MADISON'S NIGHTMARE: THE TAX-DRIVEN EXCLUSION OF DISINTERESTED VOICES FROM THE LEGISLATIVE PROCESS

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Discussion of democratic theory in the United States revolves around two models: public choice and public interest.[1] The public choice model, often associated with the Law & Economics movement[2], argues that the process of legislation is driven exclusively by selfish efforts by the participants to maximize individual economic self-interest. Legislation, according to many public choice theoreticians, is simply the outcome of an auction among interested persons seeking to maximize short-term economic advantage. Altruism is non-existent; claims to seek the common good are either cynical strategies or incoherent acts of self-delusion. Under public choice, the legislative process is reconceived as a market, with legislators acting as the sellers of a product paid for in votes,

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[1] For a description of the public interest model, see Posner, Theories of Economic Regulation, 5 Bell J. Econ & Mgmt Sci. 335, 36 (1974). It is described in Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 31-50 (1990).

For examples of public choice analysis, see, e.g. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation, 76 Va. L. Rev. 265 (1990). It is described in Shaviro, supra, at 64-71.

[2] See, e.g., McChesney, Regulation, Taxes and Political Extortion in Regulation and the Reagan Era: Politics, Bureauracracy and the Public Interest (1989)

campaign contributions, honoraria and free vacations. The buyers are economic interest groups seeking wealth transfers.

The competing model, public interest, flows from James Madison's Federalist No. 10, where Madison warns against "factions" and envisions the growth of a pluralist polity in which self-interested actors are occasionally persuaded to agitate and legislate for the common good.[3] Public interest theory, associated in recent years with the revival of civic republicanism[4] argues that an optimum solution to many problems can be found that will benefit everyone, if only some of us can be persuaded to trade short-term economic advantage for long-term collective good. Altruism plays an important role; arguments about the common good take center stage and play an important (not merely a cosmetic) role in the legislative process. Under a public interest model, the democratic process is conceived as an exercise in remedying market failure, with individual acts of selfishness viewed as part of a "prisoner's dilemma" to be redeemed by collective acts in furtherance of the common good.

Both public choice and public interest make claims to be <u>the</u> way of analyzing the democratic process, both descriptively and normatively. My own

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[3] See Kelman, <u>Why Public Ideas Matter</u> in <u>The Power of Public Ideas</u> (R. Reich, ed. 1988); Sunstein, <u>Interest Groups in American Law</u>, 38 Stan. L. Rev. 29 (1985)

[4] See Sunstein, <u>Beyond the Republican Revival</u>, 97 Yale L. J. 1539 (1988).

sense is that each has important kernels of insight. Public choice reminds us of the undeniable role that self-interest plays in the process; public interest calls us to rise above parochialism in search of common goals. Ideally, we should structure the democratic process to get the best of both worlds by encouraging self-interested economic players to make their wishes known to legislators, while assuring that a stream of information and persuasion flows from institutions self-consciously organized to reflect Madison's ideal of a search for the common good.

Instead, from 1962-1994, we structured the tax consequences of participating in the democratic process as a Madisonian nightmare. Economically self-interested groups were invited to participate vigorously in the legislative process through the use of tax-advantaged dollars. But groups seeking disinterested solutions that would have advanced the common good were either forbidden from participating at all, or were forced to do so with tax-disadvantaged dollars. The net result was a legislative process that looked very much like the public choice model; but only because the tax system had taken the public interest component out of the game.

In 1994, section 162(e) was amended to limit the tax-advantaged flow of dollars into the legislative process from the business community.[5] Under the revised 162(e) business entities cannot deduct lobbying expenses or dues to trade associations predominantly engaged in lobbying. The net effect has been to

[5] I am grateful to Seth Kreimer who gently reminded me that an earlier draft of this piece had overlooked the 1994 revisions to 162(e).

eliminate the most blatant aspect of what I have characterized as a Madisonian nightmare. But the 1994 reforms, even if they pass First Amendment scrutiny, will do little or nothing to unlock the potential for the funding of disinterested legislative solutions. Thus, while the flow of economically self-interested funds no longer includes tax-advantaged dollars, the imbalance in the legislative process continues.

