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A RAWLSIAN CRITIQUE OF THE POLITICAL SPEECH CONSTRAINTS ON CHARITIES

*Johnny Rex Buckles**

I. INTRODUCTION

In *Political Liberalism*,¹ the acclaimed philosopher John Rawls argues that lawmakers, judges, and citizens should justify their positions according to “public reason” when they publicly deliberate matters of constitutional essentials and basic justice. Rawls explains the concept as follows:

[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth—nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, the political conception would not provide a public basis of justification.²

Public reason is central to the political philosophy of Rawls.³

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¹ JOHN RAWLS, *POLITICAL LIBERALISM* (exp. ed. 2005). Numerous editions of *POLITICAL LIBERALISM* have been published. The 2005 Expanded Edition is the most recent, and it incorporates in a separate section Rawls’s law review article, *The Idea of Public Reason Revisited*, in which Rawls reexamines and refines his prior views on public reason. See, e.g., John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). For ease of reference, when identifying Rawls’s concluding thoughts on public reason as set forth in his law review article, this Essay cites that article by referring to the page on which it appears in the 2005 Expanded Edition of *POLITICAL LIBERALISM*.

² RAWLS, *supra* note 1, at 224–25. Rawls understands public reason as “characteristic of a democratic people” and “the reason of its citizens, of those sharing the status of equal citizenship.” *Id.* at 213.

³ See CHARLES LARMORE, *Public Reason*, in *THE CAMBRIDGE COMPANION TO RAWLS* 368, 368–93 (Samuel Freeman ed., Cambridge Univ. Press 2002) (stating that public reason “has always been at the heart” of Rawls’s philosophy).

Articulating arguments according to public reason is predictably commonplace in analyzing federal tax law and policy.⁴ Less intuitive is the possibility that the substantive content of tax laws may incorporate or undermine, and not merely originate from or fail to mirror, the ideal of public reason. This notion is not just hypothetical.

The Rawlsian concept of public reason and Rawls's arguments for advancing it echo through the academic literature analyzing the constraints on the political activities of charitable organizations imposed by § 501(c)(3) of the Internal Revenue Code ("IRC" or "Code"). Occasionally, legal commentators explicitly acknowledge the potential relevance of Rawlsian public reason to § 501(c)(3)'s political speech limitations.⁵ More commonly, arguments advanced to support the restrictions on the political speech of charities build on concerns over what Rawls calls "comprehensive doctrines"

⁴ See, e.g., William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974) (arguing that a consumption tax based on cash flows is superior to an income tax on various normative grounds); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) (arguing that *Chevron* deference to United States Treasury regulations is normatively proper and that tax administration has much in common with other regulatory regimes); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003) (arguing that empirical evidence suggests that the threat of enforcement of tax laws can complement efforts to foster voluntary compliance norms); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992) (arguing that a hybrid income-consumption tax system is likely superior to either an income tax or a consumption tax because the hybrid system can differentially treat life cycle, precautionary, and bequest savings); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965) (identifying and analyzing several policy norms underlying federal income tax law); Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L. J. 1081 (1980) (arguing that the norm of distributional equity does not compel the conclusion that a consumption base is superior to an income base).

⁵ Professor Philip Hamburger, who wrote an entire book criticizing the political speech constraints of § 501(c)(3), perceives an overlap between these constraints and Rawls's ideal of public reason. Hamburger observes that Rawls associates charitable institutions with "nonpublic reasons," and that § 501(c)(3)'s restrictions on "the speech of religious, educational, and charitable associations in politics ... has broadly suppressive effects on religious speech in politics." PHILIP HAMBURGER, *LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH* 158 (2018). Orthodox institutions described in § 501(c)(3), argues Hamburger, are "precisely those whose political speech is most clearly delegitimized by Rawls's philosophy." *Id.* Hamburger further claims that § 501(c)(3)'s restrictions on political speech and Rawlsian political philosophy "came out of the same liberal anxieties." *Id.* Hamburger believes that Rawls "gave refined philosophic expression to the country's theo-political culture – a culture in which it was 'liberal' and 'democratic' to demand that churches and other idealistic organizations should censor themselves in politics." *Id.* at 159.

Another scholar who has recognized the relevance of Rawlsian public reason to § 501(c)(3) is Professor Miriam Galston. She remarks that Rawls "puts the question of the relationship between religion and politics off the agenda" and cites Professor Edward M. Gaffney, Jr. as an example of "those who would be troubled" by that approach. See Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842, 1855 n.44. (1994). The Gaffney article cited by Galston critiques the political speech constraints of IRC § 501(c)(3). See, e.g., 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 (1990).

and the nature of deliberation within institutions that advance them.⁶ The intriguing issue raised by this commentary is whether the constraints on the political activity of charities under federal tax law may be justified or critiqued on the grounds that they enhance or undermine the very concept of public reason.⁷ Prior legal scholarship has not focused on this question.

