the use of tax-exempt dollars. The same can be said, however, of the goodwill of a business that lends its good name to support or oppose a candidate for public office. Goodwill increases over time in large part through expending amounts which are deductible by taxpaying entities (e.g., expenses for advertising, the costs of quality goods that are sold, and periodic expenses for maintaining high customer satisfaction).

91. See I.R.C. § 501(a), (c)(6).

92. See Treas. Reg. § 1.501(c)(6)-1 (as amended in 1990).

93. A gift must proceed from "detached and disinterested generosity" rather than from the anticipation of receiving an economic benefit from the transfer. *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (quoting *Comm'r v. LoBue*, 351 U.S. 243, 246 (1956)).

94. See I.R.C. § 162(e)(3) (2000).

tion would be entitled to a deduction of \$50,000 for its exempt function expenditures were it a taxable entity, it still receives \$20,000 of income free of tax; a benefit after taxes (assuming a tax rate of 35%) of \$7,000. In contrast, under current law, a charity that acts exactly as the trade association in this example would lose all federal income tax benefits if it participates in a political campaign on behalf of or in opposition to a candidate for public office.

Further, as *Case 2* and *Case 4* illustrate, the ban does not ensure parity between charities and tax-exempt entities that do not receive transfers which are deductible by their members. In some cases, were the ban relaxed, charities that engage in electioneering could receive less of a subsidy for their political expenditures than would other tax-exempt entities.

Were the government genuinely concerned about parity, federal tax law would ensure that non-charitable tax-exempt entities receive no greater subsidy for their political expenditures than do their section 501(c)(3) counterparts, and section 501(c)(3) entities that choose to expend funds to elect a candidate for public office would need to compensate the government *at most* only for that portion of their subsidy diverted to political ends. The ban does neither. Instead, and contrary to the norm of equal treatment, the ban relegates the voice of charitable entities to a most disfavored category of political speech.

II. REPLYING TO PROFESSOR TOBIN'S SPECIFIC ARGUMENTS APPLICABLE TO CHURCHES: POINT AND COUNTERPOINT

Professor Tobin offers several reasons that the ban is sensible as applied to churches. First, although he concedes that the Establishment Clause apparently does not prohibit churches from participating in political campaigns, he nonetheless invokes the history of the clause to support the ban.⁹⁵ He then offers four independent reasons that participation in political campaigns is not in the best interest of churches: (1) government will try to co-opt churches; (2) churches will face heightened intimidation by politicians; (3) governmentally preferred religions may emerge; and (4)

95. Tobin, *supra* note 11, at 1321.

the risk of church divisiveness will increase.⁹⁶ Professor Tobin then discusses why the use of section 501(c)(4) affiliates by churches does not subvert his analysis, and posits one major reason that eliminating the ban on participation in political campaigns by churches would harm the democratic process.⁹⁷ This part discusses each of Professor Tobin's proffered points in support of the ban as applied to churches.

A. *Professor Tobin's Concession*

Professor Tobin begins his argument supporting the ban on churches' participation in political campaigns by invoking the history of the Establishment Clause.⁹⁸ Citing the excellent work of Professor Carl Esbeck,⁹⁹ Professor Tobin observes that theologians tended to support the clause in order to ensure that government did not control and corrupt the church, and still others supported the clause to prevent the state from compelling individuals to embrace a particular faith.¹⁰⁰ Professor Tobin opines that "the history and literature surrounding the Establishment Clause" support the view "that churches and religion benefit when churches are not closely tied with a political candidate or government official."¹⁰¹ He does concede, however, that the clause "does not appear to prohibit churches from being involved in political campaigns."¹⁰²

I have no qualm with Professor Tobin's synopsis of the history of the Establishment Clause. What is troublesome is the view that the Establishment Clause and its history somehow support the ban on church participation in political campaigns. Professor Tobin's concession belies that view.

As noted above, Professor Tobin concedes that the Establishment Clause does not prohibit churches from participating in po-

96. *Id.* at 1322-24.

97. *See id.* at 1325-26 ("Subsidizing the entry of churches into politics artificially increases the power of religious institutions in society and poses serious problems for our current system of governance.").

98. *See id.* at 1321-22.

99. *See id.* at 1321 n.30 (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. AND LEE L. REV. 347, 355-56 (1984) (discussing the basis for the separation of church and state)).

100. *See id.* at 1321.

101. *Id.*

102. *Id.*

litical campaigns.¹⁰³ Because the Establishment Clause permits church participation in political campaigns, Professor Tobin's assertion that the history of the clause lends credence to the ban of Code section 501(c)(3) is puzzling. Of course, the history of the Establishment Clause illuminates its meaning. But if the history of the Establishment Clause suggests that it was intended to silence the voice of churches concerning candidates for public office, one would expect the Supreme Court of the United States to have construed the clause accordingly. The most plausible explanation for the fact that the Establishment Clause permits what section 501(c)(3) forbids is that the historical concept of separation of church and state does not require churches to be mute on a candidate's bid for public office.¹⁰⁴ Professor Tobin never attempts to demonstrate that the Court has construed the clause inconsistently with its history. Accordingly, it is unclear precisely how the history of the Establishment Clause supports section 501(c)(3)'s ban.¹⁰⁵

Moreover, the proper approach is to examine both the Establishment Clause and the Free Exercise Clause.¹⁰⁶ The Establishment Clause cannot be construed to prohibit what the Free Exercise Clause protects. An accurate concept of separation of church and state must account for both Religion Clauses, which are best

103. *Id.*

104. One judicial opinion has justified the ban as applied to religious organizations in terms of the separation norm. *See Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972).

105. Indeed, as Professor Gaffney has observed, a statute that literally forbade political campaign activity by a religious organization would violate the First Amendment. *See Gaffney, supra* note 12, at 30.

106. The entire structure of the constitutional text is relevant to a proper understanding of the separation norm animating the Constitution. Professor Douglas Laycock insightfully explains this point:

The First Amendment limits the power of government, not the rights of churches. This is explicit in the constitutional text and inherent in the constitutional structure; all the provisions in the Bill of Rights protect the people from the government, not the government from the people. State action plays a further and unique role in the Religion Clauses: State action is the difference between government religious activity, restricted by the Establishment Clause, and private religious activity, explicitly protected by the Free Exercise Clause.

Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1671-72 (2003) (book review); *see also id.* at 1672 (stating that to conceive of separation of church and state "as restricting church as much as state" is to advance a concept that is "utterly alien to the First Amendment," notwithstanding that "there are Americans who use separation to restrict churches").

viewed as complementary, rather than in tension.¹⁰⁷ The Supreme Court's jurisprudence of the Religion Clauses suggests that a vision of separation of church and state that requires churches to abstain from endorsing or opposing political candidates unduly restricts the religious voice in political affairs.¹⁰⁸

The most relevant case is *McDaniel v. Paty*, in which an ordained Baptist minister convincingly won election to the office of delegate to Tennessee's 1977 limited constitutional convention.¹⁰⁹ The Tennessee Supreme Court held that state law forbade him from serving as a delegate.¹¹⁰ The state constitution disqualified ministers from serving as state legislators, and the state legislature applied this provision by statute to candidates for delegate to the convention.¹¹¹ The Supreme Court of the United States found this statute to violate the minister's right to free exercise of religion under the First Amendment.¹¹²

In a plurality opinion,¹¹³ Chief Justice Burger traced the history of the disqualification of ministers from legislative office from England through thirteen American states, including seven of the original states of the Union.¹¹⁴ The Chief Justice observed that some prominent political philosophers and statesman believed that "one way to assure disestablishment was to keep clergymen out of public office."¹¹⁵ Of course, others, such as James Madison, opposed clergy-disqualification statutes,¹¹⁶ and in time "the selection or rejection of clergymen for public office soon came to be viewed as something safely left to the good sense and desires of the people" in most states.¹¹⁷ Although at least some statesmen once considered the clergy-disqualification statutes ra-

107. See Carl H. Esbeck, "Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses, 34 HOFSTRA L. REV. 1331, 1332-36 (2006).

108. Cf. Laycock, *supra* note 106, at 1678 (observing that "some people have inferred from separation a ban on religion addressing politics," but contending that "this inference is erroneous as an interpretation of the First Amendment").

109. 435 U.S. 618, 621 (1978) (plurality opinion).

110. *Id.* at 621-22.

111. *Id.* at 621.

112. See *id.* at 629.

113. Justices Powell, Rehnquist, and Stevens joined Chief Justice Burger's plurality opinion. *Id.* at 620.

114. See *id.* at 622-25.

115. *Id.* at 623.

116. See *id.* at 623-24.

117. *Id.* at 625.

tional,¹¹⁸ the plurality could not escape the conclusion that Tennessee had burdened the Baptist minister's free exercise of religion.¹¹⁹ The state had conditioned his exercise of the right to seek and hold public office on his surrendering the right to be a minister.¹²⁰ The plurality then squarely rejected Tennessee's claim that its interest in preventing the establishment of religion justified the state law:

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.¹²¹

In a concurring opinion, Justice Brennan, joined by Justice Marshall, concluded that the Tennessee law violated both the Free Exercise Clause and the Establishment Clause.¹²² Justice Brennan reasoned that the law established a religious qualification for office, and was therefore void under the Free Exercise Clause entirely apart from any showing of a compelling state interest.¹²³ Further, Justice Brennan found that the clergy-disqualification statute "manifests patent hostility toward, not neutrality respecting, religion."¹²⁴ He summarized his analysis as follows:

In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full meas-

118. *See id.*

119. *See id.* at 626.

120. *See id.*

121. *Id.* at 628-29 (internal citation omitted).

122. *See id.* at 629-30 (Brennan, J., concurring). Justices Stewart (relying exclusively on a violation of the Free Exercise Clause) and White (relying exclusively on a violation of equal protection) wrote separate concurring opinions. *See id.* at 642-43 (Stewart, J., concurring) (White, J., concurring). These brief concurring opinions add little to the analysis and merit no discussion here.

123. *See id.* at 631-35 n.8 (Brennan, J., concurring).

124. *Id.* at 636.

ure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.¹²⁵

Paty insightfully establishes what the constitutional norm of separation of church and state does *not* mean. First, separation of church and state does not require a church-ordained minister to abstain from partisan politics.¹²⁶ Of course, Professor Tobin never argues that Code section 501(c)(3) forbids a minister from electioneering for himself alone, and the IRS recognizes that a pastor who, on his own behalf, endorses a candidate for public office, without using church resources, does not jeopardize the exemption of his church.¹²⁷ Although the ability (indeed, the constitutional right) of a pastor to do so presents its own difficulties for Professor Tobin's thesis,¹²⁸ my present point is that *Paty's* rejection of any concept of church-state separation under which ministers must shun involvement in public elections has important implications.

Under *Paty*, because the separation norm is consistent with the ability of a minister both to endorse herself for public office and then hold such office herself, the separation norm can hardly be said to preclude a minister from endorsing someone else for public office. The latter case poses even less risk of establishment than the former case, for in the latter case, the endorsing pastor does not actually hold office after the election. If a single pastor may endorse another for public office, so may a group of pastors. And if a group of *pastors* may do so, why may not the same be done by a group of individuals whom such pastors serve—a group of lay persons known as a *church*? The logic of *Paty* simply does not bode well for a concept of church-state separation under which churches must be silent in public elections.

Further, if the *Paty* plurality opinion is correct that we have no reason to believe that "clergymen in public office will be less care-

125. *Id.* at 641 (citation omitted).

126. *See id.* at 621, 629 (plurality opinion).

127. *See infra* note 143 and accompanying text (arguing only that the church cannot endorse a candidate); note 147 and accompanying text (discussing I.R.S. recognition that church leaders may speak in an individual capacity).

128. *See infra* notes 147–48, 166–67, and 177–80 and accompanying text.

ful of anti-establishment interests” than anyone else,¹²⁹ we ought not assume that a non-clergyman endorsed by one or more churches “will be less careful of anti-establishment interests” than anyone else. A member of the pastoral staff of a church is a fiduciary of the highest order. Her responsibility to act in the best interests of church members, and indeed her God, does not end when she exits the church house. If a commitment to separation of church and state does not require us to question the ability of such a fiduciary to respect the separation norm while serving in public office, it makes little sense to question the ability of others to do so merely because one or more churches supported them.