I propose to describe the role of the tax system in shaping participation in the legislative process[6]; critique the anti-Madisonian distortions it imposes (even under the revised version of 162(e)); and suggest a partial constitutional remedy.

A. The Role of the Tax System in Shaping Participation in the

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[6] A complete treatment of the role of tax exempt organizations in the democratic process would deal with three issues that are beyond the scope of this paper. First, to what extent should tax exempts be permitted to participate directly in political campaigns, either by making contributions or engaging in independent expenditures? See e.g. FEC v. National Right to Work Comm., 459 U.S. 197 (1982); Austin v. Michigan State Chamber of Commerce, 494 U.S.6 52 (1990). Second, who gets to be treated as a 501(c)(3), or otherwise tax advantaged, organization? E.g. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980); National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983); Nationalist Movement v. Comm'r, 102 T.C. 558 (1994). See generally Treas. Reg. 1.501(c)(3)-1(d)(3)(i) (1959). Finally, what are the permissible scope of lobbying activities for everyone? I would urge that a distinction be made between "informational lobbying", which should be encouraged, and forms of sophisticated bribery, like free vacations, substantial honoraria, lunches and other financial sweeteners, which should be discouraged, if not forbidden.

I confine myself in this paper to the question of whether tax exempts should be permitted to participate vigorously in the process of legislation. I consciously avoid the word lobbying, both because, as currently practiced, it includes financial practices that I deplore, and because the word carries an extremely negative connotation.

Lawmaking Process

The Internal Revenue Code differentiates among four types of players seeking to participate in the processes of democratic lawmaking: (1) profit-making business entities; (2) non-charitable, non-profit entities; (3) charitable entities with broad public support; and (4) private charities.[7]

[7] I am indebted to Miriam Galston's excellent summary of the tax consequences of lobbying. Miriam Galston, Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities, 71 Tex. L. Rev. 1269 (1993). See also Developments in the Law: Non-Profit Corporations, 105 Harv. L. Rev. 1578 (1992).

Profit-making business entities are entitled to expend substantial, perhaps unlimited, resources in speaking to the general public and to legislators about the merits of proposed legislation.[8] Moreover, until 1994, the cost of such participation was deductible as a business expense under Sec. 162(e).[9] The net effect was to unleash powerful expressions of economic self-interest on the legislative process, using tax advantaged dollars as the financing mechanism. Under the revised

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[8] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Profit-making corporations may not make direct contributions to political campaigns, but may be organized into PACS for the purpose of tapping the resources of employees.

[9] The passage of 162(e) in 1962 reversed a long-standing policy against the tax deductibility of corporate lobbying expenditures. See Cammarano v. United States, 358 U.S. 498 (1959). Presumably, the 1994 revisions take us back to Cammarano.

version of 162(e), the self-interested flow of funds from the business community may continue, but without the added encouragement of a 162(e) deduction.[10]

[10] Arguments have been made that the revision of 162(e) violates the First Amendment. The strongest argument is that a 162(e) deduction is not a subsidy because it is needed to provide an accurate measure of net income. Denying such an economically-justified deduction, the argument goes, penalizes business entities for engaging in constitutionally protected First Amendment activities. If such an argument succeeds, it will reinstitute the pure Madisonian nightmare that existed from 1962-1994.

It should be noted that the same argument is not available to 501(c)(3) organizations, since the 170 deduction cannot be justified as necessary for an accurate economic measure of taxable income. I will attempt a discussion of the First Amendment issue posed by the various tax rules <u>infra</u> at 13-23.

Non-charitable tax exempt organizations, such as labor unions and trade associations, may also engage in unlimited lobbying activities, as long as they are "germane" to the organization's purpose.[11] Prior to 1994, since contributions to trade associations by their business members were deductible under sec. 162, the net effect was to open a second front for the expression of economic self-interest during the legislative process, once again using tax advantaged dollars. Under the revised version of 162(e), the flow of funds to trade associations may continue, but the contributions may not be deducted.

Unlike economically motivated businesses or tax exempt entities which may devote unlimited resources to self-interested lobbying, charities under 501(c)(3) with a base of public support may not devote a "substantial part" of their activities to participation in the legislative process, unless the activity can be characterized as non-partisan, technical assistance requested by a legislative body.[12] Since the touchstone of qualifying as a charity under 501(c)(3) is a commitment to serve the public interest, the IRS restriction on lobbying severely limits the availability of dollars[13] to fund disinterested "public interest" solutions to legislative problems.