The basic restrictions on the political activities of tax-exempt charitable organizations imposed by federal income tax law are straightforward. Under the statute, “no substantial part of the activities” of a tax-exempt organization described in IRC § 501(c)(3) may be “carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)).”⁸ Political campaign-related activity is even further stifled. To maintain federal income tax exemption, a charity must “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

⁶ See, e.g., Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561, 1584 (2013) (arguing that the homogeneity of voluntary organizations “often appears to harden the views of the group’s members, leaving them predisposed to doubt even basic factual propositions that would challenge their existing worldview”); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 59 (2003) (“The special difficulty of religion is that its arguments are based on the word of God, which do not lend themselves easily to debate, reason, or a search for consensus.”); Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process*, 64 EMORY L.J. 1041, 1090–91, 1099 (2015) (stating that commentators “push for exclusion of religion in politics as a general matter” because of the “inability of religious interest groups to negotiate, debate, and compromise on the outcome because of their religious mandate”; discussing the limited effectiveness of “heightened policing of the lobbying efforts of religious institutions by the IRS”). In contrast to those who view religious organizations as hopelessly uncompromising because of their doctrinal commitments, Professor (and now, Dean) Donald Tobin has argued in favor of the campaigning ban by raising nearly the opposite concern. According to him, eliminating the ban would render churches more political, and “as churches lobby for federal funds and receive money from the federal government, there is a serious risk that church theology will be influenced by amounts received from the government.” Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1329 (2007). Professor Tobin’s concern is thus that churches might be *too* compromising. Although this argument is quite different from the argument that deliberation within churches is wanting because of ideological commitments, the logical implication of the view is that deliberative processes within churches are weak, at least in the case of churches that take positions based on deliberation (as opposed to the decree of a single authority). Otherwise, the deliberative process should withstand the assault on theology that Tobin anticipates in the absence of the political speech constraints.

⁷ A variant of this question was also raised by Professor Joshua Fairfield when I presented a different paper at a faculty workshop at Washington & Lee University School of Law in 2008.

⁸ I.R.C. § 501(c)(3) (2020). Most charitable organizations that fail to qualify under § 501(c)(3) because of engaging in excessive attempts to influence legislation are subject to an excise tax on their lobbying expenditures. See I.R.C. § 4912(a). The lobbying activity of charitable organizations defined as “private foundations,” see I.R.C. § 509(a), is even more sharply limited. Because the expenses of all attempts to influence legislation by a private foundation (unless excepted) are subject to severe excise taxes, see I.R.C. §§ 4945(a), (b), (d)(1), a private foundation is generally effectively prohibited from attempting to influence legislation. The statute sets forth limited exceptions to this general prohibition. See I.R.C. § 4945(e)(2).

office.”⁹ This Essay refers to the first restriction as the “lobbying limitation,” to the second as the “campaigning ban,” and to both collectively as the “political speech constraints.”¹⁰

This Essay analyzes whether the Rawlsian concept of public reason explains the substantive content of the lobbying limitation and the campaigning ban, and, more broadly, the implications of public reason for tax-exempt charities and their political speech. The question is *not* whether public reasons—distinct premises and conclusions forming an argument—justify these provisions of law, but whether the political activity limitations of IRC § 501(c)(3) are properly understood to manifest or implement the ideal of public reason itself. Additionally, if these statutory constraints do not embody the ideal of public reason, do they offend it?

The issue is important for several reasons. First, scholarly commentary on the lobbying limitation and campaigning ban explores numerous rationales supporting or opposing these political speech constraints,¹¹ but no

⁹ *Id.*; § 501(c)(3). In addition, Code § 4955 imposes an excise tax on the political expenditures of charitable organizations. See I.R.C. § 4945(a)–(b). Political expenditures include those for “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)(1). If a tax is not imposed under § 4955, see I.R.C. § 4955(e), private foundations that engage in political campaign intervention are subject to a separate federal excise tax. See I.R.C. §§ 4945(a)–(b) (imposing excise taxes on private foundations and their managers for making taxable expenditures); § 4945(d)(2) (defining a taxable expenditure to include an amount paid “to influence the outcome of any specific public election”).

¹⁰ Complying with the political speech constraints is also required to enable a charity’s donors to deduct their donations as “charitable contributions” under Code § 170(a). See I.R.C. § 170(c)(2)(D).

¹¹ See, e.g., 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 (1999); Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001); Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 UNIV. COLO. L. REV. 143 (2015); Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaign Prohibition*, 8 PIT. TAX REV. 125 (2011); Johnny Rex Buckles, *The Penalty of Liberty: Liberal Suppression: Section 501(C)(3) and the Taxation of Speech*, 25 TEX. REV. L. & POL. 159 (2021); Johnny Rex Buckles, *Curbing (or Not) Foreign Influence on U.S. Politics and Policies Through the Federal Taxation of Charities*, 79 MD. L. REV. 590 (2020); Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447 (2009) [hereinafter *Church and State*]; Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008) [hereinafter *A Reply*]; 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 (2007) [hereinafter *Not Even a Peep?*]; Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of “Political” Activity Restrictions*, 2 J.L. & POL. 169 (1985); 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 (1992); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685 (2012); 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); Gaffney, *supra* note 5; Galle, *supra* note

scholar has explored how Code § 501(c)(3) holds up under a rigorous Rawlsian analysis. Thus, analyzing the issue of how the concept of public reason relates to the political speech constraints meaningfully and originally advances the academic debate on these constraints.