Finally, although I am not arguing that the Religion Clauses render section 501(c)(3)’s ban unconstitutional,¹³⁰ I do believe that many of Professor Tobin’s arguments are in tension with the separation norm rather than in harmony with it.¹³¹ Professor Tobin seeks to justify the ban on the basis that churches are in a better position if they do not engage in electioneering.¹³² It is one thing to argue that churches are most effective if they abstain from politics; it is quite another to justify a federal law on those grounds.¹³³ At least one of the historical justifications for clergy

129. *Paty*, 435 U.S. at 629.

130. Nor am I conceding that prohibition of electioneering under section 501(c)(3) is constitutional as applied to churches. The constitutional issues that Code section 501(c)(3) raises are extremely complex, and this article need not resolve them by responding to Professor Tobin’s policy arguments.

131. As Professor Esbeck argues, a governmental decision “to leave religion alone” is not an establishment of religion. *See* Esbeck, *supra* note 107, at 1332. To the contrary, to leave religion alone is to reinforce the separation of church and state. *Id.* Section 501(c)(3) partially negates what it does to leave religion alone—not taxing churches—by prohibiting churches from practicing their faith in a certain manner—namely, by forbidding churches to voice theological messages that support or oppose political candidates.

132. *See* Tobin, *supra* note 11, at 1322–24.

133. The 1988 policy statement of the General Assembly of the Presbyterian Church (U.S.A.) illustrates this point. The policy statement maintains that “governing bodies” of the church “at every level should speak out on public and political issues” to articulate their moral and ethical dimensions. “GOD ALONE IS LORD OF THE CONSCIENCE”: POLICY STATEMENT AND RECOMMENDATIONS REGARDING RELIGIONS LIBERTY ADOPTED BY THE 200TH GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) (1988), *reprinted in* 8 J.L. & RELIGION 331, 383 (1990) [hereinafter “GOD ALONE IS LORD OF THE CONSCIENCE”]. Further, the policy statement acknowledges that “speaking out on issues” will at times imply endorsement of, or opposition to, candidates for public office. *Id.* Although the statement opines that it is “generally unwise” to explicitly support or oppose candidates, it firmly opposes “attempts by government to limit or deny religious participation in public life by statute or regulation, including Internal Revenue Service regulations on the amount or percentage of money used to influence legislation, and prohibition of church intervention in political campaigns.” *Id.*

disqualification of the type struck down in *Paty* was of the same ilk—i.e., ensuring that clergy pursued their “sacred calling[s]” rather than the mundane affairs of politics.¹³⁴ A government committed to the separation of church and state must not forbid church activity that legislators find inconsistent with healthy religious practices.¹³⁵ While I agree with Professor Tobin that electioneering by churches can impair effective ministry, I disagree that government has any legitimate interest in imposing this view on churches. The separation norm suggests that government generally should neither favor nor disfavor conduct that churches believe will advance their mission, including the voicing of approval or disapproval of candidates for public office.¹³⁶ One should resist the urge to use federal tax law to repress one form of religious expression in order to promote a vision of healthy religion. As Justice Brennan stated in *Paty*, the Establishment Clause “may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”¹³⁷ Were the ban imposed in order to prevent religion from speaking in a way that government believes is unhealthy for religious life, that governmental policy would offend the very separation of church and state that the Religion Clauses maintain.¹³⁸

134. See *Paty*, 435 U.S. at 622 (describing the rationales for a similar practice in England).

135. See Totten, *supra* note 12, at 307 (“The question of what hinders or advances the mission of a church, synagogue, or mosque is not a question that the government can or should answer.”).

136. See STEPHEN L. CARTER, *GOD’S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 70 (2000) (stating that “the effort to use law to rein in the speech of clergy runs contrary to the origin and core meaning of the separation of church and state”).

137. See *Paty*, 435 U.S. at 641 (Brennan, J., concurring). I acknowledge that the whole point of the ban is to repress religious, educational, and charitable entities, including churches, from participating in a significant “aspect of public life”—supporting and opposing candidates for public office. But this does not mean that the purpose of the ban is to repress religion *qua* religion; one can articulate justifications for the ban on religiously neutral grounds. See *supra* notes 36–38 and accompanying text. The ban is usually justified as a means of ensuring that government does not “subsidize” electioneering by section 501(c)(3) entities. See *supra* notes 16–17 and accompanying text. Although this justification is problematic, see *supra* Parts I.B and C and *infra* Part III.E.1, at least it is a religiously neutral rationale.

138. This conclusion is especially compelling when one views tax exemption not as a subsidy, but as a recognition of the autonomy of churches. The generation of the nation’s founders may very well have viewed the tax exemption of churches in this manner. See Zelinsky, *supra* note 31, at 839–40. In other words, exempting churches from taxation is one manifestation of the separation of church and state. If so, taxing churches only when their proclamation ministries address certain topics (e.g., electoral politics) egregiously offends the separation norm.

B. *The Co-Option Argument*

Professor Tobin argues that “there is serious risk that the churches involved in politics will be co-opted and destroyed.”¹³⁹ He reasons that a church that has endorsed a candidate is thereafter less inclined to (1) “speak out against that candidate” and (2) “preach on issues that might discourage members from voting for that particular candidate” because the prior endorsement “may put pressure on the church to change or deemphasize” elements of its doctrine.¹⁴⁰ Point (1) is of minor import (even if true, which I doubt) because a church cannot “speak out against” any candidate under the current ban. Thus, even if a church is not likely to “speak out against” a previously endorsed candidate, it is no more likely to do so under current law.

Point (2) is more troublesome. Professor Tobin illustrates his argument by presenting a hypothetical church that is theologically opposed to euthanasia and the death penalty, but assigns more significance to the evils of euthanasia.¹⁴¹ The church endorses a pro-death penalty candidate who is anti-euthanasia.¹⁴² Professor Tobin asserts that under current law, “the church could not endorse any candidate and would feel free to speak out on both issues,” thereby maintaining “a moral voice on issues important to the church.”¹⁴³ Without the ban, he alleges, the church “may lose its independence” because of loyalty to the candidate and “feel constrained to speak out only on those issues that help the candidate.”¹⁴⁴

With all due respect to Professor Tobin’s speculation, I believe it is hardly clear that the ability to endorse a candidate is likely to compromise doctrinal positions of a church. Indeed, the ban itself may promote doctrinal compromise. Let us assume that in Professor Tobin’s hypothetical church, its leadership, including the pastor, overwhelmingly favors the candidate because of her position on euthanasia; the church believes that a society that practices euthanasia is immoral, and that the state must use all

139. Tobin, *supra* note 11, at 1322.

140. *Id.*

141. *See id.* at 1322–23.

142. *Id.* at 1323.

143. *Id.*

144. *See id.*

constitutional means to prevent the practice of euthanasia. Under the current ban on electioneering by charities, as interpreted by the IRS, the pastor cannot endorse the candidate from the pulpit.¹⁴⁵ But the ban does not prevent the pastor from “deemphasizing” church doctrine on capital punishment in an effort to increase the likelihood that church members will form a positive view of the candidate. Indeed, the current ban may actually increase the likelihood that church doctrine on capital punishment will be “de-emphasized,” for the pastor may fear that if he speaks boldly against capital punishment, his parishioners may wrongly infer from his sermons that he thinks that they should vote against the pro-death penalty candidate.¹⁴⁶

In contrast, were the ban relaxed, the pastor could speak boldly on all issues, including euthanasia and capital punishment, and then explain that, on balance, he believes that the pro-death penalty, anti-euthanasia candidate would be best for the moral health of the nation. Thus, in some cases, a relaxation of the ban may very well enhance the ability of a church to proclaim and advance church doctrine.

One should also not assume that a prior endorsement would lead to a future reluctance to proclaim church doctrine on issues about which the candidate and the church leadership disagree. Were the ban relaxed, a church leader would be just as free to criticize a candidate’s position on an issue from the pulpit as he is to support her positions on issues. If the pastor continues to believe that the candidate, on balance, is best for the job, the pastor can simply proclaim so. He is also free to reach a contrary conclu-

145. See INTERNAL REVENUE SERVICE, PUBLICATION 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 ex. 4 (rev. 2006) <http://www.irs.gov/pub/irs-pdf/p1828.pdf> [hereinafter TAX GUIDE FOR CHURCHES].

146. Of course, the pastor could clarify his position on political candidates by addressing the public on his own behalf rather than on behalf of the church. See *supra* text accompanying notes 143–44. But this is a solution only for a pastor who desires to proclaim his political views to the general public. Some pastors may prefer to express their views of candidates only to parishioners because, for example, they are based on common theological propositions not necessarily shared by the general public. For those pastors, the solution would be to address members privately. Although a pastor could probably clarify his position on candidates privately, forcing him to use non-church channels to do so imposes no small burden on his time.

Further, if the primary concern of the church as a body is that it does not want anyone attending services to infer wrongly that the church disfavors the pro-death penalty, anti-euthanasia candidate, the pastor’s private clarification of his personal opinion of the candidates does not redress the problem.

sion in light of changed circumstances. There is simply no good reason to assume that a church leader would feel constrained by a prior endorsement of a candidate if that candidate later changes her positions on issues important to the church. It is completely counterintuitive to assume that a pastor's loyalty to a candidate would trump loyalty to God and what the pastor (rightly or wrongly) believes to be God's will.

Further, even the IRS recognizes that the ban does not prevent a pastor or other church leader from exercising his constitutional right to speak in favor of or in opposition to a political candidate in an individual capacity, rather than on behalf of a church.¹⁴⁷ If a pastor strongly believes that the anti-euthanasia, pro-death penalty candidate is best for the moral health of the country, he is perfectly free to endorse that candidate on his own behalf under current law.¹⁴⁸ Even if, contrary to my opinion, Professor Tobin is correct that endorsing a candidate is likely to compromise independence in proclaiming church doctrine, the same problem already exists under current law. A pastor who has publicly endorsed the candidate would presumably face the same temptation to compromise his messages from the pulpit.

There is yet another reason to question the co-option argument that is perhaps the most compelling. Professor Tobin laudably seeks to ensure that churches are free to speak boldly on issues that are important to them. The ban, as interpreted by the IRS, does just the opposite. Consider a church that opposes abortion, euthanasia, and the death penalty. This church, like the Catholic Church, is passionately pro-life in general, and particularly on these three issues. Further, the church believes that the most im-

147. See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

148. Further, the most recent guidance from the IRS indicates that a pastor may endorse a candidate on his own behalf quite dramatically. Witness the following illustration offered by the IRS:

Minister *C* is the minister of Church *L*, a section 501(c)(3) organization, and Minister *C* is well known in the community. Three weeks before the election, he attends a press conference at Candidate *V*'s campaign headquarters and states that Candidate *V* should be reelected. Minister *C* does not say he is speaking on behalf of Church *L*. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church *L*. Because Minister *C* did not make the endorsement at an official church function, in an official church publication or otherwise use the church's assets, and did not state that he was speaking as a representative of Church *L*, his actions do not constitute campaign intervention by Church *L*.

Id.

portant role of government is to preserve and protect human life in all of its phases and across the globe. Thus, the church believes that the faithful should do everything in their power to protect and preserve human life, including electing public officials who will support policies promoting human life.¹⁴⁹ Plainly, as interpreted by the IRS, the ban forbids (under the penalty of forfeiting federal income tax exemption) the church from proclaiming to members that they should vote for a named candidate because her views are most consistent with the pro-life views of the church, notwithstanding that this is the doctrinal message of the church.¹⁵⁰ The church is most certainly not free to speak its message under the ban.¹⁵¹

Sadly, the ban is even more odious than this example demonstrates. Many will be quick to respond to this illustration by asserting that the church is perfectly free to speak out on issues as long as candidates are not explicitly endorsed. The reality is otherwise.¹⁵² The IRS has long interpreted the ban to foreclose not only express advocacy, but also issue advocacy in circumstances the IRS deems to constitute an unstated but implied endorsement.¹⁵³ The IRS examines all of the facts and circumstances to determine if a charity has expressed a bias in favor of, or against, a candidate for office.¹⁵⁴ Certain of the circumstances that the IRS considers important are whether the charity publicly ad-

149. See Kemmitt, *supra* note 12, at 169 (“Churches that prioritize the preservation of human life . . . may legitimately feel that their religion requires them to support the party that opposes abortion. . . .”).

150. See TAX GUIDE FOR CHURCHES, *supra* note 145, at 7, 8 exs. 2 & 4.

151. Cf. CARTER, *supra* note 136, at 81 (“[O]nly in Wonderland would anybody seriously imagine that we protect religious freedom when we punish churches that speak the wrong words.”); Kemmitt, *supra* note 12, at 169–74 (arguing that the ban burdens the free exercise of religion).