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[11] 501(c)(6) "business leagues" are permitted to lobby. Rev. Rul. 61-177,1961-2C.B.117.

[12] Treas. Reg. sec. 56.4911-2(c) (1990). An alternative regime is available to public charities under 501(h) that permits a sliding scale of between 20%-5% of expenditures to be used for lobbying. The rule of thumb I used prior to 501(h) was 10-15%.

[13] 501(c)(3) charities are tax advantaged in two ways. Their income is exempt from taxation and contributions may be deducted by individual donors under sec. 170.

The very institutions that Madison would have imagined as fulfilling his vision of a search for the common good are severely restricted in participating in the legislative process, leaving the economically-motivated "public choice" players an open field.

Finally, private charities are completely forbidden from participating in the legislative process, further restricting the ability to fund the advocacy of legislative solutions that seek the common good, as opposed to the selfish interests of the participants.[14]

[14] The prohibition is enforced by an excise tax. IRC sec. 4945.

Reasonable people can, of course, differ over the wisdom of permitting any use of tax advantaged dollars in the process of legislation.[15] Perhaps the ideal of complete government neutrality is the best way to organize the democratic process. There was, however, no defense of the pre-1994 system that permitted tax advantaged dollars to fund self-interested participation in the legislative process by business entities and service driven tax exempts, but severely limited the use of tax advantaged dollars to fund the advocacy of disinterested solutions. Prior to 1994, I believe that we inadvertently allowed the tax system to become the engine of a public choice vision of the democratic process, to the exclusion of the public interest model. Unfortunately, the 1994 revisions do little to correct the situation. The economically self-interested flow of funds from the business community is not likely to be substantially affected by the loss of the corporate income tax deduction for three reasons: (1) self-interest will drive participation even in the absence of a deduction; (2) the new rules may turn out to be unenforceable because of internal bookkeeping standards and (3) many corporations pay no corporate income tax because of consolidated returns or other tax minimization techniques. If the health care debate is any measure of the effectiveness of the revised 162(e), the reform is largely cosmetic. Economic self-interest continues to drive participation in the legislative process; tax law continues

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[15] Arguably, the revision to sec. 162(e) is a step in this direction.

to hobble disinterested participation by 501(c)(3) entities seeking a solution that advances the common good.

B. The Distorting Effects of Current Tax Policy

The most obvious distortion produced by the pre-1994 rules tax rules was a distinct tilt toward the business community. Business entities were permitted to assemble significant wealth in the marketplace and to siphon off a portion of that wealth as tax advantaged dollars to advance their economic self-interest in the legislative process. Putting aside the considerable economic advantage conferred by limited liability and the access to wealth involuntarily generated by consumers who have no desire to advance a corporation's political agenda, the pre-1994 system offered the business community the use of tax advantaged dollars in at least two forms: deductible lobbying expenses; and deductible contributions to trade associations organized primarily to lobby. The current system removes the tax advantages, but continues the invitation to transfer wealth generated by consumers to unlimited self-interested lobbying by profit-making entities.

No similar avenue of participation is available to the broad spectrum of citizens who do not identify their interests with the short-term desires of the business community, or who wish to seek disinterested solutions in the common interest. While 170 deductions aid in funnelling wealth to 501(c)(3) charities in a manner roughly equivalent to the business community's power to generate political wealth from unrelated commercial transactions, the rules of the game deviate dramatically at that point, even under the revised version of sec. 162(e). The business community is permitted to funnel its assembled wealth into the legislative process, while the 501(c)(3) community is placed under severe constraints. The net result is a legislative process badly skewed toward the short-term economic needs of the business community, with virtually no one to speak for the weakest segments of the society. The poor just don't have an effective trade association.[16]

A somewhat more abstract distortion tilts the legislative process toward self-interest and away from a search for the common good. Under existing tax rules, businesses and non-charitable tax exempts are permitted to advance their self interested concerns through the legislative process. Indeed, they are forbidden from attempting to influence any issue not directly connected to their parochial interests.