Secondly, both friends and foes of the Rawlsian idea of public reason should care about the resolution of this issue. Those who embrace the ideal of public reason must understand its proper application to the political activity of charities to remain faithful to the concept. Those who disfavor public reason as an ideal on the grounds that it stifles political speech must apprehend the scope of the ideal before dismissing it as irrelevant to an analysis of the political speech constraints of § 501(c)(3).

The issue matters for a third reason. Rawls advances the idea of public reason as instrumental in properly exercising citizenship in a liberal, constitutional democracy.¹² If the substantive tax law governing charities either promotes or hinders public reason, it may importantly impact the country's democratic processes, for better or worse. Moreover, § 501(c)(3) regulates essential associations of civil society as they teach, research, worship, combat discrimination, feed the hungry, treat the ill, and generally help citizens flourish. The tax law dares to regulate the core of constitutional liberties—political speech, including that which also may be religious

6; Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C.L. REV. 771 (2001); HAMBURGER, *supra* note 5; 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 (2006); Houck, *supra* note 6; 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 (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); 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 (2000); Benjamin M. Leff, "Sit Down and Count the Cost": *A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX REV. 673 (2009); Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RES. L. REV. 757 (2012); Lloyd H. Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407 (2011); Lloyd H. Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1 (2007); Lloyd H. Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137 (2009); Ann M. Murphy, *Campaign Signs and the Collection Plate – Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003); 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 (2001); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145 (2007); Tobin, *supra* note 6; 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 (1986); Joel E. Davidson, Note, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397 (1973); 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).

¹² See RAWLS, *supra* note 1, at xviii, 440–42.

speech—exercised by these associations as they perform their missions. The issue of this Essay is important, then, because it concerns not just central values of our constitutional democracy, but also the agents of civil society that enable democracy to flourish.¹³

A final reason to analyze the issue of this Essay now is worth acknowledging. The country has endured another federal election cycle, one highly charged with political attention to basic justice and constitutional essentials. These fundamental subjects are forefront in public discourse.¹⁴ But § 501(c)(3) limits what the institutions of civil society can contribute to this discourse at a time when hearing their voice is especially important. The time is ripe to consider whether, and if so, how, Rawls's idea of public reason bears upon the political speech constraints of IRC § 501(c)(3).

A few preliminaries clarify the scope of this Essay. First, this Essay takes no position on whether Rawls has successfully made the case for public reason.¹⁵ Academic commentary on public reason and related ideas abounds,¹⁶ and this Essay does not attempt to influence the debate on whether citizens should consider themselves morally bound by public reason. Rather, the reader—whether a Rawlsian disciple or detractor—is assumed to appreciate the relevance of determining if and how public reason relates to the political speech constraints of § 501(c)(3).

Second, this Essay does not advance a general argument for or against the political speech limitations on charities imposed by federal tax law. Although other scholarship of the author addresses these issues more

¹³ For a classic exposition of the role of nonprofit associations in American democracy, see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 514–16 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial Press 1966) (1840). For a contemporary analysis of the subject, see Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL'Y 555 (1998).

¹⁴ Examples include the deportation of immigrants who entered the country without legal permission, the treatment of people of color under the criminal justice system, the alleged suppression of voting rights, governmental subsidization of feticide, and governmental provision of food and health care security.

¹⁵ The author has an opinion on whether the argument for public reason is persuasive—and indeed, whether it advances a concept that is even internally consistent—but this opinion is irrelevant to the analysis of this Essay. Others have questioned the concept's coherence. See, e.g., Galston, *supra* note 5, at 1844 (stating that “Rawls unwittingly bases his liberal state on a species of intolerance that is foreign to his express political ideals”); cf. HAMBURGER, *supra* note 5, at 156 (“Liberal views about rationality . . . are themselves part of a theological tradition.”).

¹⁶ See, e.g., Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989); Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994); Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647 (1993); Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297 (1997); Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1991 UTAH L. REV. 639 (1999); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217 (2001).

broadly,¹⁷ this Essay focuses only on the question of how the Rawlsian concept of public reason relates to the political speech constraints of IRC § 501(c)(3).

Third, this Essay analyzes the relationship between federal tax law's restrictions on the political activity of charities and public reason *as Rawls has articulated it*. Others have suggested similar concepts or qualified the idea more to their liking,¹⁸ but this Essay does not attempt to examine competing notions of democratic reason. Because the focus is on public reason as understood by Rawls, this Essay quotes extensively from *Political Liberalism* in reaching its conclusions.