152. See Totten, *supra* note 12, at 309 (stating that “the line between partisan intervention and issue advocacy is appealing in theory, . . . [but] flawed in practice”).

153. See, e.g., Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (stating that charities “must avoid any issue advocacy that functions as political campaign intervention”); Rev. Rul. 78-248, 1978-1 C.B. 154 (ruling that an organization which widely distributes information about candidates’ voting records on only one or a few issues considered important by the charity violates the ban, even if the charity does not expressly support or oppose any candidate; reasoning that, although “the guide may provide the voting public with useful information,” its purpose is partisan because of “its emphasis on one area of concern”). The IRS has found no violation of the ban when an organization distributes voting records of congressmen on a narrow range of issues, if the distribution is not widespread and is not targeted to coincide with elections. See Rev. Rul. 80-282, 1980-2 C.B. 178.

154. Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (“All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.”).

dresses issues that have been raised to distinguish candidates and whether those issues are addressed close to the time of elections.¹⁵⁵ The IRS could find that the pro-life church violates the ban if it takes a strong stand on any of these three issues, especially if it concentrates its message around election time.¹⁵⁶ The guidance from the IRS appears to render irrelevant that the church discusses these three issues precisely because they are of

155. *See id.* The IRS maintains that the following are “key factors” in determining whether a charity has violated the ban when it engages in issue advocacy:

Whether the statement identifies one or more candidates for a given public office;

Whether the statement expresses approval or disapproval of one or more candidates’ positions and/or actions;

Whether the statement is delivered close in time to the election;

Whether the statement makes reference to voting or an election;

Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;

Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of an election; and

Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

Id.

156. For example, consider a pastor who sporadically comments from the pulpit that human life begins at conception, but delivers sermons focusing on this issue primarily in the last two months of an election cycle. In one such sermon, delivered when there is no pending legislation related to abortion, the pastor states as follows:

You have heard the speeches of Senators X, Y, and Z, all of whom are running for President. You probably know that Senators X and Y, highly educated statesmen with multiple academic degrees, do not believe that an unborn child is a person from the moment of conception. I am not here to tell you how to vote. But I am here to tell you that no issue facing this country, nay, this world, is more important than deciding whether we protect the lives of all people made in the image of the living God, no matter how strong or weak, or how old or young, they might be. God’s Word teaches us that everyone, even the unborn, have humanity, and therefore dignity. Do not be deceived by the empty, worldly rhetoric of those whose so-called enlightenment is nothing but darkness sanctioned by the intellectual elite. Do not believe them for a moment. You will be bombarded in the next few weeks with a competing message from the world. Reject it. It is evil. Instead, hold fast to the Truth. You will not be sorry that you did.

At least six, and possibly all seven, of the factors set forth in Revenue Ruling 2007-41 suggest that preaching a sermon containing this statement would constitute prohibited electioneering. It is far from clear, however, that the church has actually endorsed or opposed a candidate. One could interpret the reference to the election, the candidates, and their positions simply as a means of identifying the arguments to which the pastor objects theologically. Characterizing these arguments as evil and urging parishioners to reject them may be the best way the pastor knows to counter the tendency of people to accept the positions of those whom they respect (on account of educational or political achievement, for example). Finally, the timing of the sermon could reflect a desire to impact people’s analysis of the issues when they are most likely to be contemplating them thoroughly.

great doctrinal importance to the church and does so near an election because this is when people are prone to think most seriously about these issues.¹⁵⁷ As interpreted by the IRS, the ban produces a grimly ironic state of affairs that contradicts a healthy vision of a liberal, democratic society in which mediating institutions participate robustly.¹⁵⁸

On balance, the ban itself presents a far greater risk of the religious community's "co-option" by government than would a relaxation of the ban.¹⁵⁹ The whole point of the ban is to prevent section 501(c)(3) entities, including churches, from speaking out and otherwise participating on a partisan basis in public elections. If the doctrine of a church truly encourages it to take a stand in public elections, the church must choose between fidelity to its doctrine and the benefits of tax exemption (and favorable donee status under Code section 170). Assuming the ban is designed to influence the behavior of churches, it must rest on the assumption that, absent the ban, some churches would indeed speak out in favor of, or in opposition to, candidates for public office. In the case of churches that otherwise would endorse and oppose candidates on account of the church's theological views, the ban is a financial inducement from the government to deviate from a religiously motivated practice.¹⁶⁰ Thus, if the ban truly changes the behavior of churches, including the practice of taking political stands on candidates in accordance with church dogma, the ban itself constitutes one of the most egregious forms of gov-

157. To his credit, Professor Tobin recognizes the problems of the IRS's facts and circumstances test. *See* Tobin, *supra* note 11, at 1357.

158. *See* Garnett, *supra* note 12, at 798–801.

159. *Cf.* Kemmitt, *supra* note 12, at 174 (describing the ban as "co-opting" from the church the authority to define what is religious).

160. Professor Stephen Carter puts the matter more poignantly:

Imagine . . . a state so insecure and, at the same time, so totalitarian, so determined to invest every corner of society with a single, state-imposed vision of right and wrong, that it actually doles out benefits to those churches that preach the right messages and denies those benefits to churches that preach the wrong ones. So great a horror, one might think, is the stuff of the old communist empire or one of the few remaining dictatorships in the Third World, precisely what the Western-style tradition of constitutional rights is designed to oppose. One would be wrong.

The nation I describe is the United States of America

CARTER, *supra* note 136, at 67; *see also* Lee, *supra* note 6, at 434 (stating that the Code "pays churches through tax-exempt status to be silent on issues deemed by the state to be political").

ernmental co-optation of the religious community that one can envisage.¹⁶¹

C. *The Intimidation Argument*

Professor Tobin next argues that without the ban, “politicians may pressure churches to become involved in a political campaign.”¹⁶² He fears that churches would then face the dilemma of either disappointing “powerful politicians” or “reluctantly” endorsing them or their candidates.¹⁶³ The ban, he argues, “provides churches with justification for denying campaign requests and . . . helps insulate churches from political intimidation.”¹⁶⁴ I agree with Professor Tobin that absent the ban, candidates would actively seek the political support of section 501(c)(3) entities, including churches. I seriously question, however, whether the ban is necessary to “insulate churches from political intimidation.”

First, both the Establishment Clause and the Free Exercise Clause protect churches from state action that infringes upon the exercise of their religious liberties, including the right *not* to enter into the political fray on doctrinal grounds. Thus, the Constitution itself protects churches from the most egregious kinds of retaliation by those candidates elected to office.

Second, the ban is hardly an impenetrable shield against political pressure. As a practical matter, even with the ban, candidates seek forms of assistance from churches, as Professor Tobin himself notes.¹⁶⁵ More importantly, the ban offers church leaders, including pastors, no legal “excuse” for declining to endorse candidates on behalf of themselves rather than on behalf of their churches.

161. Professor Richard Garnett pens essentially the same thought: “[W]hen religion—whether because of the didactic effects of the tax law, or for any other reason—becomes content to be what government says it is or should be, then maybe, in Chief Justice Marshall’s words, it really has been ‘destroyed.’” Garnett, *supra* note 12, at 798; *see also id.* at 774–75 (stating that when government enforces its own view of the proper place of religion, religious entities “may yield to the temptation to embrace, and to incorporate, this view themselves”); *id.* at 796 (“[B]y telling faith where it belongs, government molds religion’s own sense of what it is.”).

162. Tobin, *supra* note 11, at 1323.

163. *Id.*

164. *Id.*

165. *See id.* (citing the 2004 Bush campaign’s request for church rosters).

To illustrate, let us assume that a candidate seeks an endorsement from Dr. Tony Evans, nationally known as a prominent Christian author and speaker and the Senior Pastor of Oak Cliff Bible Fellowship.¹⁶⁶ Although I am sure the candidate would covet an endorsement from the church itself, she will be almost as happy—and maybe happier—with a personal endorsement from Dr. Evans. People know Dr. Evans as the pastor of the church, and they know the church largely because Dr. Evans is its pastor. Should Dr. Evans decline to endorse the candidate, he must do so on his own two feet under current law; the ban provides him with not a scintilla of a basis for shunning the invitation to endorse the candidate.¹⁶⁷ Many forms of “intimidation” that could be applied against the church in the absence of the ban, should Dr. Evans hesitate to endorse the candidate, could also be applied under current law. For example, if the threat is that the candidate, if elected, would not support evangelical faith-based programs at the church without its endorsement, the candidate could level the same threat against Dr. Evans under current law should he decline to offer his personal endorsement.

Current law also fails to buffer churches from a similar risk of political pressure. The Code permits Section 501(c)(3) organizations to engage in legislative activities, including grassroots-lobbying, as long as attempts to influence legislation comprise “no substantial part” of the entity’s operations.¹⁶⁸ Thus, a church that seldom attempts to influence legislation has no good legal excuse for failing to endorse pet legislative projects of powerful politicians—including those already in office. For example, a church asked to publicly support a partial-birth abortion bill sponsored by a powerful United States Senator and endorsed by the current Presidential administration could experience just as much political pressure to support the bill as the church urged to support the same Senator in her bid for re-election. If the law permits churches to engage in modest lobbying notwithstanding this prospect for political pressure, then why must the law categorically forbid churches from endorsing candidates for public office?

166. See Oak Cliff Bible Fellowship, *Our Pastor*, <http://www.ocbchurch.org/index.cfm/pageid/660/index.html> (last visited Apr. 4, 2008).

167. See *supra* notes 147–48 and accompanying text.

168. See I.R.C. § 501(c)(3) (2000).

Further, if a church body truly prefers to abstain from partisan politics for religious reasons (as well it might), the church does not need section 501(c)(3)'s ban to bootstrap its convictions. Prior to an election year, a church body can simply adopt a policy by vote of members in a congregational church or by vote or proclamation of elders or other leaders in a hierarchical ecclesial structure clearly stating its non-partisan stance. If the church desires longevity of the policy, it can adopt the policy as part of its articles of incorporation or other governing instrument.¹⁶⁹ A church leader who is then approached by a candidate seeking endorsement on behalf of the church can invoke the policy to avoid any implication that the church is shunning that particular candidate. Although the candidate obviously could pressure the leader to attempt to change the policy, any such measure would take time (especially if it is adopted as part of the church's governing instrument filed with the office of the Secretary of State), would likely have a slim chance of success, and would reflect poorly on the candidate once her pressure tactics became public.

In sum, the ban is not as effective as Professor Tobin contemplates in insulating churches from political intimidation. Moreover, although lifting the ban may moderately increase the pressure on church leaders to endorse candidates, existing constitutional safeguards and self-help measures can minimize the adverse consequences of relaxing the ban.

D. *The Preference Argument*

Professor Tobin next argues that, in the absence of the ban, "there is a serious risk that some religions will find government favor, while others will receive government scorn."¹⁷⁰ He contemplates an "incentive system" rewarding churches that support the winning candidate,¹⁷¹ and political "retribution" directed towards religions or religious leaders who have not supported incumbents.¹⁷² The retributive parade includes the failure to receive government grants, exclusion from government discussions involving religion, and unofficial blacklisting by government offi-

169. For several complementary self-help measures an apolitical church could adopt, see *infra* Part II.F.

170. Tobin, *supra* note 11, at 1323.

171. *See id.*

172. *See id.* at 1324.

cial.¹⁷³ Professor Tobin predicts a resulting impact on religious diversity and a diminution in respect for religion.¹⁷⁴

This argument is essentially an extension of the intimidation argument, for it details the supposed reasons that candidates would intimidate churches in the first place. The assertion is that churches realize that if they do not support a winning candidate, they may be punished; on the other hand, they may receive preferential treatment if they have supported the victor.

My responses to the intimidation argument largely apply to the preference argument as well, and can be summarized into four points: (1) the Constitution protects churches from many forms of retaliation by those candidates who are elected to office and prohibits government from favoring one religion over another; (2) the ban offers religious leaders no legal “excuse” for declining to endorse candidates on behalf of themselves rather than on behalf of their churches; (3) current law offers only minimal protection against retaliation for failing to support the pet legislative projects of incumbents; and (4) self-help measures can alleviate some of the political pressure contemplated by Professor Tobin.

Although I need not reapply these arguments to the preference argument in detail, elaboration of points (1) and (2) is useful. Consider the first form of governmental action contemplated by Professor Tobin—the making or withholding of government grants.¹⁷⁵ Assume the executive branch funds a government initiative to support faith-based programs to rehabilitate drug addicts. The government declines to fund a grant proposal offered by a church’s subsidiary for its drug rehabilitation program, and it just so happens that the church and its subsidiary publicly criticized the administration in the most recent election, strictly for theological reasons consistent with church doctrine. If the church and its subsidiary can prove that the government’s decision was an attempt to punish the church for expressing its religious viewpoint, the entities would likely have a First Amendment claim against the government.¹⁷⁶ The problem is one of

173. *See id.*

174. *See id.* at 1323.