On the other hand, organizations like 501(c)(3) charities, without a self-interested economic stake in the outcome but in search of a solution that benefits the common good, are inhibited from participating. Not surprisingly, the contemporary vocabulary of the legislative process teems with self-interest. Arguments about the common good are regarded as cynical ploys, designed to advance a hidden selfish agenda.

[16] The Legal Services Corporations forbids lawyers for the poor from participating in the legislative process.

Supporters of the public choice model find nothing out of place in such a world. Honesty about the all-consuming nature of economic self-interest, they argue, makes the legislative process more efficient and less hypocritical. Moreover, they argue, assertions about the public interest are often delusions, masking an agenda no less self-interested than that of the business community's. Finally, public choice theorists argue that economics should be the sole determinant of public policy. Opening the door to non-economic arguments about values and the common good simply invites inefficient legislation.

Supporters of Madison's pluralist vision viewed the pre-1994 tax driven legislative process as a disaster. With the 501(c)(3) voices capable of urging disinterested solutions, advancement of the common good and concern for non-economic values muted by the tax rules, supporters of the public interest vision of democracy observed a legislative process that was artificially shoehorned into a public choice model. The result not only distorted outcomes; it eroded faith in the capacity of democratic government to rise above short term economic self-interest. Unfortunately, while the 1994 revision of 162(e) removed the most blatant aspects of the old system, it does not alter the strong tilt toward self-interest in the legislative process.

The third, and least discussed distortion, is a shift of emphasis from legislation to litigation as a way to solve social problems. Because we embrace a myth that says that constitutional rights always existed and that litigation to secure those rights is not the making of new law, 501(c)(3) organizations are free to fund litigation-based advocacy groups. The ready availability of 501(c)(3) funding for litigation-driven approaches to social problems, but not for legislative-driven solutions, has exercised a profound influence on our approach to problem solving. The difficulty of using the legislature to advance the needs of weak groups is enormous. But when you add a strong financial disincentive to the equation, legislation becomes an artificially disfavored alternative.

When I was at the ACLU[17], I always worried about resources. But resources for legislative change were far and away the most difficult to assemble. To the extent we were funded by individuals seeking a 170 deduction, or by private foundations forbidden from lobbying directly or indirectly, we could not use the funds to participate vigorously in the development of legislative solutions. Our legislative budget was derived from non-170 contributions to a (c)(4) affiliate and from the fraction of our 501(c)(3) funds that could be safely spent under the "substantial part" test. Whether we knew it or not, the easier availability of funds for litigation projects designed to secure new rights that we pretended always had existed tilted us toward non-democratic approaches to social change.

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[17] In the interests of consumer protection, I should reveal that I served as NYCLU Staff Counsel from 1967-72; Assistant Legal Director of the ACLU from 1972-74; and National Legal Director from 1982-86. I've spent a lot of 501(c)(3) money in my time.

In my experience, from the standpoint of the status quo, the mounting of a law reform campaign fueled by test case litigation is indistinguishable from an effort to secure the same changes through the political process. Both are efforts to secure change through the institutional mechanisms of a democratic polity. Yet, 501(c)(3) entities are encouraged to fund the litigation approach and severely restricted in funding the legislative approach. Such a distorted set of incentives turns Madisonian democracy on its head. Madison did not think that judges would be the sole voice of the common good. He was certain that legislators confronted by reasoned argument would also search for answers in the public interest. Unfortunately, the most powerful reform engines in American life have been switched onto the litigation track and discouraged from seeking legislative change because of our current tax structure. Democracy is the loser.

C. A Proposed Constitutional Solution

Having spent several pages arguing that reform should not be artificially tilted toward litigation-driven solutions, I am not unaware of the irony in suggesting a litigation-based solution to the distortions caused by the current tax structure. I do so only because I assume that legislative reform would be virtually impossible. If I am wrong, avenues for legislative change should be explored.[18] Assuming that legislation empowering 501(c)(3) entities to participate vigorously in

[18] Serious exploration of the options made available under 501(h) is also in order.

the legislative process is unlikely, in large part because the legislative system is badly skewed against allowing new players, a constitutional argument may be the only game in town.