Fourth, this Essay probes the idea of public reason in and of itself, not liberal political theory generally, and not even all aspects of Rawls's political liberalism. One may analyze limitations on political speech under numerous values of political liberalism and other political theories. However, the lens of this Essay is public reason alone.¹⁹ If the concept of public reason points in a certain direction in evaluating § 501(c)(3), one must then decide upon the next analytical steps.²⁰

This Essay proceeds as follows. Part I examines whether Rawlsian public reason—not individual arguments that are crafted according to the principles of public reason, but the ideal of public reason itself—justifies the lobbying limitation and the campaigning ban. It concludes that the ideal of public reason does not explain these political constraints. Part II takes up the next logical question: If the political speech limitations on charities under federal tax law are not justified by public reason as a distinct concept, does the ideal of public reason undermine the legitimacy of these constraints? Part II explains why Rawlsian public reason does indeed counsel against § 501(c)(3)'s constraints on speech. Part III briefly concludes.

II. PUBLIC REASON DOES NOT JUSTIFY THE LOBBYING LIMITATION OR THE CAMPAIGNING BAN

A cluster of concerns that sound in the language of Rawls's case for public reason might be thought to support the lobbying limitation and the

¹⁷ See, e.g., Buckles, *Church and State*, *supra* note 11; Buckles, *Not Even a Peep?*, *supra* note 11; Buckles, *The Penalty of Liberty*, *supra* note 11; Buckles, *A Reply*, *supra* note 11.

¹⁸ See, e.g., Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 690–91 (1993) (advocating for the concept of secular reason and explaining its relationship to public reason).

¹⁹ Hence, the title speaks of “A” *Rawlsian Critique*, not “The” *Rawlsian Critique*.

²⁰ This Essay refers to the argument of Rawls in the present tense. To discuss what Rawls “writes” on public reason, rather than what he “wrote” on the topic, is fitting because of his continuing, impressive impact on legal and philosophical scholarship.

campaigning ban. Although there are various ways of framing the argument, this Essay analyzes the following: The political speech constraints are justified because the nature of the political expression of the types of organizations described in § 501(c)(3) is contrary to the principles of public reason by virtue of the ideological purposes of these organizations. This argument is deeply problematic under the reasoning of Rawls.

A. *Public Reason Does Not Limit All Political Speech*

The first problem with rationalizing the political speech constraints under the banner of public reason is that Rawls does not seek to impose the ideal of public reason on all political speech.²¹ Only political speech addressing certain fundamentals is subject to public reason's limitations:

[T]he limits imposed by public reason do not apply to all political questions but only to those involving what we may call "constitutional essentials" and questions of basic justice. . . . This means that political values alone are to settle such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property. These and similar questions are the special subject of public reason.²²

In contrast, § 501(c)(3) applies more broadly to limit lobbying and to ban political campaign intervention by charities. It does not limit its twin penalties of forfeiting federal income tax exemption and losing the ability to receive tax-deductible donations to charities that appeal only to comprehensive doctrines in advocating positions on constitutional essentials and basic justice. A charitable thinktank that communicates with the public in arguing for or against legislation to amend the income tax deduction for accelerated depreciation, or to impose a tax on carbon emissions, for example, can easily transgress the lobbying limitation.²³ An elementary

²¹ See Griffin, *supra* note 16, at 312 (stating that "public reason is required for constitutional essentials and basic justice, not for all political questions").

²² RAWLS, *supra* note 1, at 214.

²³ Attempting to influence the general public on legislative proposals generally falls within the meaning of attempting to influence legislation, although the precise boundary between lobbying and non-lobbying is unclear under Code § 501(c)(3). The Treasury regulations deny exemption to an organization if its organizing instrument expressly enables it "[t]o devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise." Treas. Reg. § 1.501(c)(3)-1(b)(3)(i) (as amended in 2017). These regulations also deny exemption to an organization if its organizing instrument expressly enables it operate in such a manner as to "characterize it as an action organization." Treas. Reg. § 1.501(c)(3)-1(b)(3)(iii). An entity satisfies the definition of an action organization "if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise." An organization is so regarded if it either "[c]ontacts, or urges the public to contact, members of a legislative

school that supports a candidate for public office in an election defined not by basic justice or constitutional questions, but by more mundane matters—perhaps local commercial zoning, or the budget for a town’s maintenance of streets and parks—nonetheless transgresses the campaigning ban.²⁴ Section 501(c)(3) forbids campaign intervention for and against political candidates, and limits grass roots and direct lobbying, less discriminately than does the ideal of public reason. The campaigning ban is absolute, and the lobbying limitation has few exceptions.²⁵

This crude, broad brush for curtailing political discourse on legislation and in elections is not what Rawls has in mind:

Many if not most political questions do not concern those fundamental matters, for example, much tax legislation and many laws regulating property; statutes protecting the environment and controlling pollution; establishing national

body for the purpose of proposing, supporting, or opposing legislation” or “[a]dvocates the adoption or rejection of legislation.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii). For these purposes, legislation “includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. *Id.*

Certain organizations are eligible to elect under Code § 501(h) to be governed by expenditure tests for purposes of establishing their compliance with the statutory prohibition against excessive lobbying. *See* I.R.C. § 501(h)(3). The expenditure tests are accompanied by special definitions of “influencing legislation” in the case of charitable entities that make the § 501(h) election. For such charities, “influencing legislation” generally means “any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof,” as well as “any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.” I.R.C. § 4911(d)(1)(A)–(B). The statute sets forth a few exceptions to this general definition of “influencing legislation” in applying the expenditure tests under Code § 501(h). *See* I.R.C. § 4911(d)(2)–(3).