175. *See id.* at 1324.

176. The Establishment Clause requires government to maintain neutrality not only between religion and non-religion, but also between one religion and another. *See, e.g.,* *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 672–73, 679–80 (1970) (upholding prop-

proof, not the ability of churches to support or oppose candidates for public office.

Further, because the same problem exists even with the ban, this justification for the ban collapses. As discussed above, the ban does not prevent church-affiliated ministers from endorsing or opposing political candidates on their own behalf. Therefore, the ban does not even remotely prevent an incumbent from retaliating against non-endorsing religious leaders or their affiliated institutions.

Similarly, the ban does nothing to ensure that churches affiliated with religious leaders who have personally endorsed an incumbent will not receive preferential treatment. Ironically, the very sources cited by Professor Tobin support my point.¹⁷⁷ For example, an article discussing grants made under President Bush's faith-based initiative states the following: "Among other new beneficiaries of federal funding during the Bush years are groups run by Christian conservatives, including those in the African American and Hispanic communities. Many of the leaders have been active Republicans and influential supporters of Bush's presidential campaigns."¹⁷⁸ Whether or not one concludes that President Bush has rewarded his political allies, the ban plainly does not prohibit religious leaders from being politically "active" or "influential supporters" of a candidate.¹⁷⁹

The argument that the potential for abuse would be even greater without the ban is not compelling. First, it is impossible to quantify the risk of greater abuse without the ban. Second,

erty tax exemption for property owned by religious organizations and other non-profit institutions; stating that the state "has not singled out one particular church or religious group or even churches as such"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-18 (1947) (upholding public reimbursement of funds expended by parents to bus their children to Catholic parochial schools; stating that the Establishment Clause means that neither a state nor the federal government can enact laws that "aid one religion, aid all religions, or prefer one religion over another"). The denial of funding to the applicant because of its religious views could also violate its First Amendment right to free speech. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 837 (1995) (holding that a state university's denial of funding to a student journal expressing religious viewpoints violated the students' right to free speech guaranteed by the First Amendment).

177. See, e.g., Thomas B. Edsall, *Grants Flow to Bush Allies on Social Issues*, WASH. POST, Mar. 22, 2006, at A1, cited in Tobin, *supra* note 11, at 1324 n.41 (discussing the Bush administration's grants to "political and ideological allies").

178. *Id.*

179. The same analysis applies with respect to the other forms of governmental retribution suggested by Professor Tobin—political estrangement and "unofficial blacklisting."

there is no sound reason to expect the potential for abuse to be much greater without the ban. A church leader prone to curry favor with a politician on behalf of a church in the absence of the ban is likewise prone to curry favor with the politician in the presence of the ban with the hope that his personal endorsement will positively impact his church.

Finally, the gravest issue is not that permitting churches a political, partisan voice in elections could slightly enhance the prospect that some churches may receive governmental perks that withstand constitutional scrutiny. The more pressing issue is that government is free to fund programs on ideological grounds—as long as the ideology is legitimately articulated in secular terms. A presidential administration is inclined to favor the funding of programs operated by organizations that share the administration's ideology on matters of public policy, including social programs with moral implications. Moreover, an organization with an ideological mission that comports with a presidential administration's philosophy is also likely to support that President in an election year. What most enhances the organization's prospects for funding, however, is not its endorsement, but its ideology. Similarly, an organization's temptation to compromise its ideology in hopes of receiving federal funds exists whether or not the ban is in place. Thus, the ability to receive governmental funding probably poses a greater risk of encouraging government-preferred religion than does the ability to support or oppose candidates for public office.¹⁸⁰

E. *The Divisiveness Argument*

Professor Tobin also argues that when a church speaks of candidates rather than issues, "it leaves the theological realm and enters the political one."¹⁸¹ He argues that a church's endorsement of one candidate "can ostracize large portions of its membership and cause deep divisions."¹⁸² He recognizes that "public

180. I take no position in this article on whether the ability of church-related institutions to receive federal funding actually poses a significant threat to the integrity, independence, and diversity of churches. I am simply arguing that the ability of churches to support or oppose political candidates probably poses much less of a threat to their integrity, independence, and diversity than does their ability to receive government funding.

181. Tobin, *supra* note 11, at 1324.

182. *Id.*

policy need not be paternalistic with regard to religion," but maintains that "churches benefit when they keep a reasonable distance from candidate elections" because of their potential for divisiveness.¹⁸³

I happen to agree with Professor Tobin that, for many reasons, including the potential for divisiveness, a church's decision to endorse a particular candidate is usually theologically ill-advised.¹⁸⁴ But I respectfully submit that our personal opinions on the theological wisdom of a church's endorsement of candidates are utterly irrelevant to the question at hand. The issue is not whether government needs to be "paternalistic" towards religion. The First Amendment prohibits the government from "paternalistically" enacting laws that tell churches what they can and cannot do because government believes it knows better than they what fosters healthy churches. There is no more governmental justification for the ban on grounds of divisiveness than there would be for enacting a federal law dictating church practices concerning contemporary worship style, ordination of women to the pastorate, infant baptism, or teaching the doctrine of Biblical inerrancy. All of these subjects have proven extremely divisive, but government has no legitimate interest in attempting to rid the church of divisiveness generated by controversy over these issues.

Further, distinguishing these issues on the basis that they involve theological disputes, whereas candidate endorsements generate political disputes, is to no avail. One comes dangerously close to subscribing to a false dualism by strictly contrasting the "theological realm" and the "political one."¹⁸⁵ A church that endorses a candidate for theological reasons may indeed have entered the political realm, but it has most assuredly not necessarily exited the theological realm.¹⁸⁶ Governmental policy should

183. *Id.*

184. Others have noted the divisiveness of electoral politics. See, e.g., Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 76 (2004) ("[P]olitical campaigning is simply too divisive for the Church.").

185. E.g., Tobin, *supra* note 11, at 1324.

186. See CARTER, *supra* note 136, at 72 ("As any serious student of religion knows, religion has no sphere."); Gaffney, *supra* note 12, at 2 ("Within Judaism, Catholicism, and Protestantism, the line between religious and political concerns is often a fine one, and these concerns often overlap."); *id.* at 35 ("[F]or many religious bodies, what looks like 'political speech' to outsiders is a form of religious ministry. . ."); Garnett, *supra* note 12, at 776 (stating that Code section 501(c)(3) "invites government to label as 'propaganda' or 'campaign[ing]' what are, for religious believers and communities, expressions of their

not assume that the two realms have no overlap. One is free to view theology and politics as such,¹⁸⁷ but one is not free to impose this view on churches that hold a contrary view.¹⁸⁸ For some churches, a decision to endorse a candidate whom they believe will promote social justice and peace, for example, is just as much a part of their faith as is a decision to renovate houses for hurricane victims.¹⁸⁹ To these churches, political speech is a form of faith in action.¹⁹⁰

F. *The Use of Section 501(c)(4) Affiliates*

Professor Tobin's discussion of the use of section 501(c)(4) affiliates provides some salutary clarification of his justification for the ban. He recognizes that the ability of churches to form section 501(c)(4) affiliates "may present some of the same problems" that he has previously postulated, but alleges that the use of section 501(c)(4) entities by churches is not a great concern.¹⁹¹ First, he asserts that "there is significantly less risk of oppression by the government" when the section 501(c)(4) conducts political campaign activity, and notes that the section 501(c)(4) affiliate "cannot use a church's assets or resources to further its cause."¹⁹² He

faith"); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 150 (2007) (stating that church involvement in electoral politics "should be welcomed," and that many churches "consider it part of their mission to speak out and instruct on matters of public policy and morality"); Totten, *supra* note 12, at 310 ("[T]he experience of faith for the vast majority of believers . . . is an experience of something that places claims on every area of one's life."); West, *supra* note 5, at 396 (stating that many churches "reject the idea that religion is limited to the private realm of individual and family experience").

187. As Professor Carter observes, many wrongly interpret the separation norm to imply this unsupportable dualism. See CARTER, *supra* note 136, at 73 ("As understood in ordinary conversation, the separation of church and state supposes, wrongly, that it is possible to pick a sphere of life and confine all religion to it. . . .").

188. See Kemmitt, *supra* note 12, at 174 ("The campaign-activity prohibition also substantially burdens religion and religious institutions by encroaching upon the ability of the church to define what is and what is not religious.").

189. See, e.g., Bruce Nolan, *A Welcome Tide*, TIMES-PICAYUNE (New Orleans), Mar. 10, 2007, at 1 (reporting that, to date, Catholic Charities had gutted more than 1600 homes and apartments; Southern Baptists, more than 1000; and Samaritan's Purse, more than 500); Liz Szabo, *Faith Rebuilds House and Soul*, USA TODAY, July 19, 2007, at 1D (reporting the tremendous contribution of religious organizations to the rebuilding effort in Louisiana and Mississippi after Hurricane Katrina; stating that, for many hurricane victims, "every church van with out-of-state plates seems like a beacon of light").

190. See Gaffney, *supra* note 12, at 21 (stating that "for many religious bodies political speech has been a form of religious ministry that is central to their religious convictions").

191. Tobin, *supra* note 11, at 1325-26.

192. *Id.* at 1325.

also reasons that “there is considerably less risk that the church will be strong-armed into entering the political fray against its better judgment” because the section 501(c)(4) affiliate “must be affirmatively set up by the church.”¹⁹³ I will refer to these points as Professor Tobin’s “lesser oppression” argument.

Second, Professor Tobin asserts that the use of a section 501(c)(4) entity to engage in political activity “separates, to a degree, the theological and the political” because the section 501(c)(4) affiliate “cannot preach during services” or exploit the pulpit “to tell people how to vote.”¹⁹⁴ He assigns a “significant difference” between a pastor who endorses a candidate from the pulpit and one who does so as a member of a section 501(c)(4) organization because “[t]he former attempts to use the power of the pulpit and power of God” to sway voters, “while the latter attempts to encourage like-minded individuals to vote a certain way.”¹⁹⁵ I will refer to this line of reasoning as Professor Tobin’s “theological separation” argument.

Although I agree with elements of Professor Tobin’s lesser oppression argument, ultimately it does not support one categorical rule for section 501(c)(3) entities—no electioneering—and a drastically different rule for section 501(c)(4) entities—electioneering permitted. First, I agree that a section 501(c)(4) affiliate cannot freely use the assets of a section 501(c)(3) sister organization for political activities; therefore, the ability of the section 501(c)(4) entity to participate in a political campaign does not itself enable a politician to pressure a related church to employ its assets to endorse or oppose a political candidate. But a political candidate should be no less inclined to pressure a section 501(c)(4) entity to endorse her than she would be inclined to pressure a section 501(c)(3) entity to do the same in the absence of the ban. If church members and leaders create and fund a section 501(c)(4) entity with their individual donations, they therefore face whatever intimidation they would otherwise face. The only difference is that the intimidation is vented through a legal entity distinct from the church.

193. *Id.*

194. *Id.*

195. *Id.* at 1326.

Further, under the reasonable assumption that the church members create the section 501(c)(4) affiliate to promote corporately a political candidate for theological reasons, it is entirely likely that they consider their donations as part of their tithes or offerings. A significant portion of their contributions to the section 501(c)(4) entity probably would be made to the related church in the absence of the ban. Accordingly, when a politician pressures a section 501(c)(4) entity for assistance with its assets, that otherwise (i.e., in the absence of the ban) would likely constitute church assets, the same type of oppression feared by Professor Tobin occurs. In both cases, a religiously motivated entity is encouraged to aid politicians with assets that were donated to promote a message that is simultaneously political and religiously grounded.¹⁹⁶

I agree with the other prong of Professor Tobin's lesser oppression argument—that under existing law, a politician encounters some difficulty in exerting pressure on a church to become politically active when the church has declined to establish a section 501(c)(4) affiliate.¹⁹⁷ Of course, a politician could attempt to pressure a church to establish a section 501(c)(4) affiliate, but doing so requires both money and time. Although a candidate's supporters could offer to supply sufficient funding to create a section 501(c)(4) affiliate and file for recognition of exemption with the IRS, the whole process is time-consuming, and may not be worth the effort. Thus, existing law offers some shelter for a consciously apolitical church.