The usual constitutional argument seeks to invoke the unconstitutional conditions doctrine to challenge the IRS decision to condition favorable tax status -- 501(c)(3) exempt status and 170 deductibility - - on a waiver of the First Amendment right to petition for redress of grievances.[19]

The basic building blocks of an unconstitutional conditions argument are clearly present. First, the right to participate in the legislative process is protected by the First Amendment. Whether one views advocacy aimed at legislators as speech, association or a petition to redress grievances, legislative advocacy fits comfortably within the First Amendment.[20] Second, it is now well established that access to a government benefit, like a job or favorable tax status, cannot be conditioned on a waiver of a constitutional right.[21] Finally, the receipt of even a

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[19] A similar argument might be mounted against the new version of 162(e). Indeed, since the 162(e) deduction is arguably necessary to obtain an accurate economic measurement of net income, the 162(e) argument may be stronger than the unconstitutional conditions argument deployed in connection with funds derived from 170 deductions.

[20] E.g. Eastern R. Presidents' Conf. v. Noerr Motor Freight, 356 U.S. 127 (1961); Regan v. Taxation With Representation, 461 U.S. 540 (1983).

[21] E.g. Pickering v. Board of Education, 391 U.S. 561 (1968)(government employment); Speiser v. Randall, 357 U.S. 513 (1957)(tax status). See generally Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

discretionary government subsidy cannot be conditioned on a waiver of First Amendment rights.[22]

[22] FCC v. league of Women Voters, 468 U.S. 364 (1984)(subsidy to public television cannot be conditioned on waiver of editorials).

The classic unconstitutional conditions argument founders, however, on the idea of the government's power to control how government subsidies are to be spent.[23] While FCC v. League of Women Voters held that the receipt of a government subsidy cannot trigger a coerced waiver of privately funded free speech rights, the case was silent, at best, on the government's power to condition how its own subsidy was to be used. In Rust v. Sullivan[24], the Court strongly asserted government carte blanche over a recipient's use of government subsidies. Under such an analysis, the unconstitutional conditions doctrine does not apply to strings governing the use of public moneys paid to subsidize a given activity. The only check on government control over the expenditure of subsidies would be a ban on improper viewpoint-based discrimination; a ban which is not implicated by the current 501(c)(3) rules.

[23] I was substantially aided in thinking about the relationship between subsidies and tax policy by papers delivered by Kathleen Sullivan, David Cole and William Andrews at an earlier Philanthropy and the Law Conference. See Conference, Emanations from Rust: The Impact on the Non-Profit Sector of the Doctrine of Unconstitutional Conditions (N.Y.U. School of Law Program on Philanthropy and the Law, October 8 and 9, 1992).

[24] 500 U.S. 173 (1991).

Even if Rust is wrong on its facts because islands of neutrality exist (college teachers; appointed counsel; medical care; and art funding are four possibilities) where the First Amendment limits the government's power to control the use of its subsidies, the general principle asserted by the narrow majority in Rust is a recognition of a broad government power to decide how subsidized funds should be spent, even if that means channelling the funds away from a constitutionally protected activity. For example, if the government elects to subsidize 19th century art, a recipient cannot use the money to compose music, even though composing music is constitutionally protected.

Rust's sympathetic treatment of the the government's power to control the use of subsidized funds is consistent with the Court's rejection in Regan v. TWR[25] of a challenge to the discriminatory allocation of lobbying authority between and among 501(c)(3) entities. In Regan, a 501(c)(3) entity argued that Congress could not permit a veteran's charitable organization to lobby, but prevent the remaining 501(c)(3)'s from doing so. Strictly speaking, Regan is not an unconstitutional conditions case. The thrust of the challenge in Regan was aimed at the discriminatory allocation of the ability to lobby. The Court held that since the regulation of subsidized entities was involved, Congress was permitted to allocate the lobbying power under a relaxed standard of review. The majority's decision assumed, however, that the ability to lobby could be denied to all subsidized

[25] 461 U.S. 540 (1983).

entities. Thus, under Reagan and Rust, subsidies generated by a 170 deduction could be channelled to desired activities under a relaxed standard of review. Indeed, the Regan Court noted that TWR could lobby as long as it did so with unsubsidized funds via an affiliated (c)(4) social welfare organization that did not receive a 170 "subsidy".