²⁴ The campaigning ban extends to participation in political campaigns even in local elections. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

²⁵ For an organization that has made the § 501(h) election, *see supra* note 23, the term “influencing legislation” does not include the following: (i) promulgating “the results of nonpartisan analysis, study, or research”; (ii) “providing technical advice or assistance” to governmental units or committees in response to their written requests; (iii) making appearances before, or communicating with, “any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization”; (iv) communicating with the organization’s “bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members” (not including communications that encourage members themselves to engage in lobbying); and (v) communicating with non-legislative governmental officials and employees (unless the purpose is to influence legislation). *See* I.R.C. § 4911(d)(2)(A)–(E), (d)(3)(A)–(B) (1990). Treasury regulations also except from the definition of lobbying “discussions of broad social, economic and similar problems” with no reference to specific legislation or legislative proposals. *See* Treas. Reg. § 56.4911-2(c)(2).

Although these exceptions do not statutorily apply to organizations that have not made the § 501(h) election, they provide analogous guidance and often find rough parallels in administrative practice and case law interpreting the scope of the lobbying limitations under Code § 501(c)(3). For a discussion, see Jasper L. Cummings, Jr., *Tax-Exempt Organizations — Lobbying and Political Expenditures*, TAX MANAGEMENT PORTFOLIO, NO. 453, § IX.E.2.

parks and preserving wilderness areas and animal and plant species; and laying aside funds for museums and the arts.²⁶

Indeed, *Political Liberalism* is peppered with the qualification that the ideal of public reason applies only to these fundamentals of basic justice and constitutional essentials.²⁷ Rawls assures the reader that public reason does not morally bind political actors in how they advance policies that do not pertain to those essentials:

Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions.²⁸

In *The Idea of Public Reason Revisited*, Rawls reiterates that the idea of public reason entails “the fundamental political questions to which it applies,”²⁹ not all political issues. He characterizes the “subject” of public reason as “the public good concerning questions of fundamental political justice, which questions are of two kinds, constitutional essentials and matters of basic justice.”³⁰ Government officials and political candidates realize the “ideal” of public reason when they “act from and follow the idea of public reason and explain to other citizens their reasons for supporting *fundamental political positions* in terms of the political conception of justice they regard as the most reasonable.”³¹ Similarly, citizens should “think of themselves ideally as if they were legislators following public reason” under the same circumstances—“on a constitutional essential or matter of basic justice.”³² Thus, throughout his restatement of public reason, Rawls often qualifies the jurisdiction of public reason by explaining its application to these “fundamental” political questions of constitutional essentials or basic justice.³³

²⁶ RAWLS, *supra* note 1, at 214.

²⁷ See, e.g., *id.* at 215 (stating that public reason “holds equally for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake”); *id.* at 217 (“[W]hen may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?”); *id.* at 224–25 (“[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines. . .”).

²⁸ *Id.* at 235.

²⁹ *Id.* at 442.

³⁰ *Id.*

³¹ *Id.* at 444 (emphasis added); see also *id.* at 445 (discussing features of democratic citizenship “when constitutional essentials and matters of basic justice are at stake”).

³² *Id.* at 446.

³³ See, e.g., *id.* at 445, 448, 453, 476, 478.

Thus, by foreclosing all speech by charitable organizations in support of, or in opposition to, candidates for public office, and by significantly limiting speech pertaining to specific legislative proposals, even those not raising fundamental constitutional questions or matters of basic justice, § 501(c)(3) circumscribes political discourse far more than does the idea of public reason. In this respect, federal tax law's regulation of the political speech of charities is overinclusive as a means to implement public reason.

B. Public Reason Does Not Discriminate Against Ideological Speakers

A second reason that the lobbying limitation and the campaigning ban fail as mechanisms of public reason concerns speaker discrimination. One might attempt to justify the political speech constraints of § 501(c)(3) by asserting that they properly silence the institutional voice of churches and other charities that are likely to embrace some comprehensive doctrine and appeal to it exclusively when engaging in political speech.³⁴ Any such justification fails under the ideal of public reason. Public reason, according to Rawls, is at most a voluntary limitation on speech covering certain subjects by all speakers, not a ban on all speech covering certain subjects by certain speakers.

A good place to begin is how Rawls welcomes public dialogue with religious speakers specifically. He cites the example of Catholics "who may present an argument in public reason for denying" a right to abortion.³⁵ He contemplates, of course, that the Catholic Church may simultaneously require its members to follow church doctrine based on nonpublic reasons.³⁶ The important point for present purposes is that a Catholic advocate may have both public and nonpublic reasons for supporting a certain political position, such as appropriating no federal funds for abortions.³⁷ Rawls does not forbid the Catholic advocate from participating in deliberative democracy on questions involving abortion on the grounds that the advocate embraces a comprehensive doctrine against abortion.