196. The obvious retort to my argument is that when a candidate seeks assistance from a church's section 501(c)(4) affiliate, only the affiliate's assets, and not the entirety of church assets, are available for supporting the candidate. This reply has limited force. First, because of several background rules of law governing section 501(c)(3) entities, including the operational test, Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990), and the prohibition of serving a private interest, Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), even without the ban, it is highly unlikely that a church would remain exempt if it devoted a substantial portion of its assets to support political candidates. See *infra* Part III.E.1. The general rules governing section 501(c)(3) entities therefore provide a church with a legal basis for resisting a candidate's attempts to benefit significantly from church assets. Although a candidate could still pressure a church for more modest forms of support (e.g., the use of its pulpit before a worship service or the receipt of a membership roster), I am fairly confident that a church could invoke other valid, persuasive reasons for politely declining the favor. Such reasons could be ministerial in nature (e.g., maintaining a proper atmosphere for worship) or legal in nature (e.g., not permitting the use of church assets for inadequate compensation).

197. See Tobin, *supra* note 11, at 1323.

My response is that the self-help mechanisms described previously would offer similar refuge for a consciously apolitical church that operates in a world in which the ban is relaxed.¹⁹⁸ The church could amend its articles of incorporation or other governing instrument¹⁹⁹ to forbid participation in political campaigns²⁰⁰ and could require a supra-majority vote (of whatever body is necessary)²⁰¹ to alter such provisions.²⁰² In some states, the articles could also state that any amendments thereto would become effective only after some significant period of time has elapsed from the date that the amendments are approved or filed.²⁰³ In the likely event that the church is incorporated, it will often be the case that such amendments must conform to state statutory law and will be effective only upon filing with the office of the Secretary of State in which the church is incorporated.²⁰⁴ This whole process would consume substantial time and could easily require the assistance of legal counsel (and the payment of legal fees). These self-help measures therefore create obstacles to electioneering similar to those associated with the formation of a section 501(c)(4) affiliate under current law. Thus, if a deliberately apo-

198. See *supra* text accompanying note 169.

199. For examples of state law authorizing amendments to a non-profit corporation's articles of incorporations, see, for example, CAL. CORP. CODE § 5810(a) (West 1990); 805 ILL. COMP. STAT. ANN. 105/110.05(a) (West 2004); MASS. ANN. LAWS ch. 180, § 7 (LexisNexis 2005); N.Y. NOT-FOR-PROFIT CORP. LAW § 801(a) (Consol. 2002); TEX. BUS. ORGS. CODE ANN. §§ 3.051(a), 22.105, 22.164 (Vernon 2007); REV. MODEL NONPROFIT CORP. ACT § 10.01 (1986).

200. See, e.g., CAL. CORP. CODE § 9131 (2007) (authorizing the articles of incorporation of a religious corporation to limit its powers); 805 ILL. COMP. STAT. ANN. 105/102.10 (b)(1)(iv) (permitting the articles of incorporation of a nonprofit corporation to limit the powers of the corporation); N.Y. NOT-FOR-PROFIT CORP. LAW § 801(b)(3) (permitting amendments to the certificate of incorporation to change the powers of a nonprofit corporation); TEX. BUS. ORGS. CODE ANN. § 3.005(b) (stating that a certificate of formation may include provisions "not inconsistent with law" relating to the affairs of the organization); REV. MODEL NONPROFIT CORP. ACT § 2.02(b)(3)(ii) (1987) (permitting the articles of incorporation of a nonprofit corporation to limit the powers of the corporation).

201. See, e.g., 805 ILL. COMP. STAT. ANN. 105/110.20(d); N.Y. NOT-FOR-PROFIT CORP. LAW § 615(a)(2) (Consol. 2002); TEX. BUS. ORGS. CODE ANN. § 22.162 (Vernon 2007); REV. MODEL NONPROFIT CORP. ACT § 10.03(a).

202. In some states, the articles could also require approval of a designated person before the amendments are effective. See, e.g., CAL. CORP. CODE §§ 5812(a), 9132(c)(4); REV. MODEL NONPROFIT CORP. ACT § 10.30.

203. See, e.g., CAL. CORP. CODE § 5008(c) (West 1990); TEX. BUS. ORGS. CODE ANN. § 4.052, 4.053 (Vernon 2007); REV. MODEL NONPROFIT CORP. ACT § 1.23(b) (1987).

204. See, e.g., CAL. CORP. CODE § 5814(a); 805 ILL. COMP. STAT. ANN. 105/110.30, 105/110.35(a); MASS. ANN. LAWS ch. 180, § 7; N.Y. NOT-FOR-PROFIT CORP. LAW § 803(a); TEX. BUS. ORGS. CODE ANN. §§ 3.056(a), 4.001(a); REV. MODEL NONPROFIT CORP. ACT § 10.05.

litical church desires to buffer itself against political pressure, it can take affirmative steps to do so. It need not rely on an act of Congress for an excuse to abstain from electioneering.

Professor Tobin's "theological separation" argument also does not justify the ban. His assumption that a pastor who speaks on behalf of a church's 501(c)(4) affiliate does not attempt "to use the power of the pulpit and power of God"²⁰⁵ is suspect. To assume that a pastor who endorses a candidate as an officer or member of a section 501(c)(4) entity does so apart from "the pulpit" or without implying that one may be held accountable to God for how one votes is peculiar. Often, a pastor endorses a candidate for theological reasons (e.g., to promote the life of the unborn, to crusade against the death penalty, to improve the conditions of the poor, to fight racial discrimination, or to strive for world peace). Under current law, a pastor is perfectly free to endorse a candidate for theological reasons on behalf of himself or on behalf of a section 501(c)(4) entity affiliated with a church. The pastor can even do so after identifying himself as the pastor of his church so as to ensure that people know precisely who is endorsing the candidate.²⁰⁶ Moreover, a pastor carries the pulpit with him wherever he goes—figuratively, but ever so surely.²⁰⁷ Countless people are interested in his opinion because of his clerical position and lifetime commitment to a higher calling, and he is likely to explain his position on a candidate just as he would before a church congregation. The general public is unlikely to assign enormous significance to the distinction between a pastor's endorsement on behalf of his church and his endorsement on behalf of himself or a church affiliate. What matters most is that this pastor has something to say about a candidate for theological reasons. Many, and probably most, people will assume that the pastor has formed his views in accordance with his perception of the will of God, whether he addresses them in a church sanctuary or on the courthouse lawn.

Consequently, the effect of the ban is not necessarily to prevent a pastor from relying on the pulpit or the power of God in an at-

205. See Tobin, *supra* note 11, at 1325–26.

206. See, e.g., Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (Situation 3).

207. See Samansky, *supra* note 186, at 154 (stating that when a minister believes that the theological tenets of a religious body compel voting a certain way, the minister's "communication of that conclusion to her congregants has the authority of her position and learning").

tempt to influence a person's vote. Rather, the effect of the ban, as interpreted by the IRS, is to prevent a church leader from doing so in a church service or in some other official church medium. It requires little imagination to conclude that a congregation will learn of a vocal pastor's theological position on a candidate regardless of the public forum in which he chooses to express his views.²⁰⁸ Rather than protecting parishioners from a pastor who tells them how to vote, the ban often just changes how the pastor will go about doing so.

G. *The Democratic Values Argument*

Professor Tobin's final argument in favor of the ban as it applies specifically to churches is that "[s]ubsidizing the entry of churches into politics artificially increases the power of religious institutions" and renders them "overrepresented in political debates and political life."²⁰⁹ Relying on public choice theory,²¹⁰ Professor Tobin argues that "[a] system that tips the scale in favor of one group over another" may "challenge majority governance" and "trample on the rights of minorities."²¹¹ Moreover, he asserts that with new-found power resulting from a removal of the ban, churches will become more vulnerable to corruption.²¹² He contemplates that churches may modify their doctrine in order to receive government funding, churches may endorse candidates to enhance their prospects of receiving funding, and religious leaders may accept money personally (rather than on behalf of their churches) in exchange for a political endorsement.²¹³

This final argument is quite problematic. First, it smacks of an internal inconsistency. If, contrary to what I believe, relaxing the ban would dramatically increase the power of churches, it is odd that these churches with additional clout would suddenly be *more prone* to compromise church doctrine in an effort to obtain federal funding. If anything, one would expect a more powerful church

208. *Cf. id.* at 153–54 (describing an account of a New York rabbi who expresses a preference for a political candidate, and then his selection is reported to his orthodox community).

209. *See* Tobin, *supra* note 11, at 1326.

210. *See id.* at 1326–27.

211. *Id.* at 1328–29.

212. *See id.* at 1329–30.

213. *See id.*

lobby to compromise *less* on church doctrine, for now these potent churches are, as Professor Tobin argues supposedly better at imposing their will on society.²¹⁴

Moreover, even if relaxing the ban would increase the power of churches, it hardly follows that minorities would be oppressed. There is simply no collective “will of the churches” on most issues of public policy.²¹⁵ Some are pro-life, others pro-choice. Some favor the death penalty on theological grounds, others oppose it. The same is true of the war in Iraq, legislation concerning civil unions, and many other issues. Churches as a whole plainly do not form a united theological front,²¹⁶ so it is difficult to imagine that their voice in electoral politics would lead to the oppression of minorities.

If the concern is primarily about federal money, that problem already exists.²¹⁷ In brief, a desire to receive federal funding is more likely to lead to compromising church doctrine than is the ability to endorse or oppose a political candidate. Further, as previously discussed, current law allows pastors to endorse a candi-

214. *See id.* at 1326.

215. *See* Gaffney, *supra* note 12, at 37 (“Exempt religious organizations by no means agree with one another about many of the issues on today’s political agenda. . . .”); Totten, *supra* note 12, at 308 (stating that “the broad range of political viewpoints expressed from pulpits” undermines claims that taxpayers are forced to subsidize objectionable viewpoints).

216. Steffen Johnson has stated the point lucidly:

Some might fear that widening the doorway to churches’ involvement in politics would tilt the public debate in a certain direction—skewing it, for example, either in favor of the Reverend Jesse Jackson or those who make up the “religious right.” Such concerns seem unfounded. Churches’ views on political matters, and their approach to expressing them, vary widely. Some churches believe in isolating themselves from the government, other churches believe in submitting to the government, and still other churches believe in witnessing to the government. Members of the National Council of Churches or the Jewish Community Relations Advisory Council are likely to hold views quite different from those of the United States Catholic Conference. Congregations in major metropolitan areas are likely to view political issues differently than those in rural areas, congregations in the suburbs are likely to have a different outlook than those in the inner city, and congregations made up of racial minorities are likely to favor different policies and candidates than those made up of whites. Thus, there is a healthy pluralism of approaches to involvement in politics in American churches—but remarkable agreement on the fact that faith has something to say about the policies and the people who appear on the political stage.

Johnson, *supra* note 12, at 884–85 (citations omitted).

217. *See supra* text accompanying note 176.

date personally or on behalf of a section 501(c)(4) affiliate,²¹⁸ so there is already a risk that a pastor prone to corruption would offer an endorsement to benefit himself or his church financially. Relaxing the ban should not significantly heighten this risk.

Apart from these objections, the assumption that the ban is necessary to prevent churches from enjoying disproportionate political power on account of their supposed "subsidy" is in some tension with current law. Churches may already lobby Congress, both directly and at the grass roots level.²¹⁹ If modest lobbying by churches has not jeopardized the fabric of United States democracy, I question whether some modest degree of political campaign participation by churches would do so. In any event, Professor Tobin's arguments do not justify one moderately permissive rule for lobbying, but a categorical prohibition against political campaign activity.

Moreover, even if one assumes that tax exemption and the charitable contributions deduction give rise to a subsidy, the amount of this supposed subsidy varies greatly with numerous factors.²²⁰ One such factor is the number of donations derived from persons who do not itemize deductions. As a group, relative to other charitable donees, churches receive a high percentage of their assets from individuals who are of low and moderate income—those less likely to itemize deductions.²²¹ Thus, compared to many other charities, it is likely that churches are not nearly as "subsidized."²²² If anything, the ban disproportionately impairs the political voice of churches, because it forbids them from endorsing a candidate notwithstanding that they are less subsidized than many other charities.²²³

Further, the ban does not merely level the playing field between charities and other entities.²²⁴ Because the penalty for vio-

218. See *supra* note 206 and accompanying text.

219. See I.R.C. § 501(c)(3) (2000) (permitting attempts to influence legislation that do not comprise a "substantial part" of the charitable organization's activities).