Regan is, therefore, consistent with League of Women Voters. Both refuse to permit the receipt of government subsidies to trigger a waiver of the right to use unsubsidized funds to engage in First Amendment activity. But both suggest (and Rust confirms) that government has broad (and dangerous) power to control the way subsidized funds are spent. Thus, I fear that a conventional unconstitutional conditions argument aimed at removing the limits on lobbying by 501(c)(3) entities would fail, unless the Court could be persuaded to overrule Regan and Rust.

There are, however, at least four avenues to explore in rejuvenating an unconstitutional conditions argument. First, many have argued that the broad power asserted to control the expenditure of subsidized funds in both Regan and Rust is profoundly wrong. After all, Rust was a 5-4 case. Perhaps it is ripe for overruling.

If, as I believe, government subsidies will be an increasingly important aspect of governance in the 21st century as we seek to evolve new institutions to serve the weak, it is enormously dangerous to permit the government to control behavior by the carrot instead of the stick. I predict that the model of governance in the 21st century will increasingly revolve around efforts to delegate social resources to subsidized private groups with a better chance of performing traditional governmental tasks in an efficient and fair way. In short, "subsidies" may become ubiquitous. If receipt of such a "subsidy" can be conditioned on behavior that the government would lack the power to control if "privately" performed, the real-world power of government to control the individual will increase dramatically. Many settings in which the government is effectively constrained today will be fair game for governmental coercion in the future unless we evolve a vocabulary for dealing with the coercive allocation of subsidies.

I do not believe, however, that it is time for a frontal assault on Rust for two reasons. First, I do not see the votes. Until a theory can be developed that can persuade Justice Souter to change his position in Rust, I am doubtful that a frontal assault can succeed. That brings me to my second concern. We have not yet developed a coherent theory for how subsidies are to be treated. In some settings, the Establishment Clause and Title IX for example, the public interest world has argued that the receipt of government subsidies carries with it substantial limits on the use of the funds and, even, on the use of private funds. Thus, while I believe that Rust was wrong and that a vocabulary must be developed to help us think about the intersection of subsidies and substantive constitutional rights, I am not certain that we have developed a theory powerful enough to force the overruling of Rust.

A second possible avenue is to challenge the notion that 170 deductions constitute a true subsidy within the meaning of Rust. Of course, if one assumes that the proper baseline is maximum possible taxable income, any government decision to forego taxation is a subsidy, even a decision to lower the tax rates. But maximum possible taxable income is not an inherent baseline. It is certainly plausible to think that the true baseline should be a figure below potential taxable income designed to free certain funds for purely private use. A 170 deduction is, after all, merely a technique to short-circuit the process of, first, collecting tax revenues and, second, disbursing the proceeds to worthy causes as direct subsidies. It is more efficient, because it cuts out the transaction costs. More importantly, it permits decentralized, autonomous use of the assets, without imposing the restraints associated with governmental decision-making. Perhaps that is a bad idea. Perhaps all social assets should be subjected to majoritarian constraints on disbursement. But 170 is a decision to free some funds from majoritarian constraints. As long as we adhere to it, it seems self-defeating to let the government constraints in through the back door by labelling funds assembled pursuant to 170 as "subsidies" subject to plenary governmental supervision.

I find the autonomy argument about 170 subsidies persuasive. In preparing this paper, though, I confronted a literature on the nature and desirability of tax subsidies that gave me a serious headache. As with my concerns about a frontal assault on Rust, I would feel more comfortable if we had developed a better consensus around the idea of a tax subsidy. For example, I am not certain about the Establishment Clause implications of my subsidy argument and I am troubled over its implication in other areas of tax law.[26]

[26] If funds assembled pursuant to a 170 deduction should not be treated as subsidies, funds assembled pursuant to a 162(e) deduction are not subsidies either. Indeed, the argument is probably stronger in a 162(e) context because it is buttressed with concerns about economic accuracy.