Even more fundamentally, Rawls applies the moral duty to articulate public reasons to speakers that he assumes are religious and philosophical. Indeed, those who embrace comprehensive doctrines are the speakers whom Rawls primarily is seeking to persuade to invoke public reason, for those who

³⁴ Naturally, an opponent of the political speech constraints might criticize them on similar grounds.

³⁵ RAWLS, *supra* note 1, at 480.

³⁶ *Id.*

³⁷ *Cf.* HAMBURGER, *supra* note 5, at 238 (observing that "many religious organizations make rational and even areligious arguments" in politics).

do not believe in comprehensive doctrines are less likely to need such persuasion. That many, if not most, citizens believe firmly in comprehensive doctrines is one of the premises of Rawls's thinking:

I have assumed throughout that citizens affirm comprehensive religious and philosophical doctrines and many will think that nonpolitical and transcendent values are the true ground of political values. Does this belief make our appeal to political values insincere? It does not. . . . That we think political values have some further backing does not mean we do not accept those values or affirm the conditions of honoring public reason, any more than our accepting the axioms of geometry means that we do not accept the theorems.³⁸

Moreover, Rawls assumes that citizens are perfectly aware that fellow citizens embrace a variety of comprehensive doctrines, and that this knowledge informs the duty to appeal to public reason:

As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.³⁹

Rawls expressly contemplates that religious and other ideological speakers do and should engage in public reason as active political participants. Further, he acknowledges that many are true believers, in that they ground their political values in a comprehensive doctrine.⁴⁰ The idea that speakers with ideological commitments should be banished from the land of public reason is foreign to Rawls. Nothing in Rawls's argument indicates that a Jewish hunger relief society, for example, is disqualified from invoking public reasons to expand school lunch programs simply because it is Jewish. Thus, the ideal of public reason does not support the political speech constraints of § 501(c)(3) as necessary to muffle the political voice of

³⁸ RAWLS, *supra* note 1, at 242; *see also id.* at 243 (stating that everyone must understand "that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values").

³⁹ *Id.* at 218.

⁴⁰ *See id.* at 242. Rawls further opines that "the paradox of public reason disappears" when "an overlapping consensus of reasonable comprehensive doctrines" supports "the political conception." *Id.* at 218. The "ideal of citizens governing themselves in ways that each thinks the others might reasonably be expected to accept" finds support in "the comprehensive doctrines reasonable persons affirm." In this way, "[c]itizens affirm the ideal of public reason, not as a result of political compromise, as in a *modus vivendi*, but from within their own reasonable doctrines."

ideological institutional speakers. In this respect, federal tax law's regulation of the political speech of charities is once again overinclusive relative to the ideal of public reason.

C. Section 501(c)(3) Does Not Rationally Advance Public Reason as Applied to Nonideological Charities

Even if, contrary to Rawls and logic (as well as basic respect), one were to assume that speakers committed to comprehensive doctrines are capable of advancing only nonpublic reasons in arguing for or against measures raising major constitutional issues or questions of fundamental justice, the political speech constraints of § 501(c)(3) would continue to elude justification by public reason. The swath of § 501(c)(3) is still too wide.

Section 501(c)(3) applies to all types of charitable organizations, including those with missions that have little or nothing to do with comprehensive doctrines, and it limits the political speech of all of them. Certainly, many religious organizations (e.g., churches, synagogues, evangelistic associations, Islamic charities, and seminaries) have missions tied to comprehensive doctrines. The same is true of some charitable organizations that provide basic human services and simultaneously advance religion. And one may even concede that some secular institutions are so dominated by leaders and influential employees subscribing to a family of ideologies that their institutions are fairly characterized as advancing comprehensive doctrines.⁴¹

However, numerous organizations described in § 501(c)(3) do not execute missions clearly associated with comprehensive doctrines, and more importantly, they will seldom or never articulate policy positions in the language of comprehensive doctrines. One would not expect a cancer research organization, a non-sectarian hospital, or a modern art museum, for example, to engage in much political speech that refers to comprehensive doctrines. But the lobbying limitation and campaigning ban apply to these nonideological entities just as rigorously as they apply to ideological organizations. Section 501(c)(3) thereby stifles the political speech of many types of charities that will employ only public reason in political discourse.⁴² They are marked for this treatment just because they are charitable and otherwise tax-exempt. The concept of public reason offers no justification for this result. In yet a third respect, then, the political speech constraints of §

⁴¹ Rawls so asserted. *See id.* at 220 (identifying as “nonpublic” the reasons “of associations of all kinds: churches and universities, scientific societies and professional groups”).

⁴² *See* HAMBURGER, *supra* note 5, at 238 (arguing that, “among organizations” § 501(c)(3) “suppresses much merely rational speech”; stating that “the rationality or secularism excuse has no necessary connection with educational and charitable organizations”).