220. See *supra* Part I.C.1.

221. See Aprill, *supra* note 31, at 845–46; Hatfield, *supra* note 4, at 157–58.

222. Churches are likely less subsidized not only because they are substantially supported by non-itemizers, but also because most of their income derives from donations that would be excludible from gross income under Code section 102 if they were not exempt under Code section 501(c)(3). See Hatfield, *supra* note 4, at 155.

223. Cf. Aprill, *supra* note 31, at 845 ("[C]hurches often bear the burden of the electioneering prohibition without their contributors enjoying the benefit of a tax deduction.").

224. See *supra* Part I.C.2.

lating the ban is the loss of exemption on all entity income, as well as the forfeiture of the ability to receive tax-deductible contributions entirely—not just those employed for political purposes—the ban actually impairs the political voice of charities, including churches, relative to other entities. Were parity in politics really desired, section 501(c)(3) entities that choose to expend funds to elect a candidate for public office would need to compensate the government *at most* only for that portion of their subsidy diverted to political ends. To state the point more bluntly, if Professor Tobin is correct to invoke public choice theory in this context, one may plausibly argue the ban disadvantages churches relative to certain other entities and renders churches prone to oppression by other elements of society.

H. *Synopsis*

In summary, Professor Tobin has raised some thought-provoking points, and I applaud his originality and effort. Professor Tobin, however, has not made a convincing case that the ban is necessary to protect the integrity or effectiveness of churches, or to preserve a healthy democracy. His arguments (1) tend to offend the norm of separation of church and state more than they support it; (2) do not fully account for the realities of political life even with the ban; (3) do not explain why Code section 501(c)(3)'s more permissive rule for lobbying, and the ability of religious leaders to make political endorsements on behalf of themselves, do not create the type of problems purportedly avoided by the ban;²²⁵ (4) seem to ignore that the ban may tend to hinder, rather than liberate, churches in their ministries of proclamation; (5) do not grapple with the inherently co-opting effect of demanding that churches abstain from theologically grounded political endorsements on penalty of losing tax-favored status; (6) do not take into account the protections afforded by the Religion Clauses of the First Amendment; (7) do not take into account the self-help mechanisms available to churches that would prefer to remain apolitical were the ban relaxed; (8) do not consider the actual, minimal subsidy likely received by churches relative to other en-

225. In fairness to Professor Tobin, his article attempts only to justify the ban on participation in political campaigns by charities, not all other elements of federal tax law governing the political activities of charities and their officials. Perhaps Professor Tobin would prefer to modify many features of tax law in this area to better address his concerns. After such modifications, some of my responses might no longer apply.

tities; and (9) do not acknowledge that the ban actually imposes a harsher tax penalty on the political expression of churches and other charities than that imposed on other entities by federal tax law.

III. REPLYING TO PROFESSOR TOBIN'S SPECIFIC ARGUMENTS APPLICABLE TO CHARITIES IN GENERAL: POINT AND COUNTERPOINT

Professor Tobin also justifies the ban as it applies to the entire class of charities. He offers five major arguments: (1) participation in political campaigns is inconsistent with the rationales for providing charities a subsidy; (2) participation in political campaigns can impair an organization's independence; (3) participation in political campaigns can impair an organization's objective educational mission; (4) participation in political campaigns is inconsistent with an organization's charitable mission; and (5) permitting participation in political campaigns by section 501(c)(3) entities is structurally unsound.²²⁶ I address each argument in turn.

A. *The Subsidy Argument*

Professor Tobin begins his analysis of the ban as it applies to charities in general with a selective primer on the subsidy theory. He observes two rationales for subsidizing section 501(c)(3) entities: charities provide services and supply goods that government otherwise would offer; and charities promote the general welfare of the public and therefore deserve a government subsidy.²²⁷ Professor Tobin observes that the ban is consistent with the first rationale because the federal government generally does not as-

226. See Tobin, *supra* note 11, at 1335-39.

227. See *id.* at 1335-36. Professor Tobin also acknowledges that section 501(c)(3) entities are charities that receive "special status" under the common law of charitable trusts, but states that nothing in the common law suggests that contributions to charities should be deductible for income tax purposes, or that they should receive a subsidy and the ability to engage in electioneering. See *id.* Obviously, the deductibility of charitable contributions under United States federal income tax law is not within the scope of the common law, so I would certainly not dispute that the common law does not compel any certain tax treatment for charities. This observation, however, does not mean that the rationale for special treatment of charitable trusts under the common law has no relevance to federal income tax law and policy. Because a full exploration of this subject is unnecessary for purposes of replying to Professor Tobin, this article does not explore the issue further.

sume responsibility for funding political campaigns.²²⁸ I concur. I also, however, agree with Professor Tobin that this first rationale does not truly justify the tax exemption of charities;²²⁹ therefore, the consistency of the ban with this rationale is inconsequential.

More problematic is Professor Tobin's assertion that permitting charities to participate in political campaigns is inconsistent with the public welfare rationale. He reasons that participation in a political campaign "necessarily forces [a charity] to take sides," and that even when the charity considers its endorsement to promote the welfare of the public, "surely the people on the other side disagree."²³⁰ He contrasts the discussion of issues, which he considers educational, with the endorsement of candidates, which he believes negates the status of charities as "independent, objective voices."²³¹

With respect, I proffer that this line of reasoning fails to account for the nature of the charitable sector and how it promotes the public welfare. The vast charitable sector²³² is quite diverse.²³³ It serves society not by means of uniformity, but with a variety of visions and methods. One charity seeks to lessen teen pregnancy through abstinence education, whereas another does so by providing free birth control. One charity strives to treat brain cancer patients with chemotherapy, whereas another does so with alternative, experimental drugs shunned by the majority of oncologists. One elementary school teaches students how to read by recognizing common words, whereas another trains students to be "hooked on phonics." One religious organization teaches that Jesus is "the way, the truth, the life," and the only

228. *See id.* at 1336.

229. *See id.* at 1336 n.98.

230. *Id.* at 1336.

231. *Id.*

232. The charitable sector consists of more than one million entities. *See* INTERNAL REVENUE SERVICE, DATA BOOK 2006, at 56 tbl.25 (2007), <http://www.irs.gov/pub/irs-soi/06databk.pdf>.

233. *See* Elizabeth T. Boris, *The Nonprofit Sector in the 1990s*, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA 1, 9–12 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999); David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITTSBURGH TAX REV. 1, 24 (2006) ("[T]he charitable tax exemption allows for diversity and experimentation that often lead to production of undiscovered values."); Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 463–66 (2005); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960).

way to the Father,²³⁴ whereas another teaches that there is no God but Allah and Muhammad is His Prophet.²³⁵ The list is nearly infinite. Although in each case one charity believes its methods and mission promote the public welfare best, "surely the people on the other side disagree."²³⁶ To advance competing visions does not negate the essential nature of charity.²³⁷ This fact remains true when a charity believes that its vision is better served by one candidate than another, and believes it strongly enough to say so publicly.

Nor is it true that endorsing a candidate need be less objective or informative than advocating positions on issues. A charity that fully discusses an issue and then ultimately takes a position on it is not necessarily more educational than a charity that fully discusses the strengths and weaknesses of several political candidates and then ultimately endorses one.²³⁸ Can political endorsements be nothing but partisan, unreflective rubber stamps? Yes. But so can issue advocacy. Further, the less objective and reflective a charity is in its endorsement, the less influence the endorsement will exert. Thus, a charity that desires to persuade the public with an endorsement has an incentive to base its conclusion on facts and rational analysis.

Finally, it is worth recalling that other rationales for the federal income tax exemption of charities exist. Importantly, under the base-defining theories discussed briefly above,²³⁹ there is *no subsidy to charities from government* by virtue of Code sections 170 and 501(c)(3), and therefore the ban cannot be justified on

234. See *John* 14:6 (King James); see also *Acts* 4:12 (King James) (stating that salvation is available in Jesus alone); *Acts* 16:31 (King James) ("Believe on the Lord Jesus Christ, and thou shalt be saved, and thy house."). Although the message of Jesus and His apostles is exclusive in claiming that only through Him can one experience reconciliation with God, the message is inclusive in stating that the offer of reconciliation extends to all people of every nationality, ethnicity and culture. See, e.g., *Matt.* 28:19; *John* 3:16; *Rom.* 10:11-13; *Col.* 3:11.

235. This belief is the first of the five pillars of faith in Islam. See JOSH MCDOWELL & DON STEWART, *HANDBOOK OF TODAY'S RELIGIONS* 390-91 (1983).

236. Tobin, *supra* note 11, at 1336.

237. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring) (stating that tax exemptions serve the important role of "encouraging diverse, indeed often sharply conflicting, activities and viewpoints").

238. I am not arguing, however, that a balanced presentation of the strengths and weaknesses of various political candidates, culminating in an endorsement, should be considered an "educational" purpose under Code section 501(c)(3). Such an approach would present an intolerably high risk of abuse.

239. See *supra* Part I.B.

subsidy grounds. Moreover, versions of the subsidy theory not discussed by Professor Tobin also exist.²⁴⁰ Even if one were to agree with Professor Tobin that the ban is consistent with the public welfare version of the subsidy theory, the ban would hardly rest on firm ground. One would need to justify the ban under other versions of the subsidy theory, as well as under base-defining theories—or at least explain why these other theories should be rejected.

B. *The Independence Argument*

Professor Tobin briefly reapplies his co-option argument discussed initially in the context of churches to charities in general. He fears that if charities can participate in political campaigns, otherwise non-partisan charities could be co-opted, and thereby lose their ability to serve as independent voices.²⁴¹ I have responded to these concerns in detail above in the context of churches,²⁴² and need not repeat the many reasons why this argument is problematic.

It is likely, however, that charities as a broad class, including quasi-religious organizations, are somewhat more prone than churches to losing a degree of independence if they engage in electioneering.²⁴³ If parishioners believe that church leadership is compromising the faith, they will probably disassociate with the leadership (one way or another). While stakeholders in a non-church charity are free to do the same, they may not be as quick to spot “heresy” as their ecclesial counterparts, for whom purity of doctrine is often of paramount importance.

This increased risk, however, does not justify the ban. First, the foundational rules governing section 501(c)(3) entities require them to be organized and operated for an exempt purpose.²⁴⁴ An organization would not maintain exemption if its purpose became

240. For a discussion of most of these theories, see Colombo, *supra* note 31, at 682–90, 696–701.

241. See Tobin, *supra* note 11, at 1337. Professor Tobin is not alone in expressing this concern. See, e.g., Pablo Eisenberg, *Charities Should Remain Nonpolitical*, CHRON. PHILANTHROPY, June 28, 2007, at 53 (opining that discarding the ban would cause nonprofit groups to lose their independence from politicians and government).

242. See *supra* Part II.B.

243. Cf. CARTER, *supra* note 136, at 54–58 (observing the pressure on politically active organizations that are “putatively religious” to lose their religious focus).

244. See *infra* Part III.E.1.

significantly political. Second, there are several alternatives to the ban that would permit charities to retain a voice in electoral politics without giving them unbounded discretion to support and oppose candidates.²⁴⁵ Just because government has a role in preserving the independence of the charitable sector does not mean that government must effectively prohibit charities from expressing a voice in elections.

C. *The Objective Educational Mission Argument*

Professor Tobin next revisits his concern that the objectivity of charities would decline were the ban repealed.²⁴⁶ He admits that educational organizations may “still have a biased slant on issues,” but apparently accepts the status quo because “the information comes from a nonpartisan organization that is not trying to elect a candidate” and “there are some checks designed to provide that some level of objectivity is contained in the educational literature.”²⁴⁷

I have already questioned the basic concern with objectivity above.²⁴⁸ In addition, I offer the following. First, if an organization plainly has a biased slant on issues, it is doubtful that the ability to endorse candidates would significantly propel the organization to even greater bias. The bias is extant. Although that bias may well dictate what candidate the organization endorses, the endorsement of the candidate would not necessarily cause the organization to become more biased on the issues.

Second, even without the ban, the most important legal checks that ensure that an educational organization is indeed educational under current law should remain intact. Currently, the IRS employs a methodology test to ensure that an educational organization is not merely a vehicle for propaganda.²⁴⁹ The same test could apply if the organization endorses a candidate for public office. Indeed, one could even apply the test only to the organization's issue advocacy, and not permit any communications concerning a candidate to qualify as “educational” per se. This

245. See *infra* Parts III.E.1, III.E.2.

246. See Tobin, *supra* note 11, at 1337.

247. *Id.*

248. See *supra* text accompanying note 233.

249. See Rev. Proc. 86-43, 1986-2 C.B. 729.

approach would offer the same legal checks against bias that exist under current law.