A third possible approach would be to focus on the inequalities built into the existing tax scheme. If a persuasive empirical case could be made that the current system is tilted in favor of a particular viewpoint (the business community's, for example), support exists for a constitutional challenge. In a series of cases, the Court has struck down differential tax schemes that have the purpose or effect (even potential effect) of discriminating against a disfavored viewpoint.[27] But alleging a viewpoint tilt; even strongly intuiting one, is a far cry from establishing an empirical case for it. While I believe that such a tilt exists and that an empirical case could be made for it, the factual issues raised by such an effort would be monumental. At a minimum, for example, one would have to argue that the business community shares a single dominant viewpoint. Moreover, the revised version of 162(e) makes it impossible to argue that a current tilt in tax-advantaged dollars flows in favor of the business community.

The fourth avenue - which I find most appealing both analytically and practically - would seek to invoke FCC v. League of Women Voters to free at least half the funds held by 501(c)(3)'s for use in the legislative process.[28]

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[27] E.g. Grosjean v. American Press Co., 297 U.S. 233 (1936); Minneapolis Star & Tribune v. Minn. Comm'r of Rev., 460 U.S. 575 (1983); Arkansas Writer's Project v. Ragland, 481 U.S. 221 (1987); Texas Monthly v. Bullock, 489 U.S. 1 (1989). But see Leathers v. Medlock, 499 U.S. 439 (1991).

[28] The 501(h) election is designed to free a decreasing sliding scale of 501(c)(3) expenditures for lobbying, ranging from 20% of the first $500,000, to 5% of expenditures in excess of $1,500,000.

The uncontroversial principle of FCC v. League of Women Voters is that government cannot condition the payment of a subsidy on the waiver of the ability to use private funds for First Amendment purposes. It has been assumed, however, that League of Women Voters does not apply to 501(c)(3)'s because contributions obtained pursuant to a 170 deduction are "subsidy" funds, not private assets. But I believe that assumption is demonstrably inaccurate as to a proportion of the assets.

Once again remembering my ACLU days, I was delighted at the response of the ACLU membership to a notice that ordinary dues could not be deducted under 170 because we were using the proceeds to lobby. We feared that dues payments would dry up. Instead, they remained steady and even increased. Similarly, when large donors were approached about important legislative initiatives, we occasionally asked them to forego a 170 deduction in order to free the money for crucial legislative work. Many did so and did so without diminishing their gifts. Others diminished their gifts to take into account the 170 calculation, but made substantial contributions to the (c)(4) affiliate in any event. My experience suggests that donors to 501(c)(3) charities are aware of the 170 deduction, but that their decision whether to support the charity does not turn on the deduction. At most, it is the amount of the gift that is affected; not the fact of the gift itself.

Similarly, the actual value of the so-called subsidy provided by 170 to a 501(c)(3) is not 100% of the gift. Rather it is keyed to the tax bracket of the donor. Assuming the highest bracket, the most the federal subsidy can be said to represent is about 35% of the gift. Thus, in the absence of 170, 501(c)(3)'s would still receive substantial non-subsidized contributions equal to at least 2/3 of the amounts contributed under 170.

I do not believe that money that would have been contributed to a 501(c)(3) entity even in the absence of 170 may fairly be characterized as government "subsidy" money. Instead, it is more analogous to the private funds that were used by public television stations to fund editorials in League of Women Voters. In short, I believe that the assets of a 501(c)(3) are divisible into the fruits of the 170 "subsidy", which may fairly be regulated by the government under principles set forth in Regan and Rust (at least, until they are overruled), and money that would have been contributed even without 170, for which the donor receives no tax benefit and which cannot fairly be characterized as ever having belonged to the government. I believe, therefore, that every 501(c)(3) charity has money that cannot be treated as though it were a government subsidy.

If that is so, the conventional unconstitutional conditions argument may re-started as to that money. For the sake of administrative convenience, I would place the percentage at 50%, which assumes highest bracket donors, takes account of state tax benefits and leaves a little left over for the benefits of tax exempt status.

If I am correct, the distortions in the legislative process caused by current tax policy can be substantially alleviated. Unleashing 50% of the assets of 501(c)(3)'s for use in the legislative process would go a long way to offset the current tilt to self-interest. It would enable the voice of the common good and the public interest to be heard in the legislative debate in fair competition with the voice of economic self-interest that currently dominates the process. Finally, it would free 501(c)(3)'s to explore legislative solutions on a level playing field with litigation solutions.