501(c)(3) are overinclusive if their goal is to promote the ideal of public reason.

D. Section 501(c)(3) Does Not Implement Public Reason as Applied to Officers and Employees of Charities Acting in Unofficial Capacities

Charitable associations embracing comprehensive doctrines must act through human beings, typically those who are citizens. In explaining the moral jurisdiction of public reason, Rawls writes that “it applies to citizens when they engage in political advocacy in the public forum, in political campaigns for example and when they vote on those fundamental questions.”⁴³ When an officer or employee of a charitable institution takes a public position, perhaps on gun control legislation or on a candidate running for the presidency of the United States, the individual is a “citizen” who is engaged “in political advocacy in the public forum” or “in political campaigns.” One might conjecture that § 501(c)(3) supports the ideal of public reason because the provision squelches political discourse by those agents of charities who are likely to be the most ideologically committed, such as senior pastors of churches, executives of policy groups, presidents of ideological schools, and the like.

For reasons discussed above, this argument is implausible as a Rawlsian rationale because it assumes that ideologically committed speakers cannot or will not employ public reason. But beyond this egregious (and offensive) defect, the argument ignores that § 501(c)(3) does not control the political speech of citizens acting in their personal, or unofficial, capacities, even when those citizens work for a charity constrained by § 501(c)(3) and share the institution’s comprehensive doctrines.⁴⁴

The political speech constraints do not prevent church pastors, university presidents, think-tank executives, and other leaders from endorsing and opposing candidates, or advocating for or against proposed legislation, when they speak for themselves, rather than for their institutions.⁴⁵ Indeed, a prominent employee or other leader of a charitable organization can even self-identify by referring to the official position of the

⁴³ RAWLS, *supra* note 1, at 252.

⁴⁴ *Cf.* HAMBURGER, *supra* note 5, at 238 (observing that § 501(c)(3) “leaves room for much irrational religious speech” by individuals).

⁴⁵ *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422 (“The political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals.”); INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 (rev. 2015) [hereinafter, PUB. NO. 1828] (Examples 1 and 2).

charity that he or she occupies prior to engaging in political advocacy.⁴⁶ The leader is perfectly free under § 501(c)(3) to articulate an argument in the language of religious faith or a philosophical ideal. The political activity constraints do not foreclose appeals solely to nonpublic reasons by those who speak on their own behalf, no matter their affiliation with a tax-exempt charity.

Thus, to justify the lobbying limitation and campaigning ban on the rationale that it prevents individual citizens affiliated with ideological institutions from advancing nonpublic reasons in the public square is simply mistaken as a matter of law. Unlike the first three critiques, this objection demonstrates that the political speech constraints of § 501(c)(3) are underinclusive if their aim is to prevent leaders of ideological organizations from employing nonpublic reason in public discourse, even that concerning legislation and political candidacies.

E. Section 501(c)(3) Does Not Implement Public Reason as Applied to Many Forms of Institutional Political Speech

A fifth reason that § 501(c)(3) can hardly be explained as a successful attempt to instill Rawlsian public reason in the ideological charitable sector is that the political activity constraints apply only to political campaign intervention and, less absolutely, to attempts to influence legislation. Although the IRS has warned that issue advocacy can qualify as campaign intervention in some circumstances⁴⁷—a position that may well chill political discourse by obfuscating the bounds of the law—in general, charities may discuss problems of broad policy concern freely and with reference to their comprehensive doctrines.⁴⁸ A group formed to educate the public on social Darwinism, for example, can devote substantial effort and resources to trying to persuade the public of the soundness of its general position on questions concerning public support of the mentally or physically weak as long as it does not refer to specific legislation.⁴⁹ In this respect, § 501(c)(3) underperforms as a tool for implementing public reason. The political speech

⁴⁶ See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422 (Situation 3); PUB. NO. 1828, *supra* note 45, at 8 (Example 1).

⁴⁷ See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1424 (stating that “section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention”).

⁴⁸ See, e.g., Treas. Reg. § 56.4911-2(c)(2) (1990) (stating that lobbying does not include “[e]xaminations and discussions of broad social, economic, and similar problems” by charities making the § 501(h) election); Treas. Reg. § 53.4945-2(d)(4) (applying the same rule to private foundations for purposes of imposing the excise tax on taxable expenditures).

⁴⁹ At least this conclusion holds if the entity has made the § 501(h) election. See Treas. Reg. § 56.4911-2(b)(2)(ii)(A), -2(c)(2).

constraints cut a swath *too narrow* to limit general political discourse under the Rawlsian ideal.

To illustrate the point more vividly, assume a civic organization invites community leaders to speak to the general public on pressing political issues of the day. Topics include abortion, euthanasia, immigration, crime and punishment, marriage and divorce, state aid to the poor, and capital punishment. Each speaker is urged to take a general position on these issues, not simply to inform attendees of plausible views, but without addressing any legislation or need for change in the law. The speakers see their role as persuasive, and they realize a broad cross-section of the community is in attendance. One of the speakers, the pastor of a local church, has been authorized to speak on behalf of the church.⁵⁰ The pastor analyzes these issues from a theological perspective endorsed by the church and urges attendees to adopt a perspective consistent with that of the church. Although these positions could be justified by arguments consistent with public reason, the pastor urges attendees to agree with him solely by appealing to the church's theological reasoning.