Finally, the ability to endorse a candidate necessarily subsumes the ability to decline to endorse any candidate. Thus, an educational organization that is genuinely non-partisan, and desires to remain so, would be better able to distinguish itself from its more partisan counterparts if the ban is relaxed. With the ban, no organization—even one led by those with a hidden political agenda—can endorse or oppose a political candidate. But in the absence of the ban, the more partisan entities are likely to endorse and oppose candidates. Correlatively, in the absence of the ban, the genuinely non-partisan educational organization can demonstrate its objectivity in a manner not possible under current law; because it is free to endorse or oppose a candidate, its refusal to do so evinces objectivity. By facilitating the ability of non-partisan charities to signal their independence to the public, the repeal of the ban may actually enhance the influence of non-partisan charities as they communicate their objective analysis.

D. *The Charitable Mission Argument*

Professor Tobin next argues that “political intervention is not consistent with our current and common definition of charitable.”²⁵⁰ First, he states that supporting a political candidate “does not fit within” the common law definition of charity.²⁵¹ His observation is correct, but irrelevant. Charities engage in many activities that are not inherently “charitable” within the meaning of the common law. Such activities include investment management, fundraising, and even the payment of compensation to employees. These activities are usually perfectly legitimate, however, because they are the instrumental means through which a charity accomplishes its charitable mission.

Professor Tobin concedes “that political intervention may be a means of promoting one’s charitable mission,” but counters that “charities are incorrect in assuming that any means of promoting a charitable mission must be charitable.”²⁵² Again, the comment misses the point. The point is *not* that political campaign partici-

250. Tobin, *supra* note 11, at 1338.

251. *Id.*

252. *Id.*

pation necessarily furthers a charitable mission. The point is that it *can* further a charitable mission. One might as well object to the ability of a charity to maintain an endowment and invest its assets. A charity that invests its entire portfolio in a single, high-risk, start-up company primarily to provide capital to the best friend of the charity's executive director is hardly using its assets to further its charitable mission. But this potential misuse of investment assets does not mean that investing cannot further a charitable mission. Moreover, the pursuit of investment returns could so dominate a charity's operations that the charitable mission becomes secondary to the investment function. Under such circumstances, the charity no longer remains exempt from federal income taxation.²⁵³ But this observation does not dictate that the Code prohibit section 501(c)(3) entities from making investments. Similarly, the potential for engaging in political activities in a manner that is inconsistent with charitable status does not itself justify the categorical ban.²⁵⁴

Professor Tobin also argues that "support of a political candidate may interfere with a charity's core mission," and illustrates the point with an individual who donates money to a food pantry that then uses the donation to support a political candidate whom the donor disfavors.²⁵⁵ He claims that the charity has applied funds "for a purpose that, at least to the donor, was outside the charity's purpose."²⁵⁶ While I agree with Professor Tobin's assessment of the donor's opinion, I hardly agree that his hypothetical makes his case. First, donors would likely disagree with countless decisions affecting donated funds were they aware of them.²⁵⁷ The issue is not unique to the political funding context. If donors do not desire that their donations be used for a specific purpose (be it to support or oppose a political candidate, to construct a new facility, or to pay legal fees), the solution is for do-

253. Cf. Rev. Rul. 64-182, 1964-1 C.B. (Part 1) 186 (stating that a charitable organization that derived rents from a commercial office building was tax exempt because it conducted "a charitable program commensurate in scope with its financial resources").

254. As discussed below, several legal checks, both existing and proposed, would prevent the exploitation of charities for political ends. See *infra* Parts III.E.1, III.E.2.

255. Tobin, *supra* note 11, at 1338.

256. *Id.*

257. Examples (to name just a few) include: what employees to hire, what individuals to aid, what forms of assistance to provide, how much assistance to provide any one person, what investments to make, how much compensation to pay personnel, what suppliers of goods and services to patronize, how much office equipment to buy, what fundraising methods to employ, and what legal counsel to retain.

nors to so specify in correspondence or formal agreements accompanying donations.²⁵⁸

Moreover, although the voice of donors—especially small donors—in charitable affairs is important,²⁵⁹ the ban does not ensure respect for their voice, nor does lifting the ban necessarily stifle their voice. As Professor Tobin seems to recognize, the effect on donations of lifting the ban is indeterminate. Professor Tobin speculates that charities that endorse political candidates may encounter difficulty in raising funds.²⁶⁰ If he is correct, that simply means that the “market for donations” is signaling to politically active charities that they should adhere to their historic activities. One would expect charities that struggle for donations either to repent of their political activities, or eventually close their doors as their similarly situated, apolitical sister charities attract better funding. In either case, the wishes of donors have impacted the behavior of charities.

Professor Tobin also recognizes that some donors might give to a charity only if it endorses a particular candidate²⁶¹ (or, I would add, only if it does not endorse the wrong candidate). Again, if he is right, it does not follow that the ban is necessary to protect the desires of donors. One would simply expect that donors would support charities that do not offend donors’ political judgment. Only if donors pressured charities to become politically active against their better judgment would a problem arise.²⁶² That is not a problem of defeating donor preferences, however; it is a problem of changing the character of a charitable organization’s operations. I do believe that some legal protections are necessary to guard against this risk. As explained in the next section of this article, however, those legal protections need not include the current law’s ban.

258. Professor Tobin observes that donors could restrict their gifts in the manner suggested but never explains why doing so is insufficient to respect their preferences. See Tobin, *supra* note 11, at 1338.

259. See *The Case for the Taxpaying Good Samaritan*, *supra* note 32, at 1314–17.

260. See Tobin, *supra* note 11, at 1338.

261. See *id.*

262. A quite different problem is that donor discipline may not serve as an effective check on many charities. See *Not Even a Peep?*, *supra* note 14, at 1088–89.

E. *The Structural Soundness Argument*

Professor Tobin's final argument is that allowing charitable organizations to participate in political campaigns is "structurally unsound."²⁶³ Professor Tobin argues that lifting the ban would render section 501(c)(3) entities the vehicle of choice for making political contributions because donations to them are deductible under Code section 170(c).²⁶⁴ He believes that there is no good reason to subsidize the electioneering of section 501(c)(3) organizations and thereby impart them with preferential status in the political process.²⁶⁵ He foresees that lifting the ban would cause section 501(c)(3) entities to be conduits for political campaign contributions²⁶⁶ and greatly increase their political power.²⁶⁷

As a threshold matter, it is important to identify a subtle distinction between two concerns that Professor Tobin has expressed. One is the concern that, in the absence of the ban, charities could be used as conduits to channel political contributions to further private interests. This article refers to the potential for this abuse as the "private interest/conduit" issue. A related, but distinct, concern is that, without the ban, government would provide section 501(c)(3) entities (or donors thereto) with a unique "subsidy" to endorse or oppose political candidates. This article refers to this concern as the "subsidized electioneering" issue.

Although I do not fully embrace Professor Tobin's subsidy analysis, I agree with him that, without legal checks, donors are likely to try to channel political contributions through charitable organizations on account of the deductibility of contributions thereto. I also agree with Professor Tobin that the risk of this scenario is serious.²⁶⁸ This concern, however, does not justify the ban. In this section of the article, I discuss in detail my points of agreement and disagreement with Professor Tobin, and explain why alternatives to the ban are superior.

263. Tobin, *supra* note 11, at 1339.

264. *See id.*; I.R.C. § 170(c) (2000).

265. *See* Tobin, *supra* note 11, at 1339–42.

266. *See id.* at 1339.

267. *See id.* at 1341.

268. *See Not Even a Peep?*, *supra* note 14, at 1085–89 (discussing the private interests served in the absence of the ban).

1. The Private Interest/Conduit Issue

The ban on electioneering largely prevents charitable organizations from serving two “private interests”—the private interest of candidates and the private interests of their supporters (who desire to elect politicians inclined to further their supporters’ agendas).²⁶⁹ The theoretical concern raised by the private interest/conduit issue is that, without the ban, electioneering by charities could become nothing more than electioneering by those who fund the charities—their politically motivated donors.²⁷⁰ Strictly speaking, however, this concern is not that electioneering by charities is necessarily illegitimate. It is legitimate as long as (1) the charity decides whether, and to what extent, to participate in political campaigns, and (2) its decision can be trusted as having been made primarily to further an exempt purpose rather than the private interests of individuals, such as donors or candidates. Because I have elsewhere discussed in some detail the seriousness of the risk that charities could be exploited to further private interests without some legal safeguards,²⁷¹ my comments here are brief.²⁷²

I concede that, entirely apart from the ban, existing law offers some level of protection against the risk that donors and the candidates that they support will successfully use charities as mere conduits for political campaign contributions. First, the general background rules governing section 501(c)(3) entities preclude an organization from obtaining and maintaining its exemption when it is organized or operated to serve a non-exempt purpose—such as promoting one or more political candidates—to any significant degree. Under the organizational test, an organization is organized “exclusively” for an exempt purpose only if its governing document limits the organization’s purposes to an exempt pur-

269. See *id.* at 1086; Chisolm, *supra* note 12, at 342–44.

270. See Johnson, *supra* note 12, at 893–900 (observing that the conduit issue “is certainly an important public policy consideration,” but discussing why generalizing the significance of the concern is difficult).

271. See *Not Even a Peep?*, *supra* note 14, at 1085–89.

272. Consistent with the community income theory of the charity income tax exemption and the charitable contributions deduction, the favorable tax treatment of charities and donations thereto assumes that charities are truly acting as agents of the community. When charities cease to do so, they forfeit their special tax status. Thus, a charity that is used primarily as a mere conduit for political contributions does not merit recognition as a section 501(c)(3) entity.

pose.²⁷³ Under the operational test, an organization is operated “exclusively” for an exempt purpose “only if it engages primarily in activities which accomplish” an exempt purpose.²⁷⁴ The test is failed “if more than an insubstantial part of its activities” do not further an exempt purpose.²⁷⁵

Although the organizational test is easily satisfied, the operational test is more difficult to pass. For example, if a charity has expended one-half of its time and resources on political endorsements, a court could readily conclude that the organization does not “engage primarily” in activities which accomplish an exempt purpose, or that “more than an insubstantial part of its activities” do not further an exempt purpose. At some point, the scale of political activities relative to activities that inherently further an exempt purpose tends to negate the charity’s claim that its electioneering is merely an instrumental means of accomplishing an exempt purpose.²⁷⁶

Under existing federal income tax law, the private benefit doctrine provides another measure of protection against the exploitation of charities to further the private interest of candidates. Charitable organizations are exempt from federal income tax only if they serve a public, rather than a private, interest.²⁷⁷ In *Ameri-*

273. See Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(a) (as amended in 1990).

274. See Treas. Reg. § 1.501(c)(3)-1(c)(1).

275. See *id.*

276. *Cf., e.g.,* Scripture Press Found. v. United States, 285 F.2d 800, 806–07 (Ct. Cl. 1961) (holding that a religious publishing organization failed the operational test, stating that the “crucial factor” is “that the sales aspect of plaintiff’s work looms so large as to overshadow all else”); Rev. Rul. 77-366, 1977-2 C.B. 192 (ruling that an organization conducting ocean cruises and providing both religious education and recreational activities is not operated exclusively for exempt purposes). Because the determination of whether an organization has violated the operational test is a fact-intensive, subjective inquiry, it is conceivable that the test would be applied inconsistently by the judiciary and the IRS in the absence of the ban. If this potential proved to be a real problem in the absence of the ban, more objective tests could be adopted. See, e.g., *supra* text accompanying note 298.

277. See Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii). The requirement that charities not serve a private interest is known as the private benefit doctrine. It is related to, but distinct from, the statutory prohibition in section 501(c)(3) against private inurement of a charitable organization’s net earnings for the benefit of any “private shareholder or individual.” See I.R.C. § 501(c)(3) (2000). The prohibition against private inurement of net earnings applies only to transactions between a charity and those with some type of “insider” status with the charity (i.e., someone with functional control over the charity’s operations). See *United Cancer Council, Inc. v. Comm’r*, 165 F.3d 1173, 1178–79 (7th Cir. 1999). The private benefit doctrine is much broader. For a concise summary of the private benefit doctrine and the prohibition of private inurement, see Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 *FORDHAM L. REV.* 1827,

can Campaign Academy v. Commissioner, the United States Tax Court interpreted this requirement to mean that a purportedly charitable organization fails to qualify for federal income tax exemption if more than an insubstantial part of its activities further the non-exempt purpose of serving a private interest.²⁷⁸ In this case, a school trained students for careers in managing political campaigns.²⁷⁹ Approximately 80% of the school's graduating class worked on political campaigns in 1986.²⁸⁰ The school received funding exclusively from the National Republican Congressional Trust, offered a curriculum focused on Republican politics, and was initially governed by a board of directors who were prominent Republicans.²⁸¹ The Tax Court held that the organization failed to qualify under Code section 501(c)(3) because its training activities were intended to and did serve private interests—the Republican party and its candidates.²⁸²

A supposed “charity” that devotes a substantial portion of its resources to supporting or opposing candidates for public office would likely run afoul of the private benefit doctrine. Candidates who receive endorsements from a charity receive benefits similar to those who employed the students trained by the school in *American Campaign Academy*. Further, a practice of devoting substantial resources to the endorsement and opposition of political candidates suggests a non-exempt purpose of the endorsing entity, just as the practice of placing graduates in the political campaigns of Republican candidates suggested a non-exempt purpose of the school in *American Campaign Academy*. Therefore, in the absence of the ban, the private benefit doctrine would likely thwart the gross exploitation of section 501(c)(3) entities by political candidates.

The private benefit doctrine is less suited to prevent the exploitation of a charity for the benefit of its donors and managers who influence a charity's decision to endorse or oppose political candidates. As applied to a charitable organization's donors or managers who anticipate obtaining political favors from the candidates supported by the charity, establishing the presence of private

1844-46 (2003).

278. 92 T.C. 1053, 1079 (1989).

279. *Id.* at 1055.

280. *Id.* at 1060.

281. *Id.* at 1070.

282. *Id.* at 1079.

benefit is difficult. Both the IRS and the courts would be hard-pressed to find the presence of such private benefit when the charity's governing board and officers offer plausible, but false, justifications for their participation in political campaigns. Moreover, if the charity's political activities are highly selective, such that it endorses and opposes only a few candidates occasionally, it would be difficult to conclude that the charity has furthered the private interests of political candidates as a substantial part of its activities.

Consequently, some legal safeguard in addition to the private benefit doctrine is necessary to ensure that, if the ban is repealed, those who exert significant influence over the operations of charities will not exploit them to further their own selfish interests. A number of approaches are available. One approach is to distinguish between (1) a charitable organization that is controlled by directors who are independent of one another, the charity's officers, and its substantial donors, and makes political campaign expenditures totally independently of non-fiduciaries who are able to exercise substantial influence over the charity (and persons related to such non-fiduciaries); and (2) any charity that fails these tests of independence.²⁸³ Although neither type of charitable organization need be prohibited from supporting or opposing political candidates on penalty of forfeiting federal income tax exemption, only the former category would generally be able to do so free from tax.²⁸⁴ Charitable organizations that fail the tests of independence, or in some cases their directors or even non-fiduciaries who exercise substantial influence over the organizations, would pay an excise tax on the charities' political campaign-related expenditures.²⁸⁵ The proposed excise tax would discourage the exploitation of non-independent charities for private gain.²⁸⁶ This system would not tax the political expenditures of charities that are truly independent, both in their governing board's composition and in the way they actually function relative to donors and other people of influence, under the theory that independent charities are less prone to exploitation by a few key insiders.²⁸⁷ In other words, independent charities are more likely to

283. See *Not Even a Peep?*, *supra* note 14, at 1098–1107.

284. See *id.* at 1102.

285. See *id.* at 1102–04.

286. See *id.* at 1104.

287. See *id.* at 1100–01, 1104.

make political expenditures to further an exempt purpose rather than to function as mere conduits that channel contributions to further the interests of donors and the candidates that they favor.

If legislators do not share my willingness to trust truly independent charities, as constrained by the general federal income tax rules discussed above,²⁸⁸ alternative approaches are available. One approach is to deny donors a federal income tax deduction for a portion of their contributions to a charity that makes political campaign-related expenditures. A similar, partial deduction disallowance rule already applies with respect to membership dues paid to a tax-exempt organization that makes lobbying or political campaign-related expenditures; an allocable portion of such dues is non-deductible by a taxpayer that incurs them in carrying on a trade or business.²⁸⁹ Similarly, one may deny a charitable contributions deduction for a portion of a donation used by the charitable donee to support or oppose political candidates.²⁹⁰

A variant of this alternative is to distinguish statutorily among three types of donations: (1) those that are restricted exclusively for non-political expenditures; (2) those that are unrestricted; and (3) those that are designated for political expenditures made in the discretion of the donee. Contributions in the first category would be fully deductible under Code section 170, whereas those in the third category would be entirely non-deductible. Contributions in the second category would be partially deductible, depending on the extent to which they are allocable to political expenditures.

All of these alternatives address the private interest/conduit issue without silencing the voice of charities wishing to endorse or oppose a candidate for public office. They demonstrate the false dilemma that characterizes arguments in favor of current law—that one must choose between the ban and unabridged electioneering by charities that will be exploited by politicians and their supporters. The ban is simply not the only way to protect against this exploitation of charities.

288. See *supra* text accompanying notes 269–76.

289. See I.R.C. §§ 162(e)(3), 6033(e)(1) (2000).

290. Of course, any such approach should account for strategic behavior by donors and charities, for example, bunching donations in one year and expenditures in another.

Moreover, these alternatives offer some advantages over the use of section 501(c)(4) affiliates under current law. First, the ability to endorse a candidate directly and without the loss of tax exemption can be extremely important to a charitable entity. The major point of an endorsement is often to lend a good name to a candidate. To force the stakeholders of a charity to form a section 501(c)(4) entity for political endorsements is to deny the charity the use of its reputation and credibility in making the endorsement.²⁹¹ The alternatives to the ban avoid this disassociation, and they do so in a way that is parallel to the manner with which current law treats political campaign-related expenditures incurred in furthering a trade or business.²⁹² Further, requiring the creation of section 501(c)(4) affiliates produces inefficiencies. Most obviously, their formation and operation generate additional costs (e.g., legal fees, filing fees, and probably increased accounting and auditing fees). These costs may be sufficiently high that a small charity cannot even afford to create a section 501(c)(4) affiliate. Moreover, if a leader of a charity desires to communicate her views about a political candidate to a charity's members, she can do so under current law;²⁹³ she just may not do so in the normal course of the charity's operations, such as in a sermon²⁹⁴ or in a speech to members at an annual meeting.²⁹⁵ Forcing her to pursue methods of informing her membership outside the context of normal operations will often require the expenditure of additional resources and the sacrifice of more time.

In summary, alternatives to the ban will enable charities to express their political voices without creating a serious risk that politicians and their self-seeking constituents will exploit charities to further their private interests.

291. Cf. Kemmitt, *supra* note 12, at 173 (stating that a "church's free exercise rights and its religious/political message are bound up in the identity of the speaker to a unique degree"). Indeed, at least one religious entity has insisted that the ability to speak as a church, rather than through an affiliated ministry, is theologically imperative. See *GOD ALONE IS LORD OF THE CONSCIENCE*, *supra* note 133, at 379.

292. See I.R.C. § 162(e)(1).

293. See *supra* notes 143–44 and accompanying text; see also Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

294. See *TAX GUIDE FOR CHURCHES*, *supra* note 145, at 8 ex.4.

295. See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

2. The Subsidized Electioneering Issue

The subsidized electioneering issue also does not require adherence to the ban. First, justifying the outright ban is problematic even under one or more subsidy theories. Even if one concludes that the Code conveys a governmental subsidy to charities, one can determine whether any given charity actually receives a subsidy in excess of that received by other entities permitted to intervene in political campaigns only on a case-by-case basis.²⁹⁶ There are especially good reasons to doubt that many churches receive a substantial subsidy.²⁹⁷ As applied to numerous charities, the ban may actually impose a disproportionately high penalty for expressing their political voice (relative to their non-charitable counterparts). For those charities, the subsidized electioneering concern does not justify the ban; if anything, it suggests that the ban disproportionately amplifies the partisan political voice of non-charitable entities.

Moreover, if the better view is that charities do not receive a governmental subsidy by virtue of Code sections 170 and 501(c)(3), any concern is not really one of “subsidized electioneering.” Nevertheless, the fact remains that some charitable donees receive more money than they would absent the ability to receive donations that are deductible by donors. If these charities are allowed to support and oppose political candidates, they will have an advantage over many non-section 501(c)(3) entities. This may or may not be a significant concern.²⁹⁸ Assuming that it is a real concern, it is helpful to demonstrate that the ban is still unnecessary.

Consider the two alternatives, briefly discussed in Part III.E.1, which deny a deduction for the portion of charitable contributions used by charitable donees to support or oppose a candidate for public office. Professor Tobin’s main concern is with the ability of donors to deduct contributions used by charitable donees to par-

296. See *supra* Part I.C.1.

297. See *supra* notes 221–23 and accompanying text.

298. Existing law, apart from the ban, already prevents a charity from operating primarily for political purposes. See *supra* notes 269–76 and accompanying text. A charity that devotes extensive assets to promote a political agenda would likely fail to remain exempt even in the absence of the ban. See *id.* Moreover, the charitable sector is extremely diverse. See *supra* note 233 and accompanying text. Even if the charitable sector would gain an especially prominent political voice in the absence of the ban, it is not clear that this voice would harm the democratic process.

ticipate in political campaigns.²⁹⁹ These methods solve this problem, and they do so without squelching the political voice of charities.

Further, insofar as Professor Tobin is willing to tolerate minimal subsidizing of political speech, additional alternatives to the ban are available. One alternative is to permit charitable organizations to engage in political campaign activity to the same degree that they may lobby under current law—as an insubstantial part of their activities.³⁰⁰ Another option is to permit charities to expend funds for partisan political purposes as long as expenditures fall within some statutory ceiling—an approach similar to that codified in Code section 170(h) for charities that elect to be governed by that section. There are other options, as well. My point is not to discuss these options exhaustively, but simply to illustrate that Professor Tobin's subsidized electioneering concern does not require federal income tax law to maintain the ban. Other options can satisfactorily address this concern, without stifling the political expression of charitable entities.

F. *Synopsis*

Professor Tobin's arguments in support of the ban as it applies to charities raise important issues, and his final argument rests upon valid concerns. His arguments, however, do not reflect the diversity of the charitable sector and the multitude of competing approaches employed by charities to better society, nor do they account for the extant problems of non-objectivity of educational organizations even with the ban, or recognize how removing the ban could enhance the influence of truly objective charities. Further, his arguments discount how more complete participation in the political process can further a charity's mission and do not account for theories of the charity income tax exemption and the charitable contributions deduction that are not based on the subsidy theory.

To his credit, Professor Tobin does identify the most compelling reasons to limit political campaign participation by charities—the private interest/conduit issue and, perhaps, the subsidized electioneering issue. Alternatives to the ban can address these con-

299. See Tobin, *supra* note 11, at 1325.

300. See *supra* note 86 and accompanying text.

cerns, however, without unduly stifling charitable organizations' legitimate political speech.

CONCLUSION

Professor Tobin's justification of the ban on participation in political campaigns by charities is an important contribution to the legal literature discussing this provocative topic. The type of charitable sector that he is attempting to foster—one that is objective, primarily independent of governmental influence, and true to a charitable mission—is laudable. Furthermore, his commitment to democratic values is sound. His arguments, however, do not justify the ban.

This conclusion does not imply that Professor Tobin has expressed entirely groundless concerns or an absurd thesis. On the contrary, he has identified at least two issues—the private interest/conduit issue and the subsidized electioneering issue—that suggest the propriety of some type of governmental restriction on the political expenditures of charities. The private interest/conduit issue is probably the greater concern. Nonetheless, in the context of current law and available alternatives, these valid concerns do not compel adherence to Code section 501(c)(3)'s ban on electioneering by charities. Alternatives to the ban are available.

The most compelling reason to favor these alternatives is that they enable charities to retain a more meaningful voice in public affairs. Historically, the political voice of charities has contributed importantly to social change.³⁰¹ Political campaigns raise issues that demarcate the positions of candidates; therefore, a charity's position on issues will often imply approval or disapproval of individual candidates. Moreover, many charitable organizations may rightly believe that the policies which they favor are most likely to become law if certain candidates are elected. Permitting charities to communicate their views of political candidates without incurring tax-related penalties affords them the opportunity to advocate vigorously for these policies. Given this country's commitment to free expression, federal tax law should err, if at all, on the side of permitting more speech—not stifling it.

301. See *Not Even a Peep?*, *supra* note 14, at 1095–96.