In the many cases like this example, § 501(c)(3) serves no direct role in promoting public reason. To understand why, it is first important to appreciate that the pastor in this example does not employ public reason. According to Rawls, under the ideal of public reason, “in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth.”⁵¹ Surely, some, if not all, of the issues raised in this example involve “constitutional essentials and matters of basic justice,” and yet the hypothetical pastor invokes only nonpublic reasons. Granted, on First Amendment grounds, that federal tax law does nothing to influence how the pastor presents his arguments is grounds for rejoicing. But that is beside the point. The point is that § 501(c)(3) does nothing to steer the pastor away from relying solely on nonpublic reasons. The political speech constraints cannot plausibly be viewed as effective tools for promoting public reason as an ideal, for they do nothing to actualize the ideal as it applies to the discourse of charitable institutions and their representatives on matters of broad public concern. In this respect, as under the fourth critique, the political speech constraints are underinclusive as a tool for advancing public reason.

The political speech constraints are in additional respects underinclusive mechanisms for reinforcing the ideal of public reason. First, the permitted

⁵⁰ The example adds the detail of speaking “on behalf of the church” only to illustrate the boundaries of § 501(c)(3) when an employee's speech is properly attributed to the employing entity. Were the pastor in this example not speaking on behalf of the church, § 501(c)(3) would be irrelevant.

⁵¹ RAWLS, *supra* note 1, at 224–25.

“insubstantial” lobbying efforts of tax-exempt charities may be fully articulated in the language of nonpublic reasons. “Substantiality” is not determined by reference to Rawlsian norms. Secondly, as briefly noted previously, under United States Treasury regulations, a charity that has made the § 501(h) election⁵² does not engage in either direct lobbying or grass roots lobbying if the charity does not refer to specific legislation.⁵³ Thus, petitioning government or influencing the public in favor of general policy positions is not checked by the political speech constraints, and a charity may justify these positions however it sees fit. Moreover, a charity is not considered to engage in grass roots lobbying if the charity does not encourage anyone to “take action” on specific legislation.⁵⁴ Again, a charity is free to shape public opinion by appealing exclusively to its comprehensive doctrines. Finally, the lobbying limitation generally does not apply to attempts to influence executive action or administrative rulemaking, no matter how extensively an actor invokes nonpublic reasons.⁵⁵ In brief, anyone who is inclined to cheer § 501(c)(3) for effectively instilling Rawlsian norms should hold the applause.

III. PUBLIC REASON COUNSELS AGAINST THE LOBBYING LIMITATION AND THE CAMPAIGNING BAN

The previous section of this Essay explains how the political speech constraints of Code section 501(c)(3) fail to advance the ideal of public reason in any meaningful sense. These constraints are both overinclusive and underinclusive in various respects. That public reason as a concept is not coherently or even importantly advanced by these constraints is the minimal claim of this Essay.

Standing alone this minimal claim is not especially troubling. It means only that Rawlsian public reason does not affirmatively support the lobbying limitation and the campaigning ban; the claim does not directly argue against these constraints. One could similarly and rightly demonstrate that the political activity constraints find no support in the general theory of relativity, but doing so would not call § 501(c)(3) into serious question. Something more must be shown.⁵⁶

⁵² For a discussion, see *supra* note 23.

⁵³ See Treas. Reg. § 56.4911-2(b)(1)(ii)(A), -2(b)(2)(ii)(A).

⁵⁴ See Treas. Reg. § 56.4911-2(b)(2)(ii)(C). This regulation applies to a charity that has made the § 501(h) election.

⁵⁵ See Treas. Reg. § 56.4911-2(d)(3) (stating that “legislative body” excludes “executive, judicial, or administrative bodies”).

⁵⁶ If the ideal of public reason constituted the crux of justifications for the political speech constraints, the minimal claim would itself raise grave concerns. But numerous arguments for the

This part of the Essay provides that “something more.” Part II argues that the ideal of public reason counsels against the political speech constraints of § 501(c)(3). When one closely examines what Rawls means by public reason, how and why he believes society should appropriate it, and what he conceives as its relationship to comprehensive doctrines in public discourse, one finds that the political speech constraints offend the ideal of public reason in several respects. This Essay refers to this conclusion as its robust claim. Together, the minimal claim and the robust claim form a Rawlsian critique of the political speech constraints of § 501(c)(3).

A. Public Reason Is Not Enforceable at Law

The first critique of § 501(c)(3) on Rawlsian grounds applies when the concept of public reason is invoked in and of itself to justify the lobbying limitation and the campaigning ban. To illustrate, imagine that the congressional design of the political speech constraints is the suppression of advocacy by charities based on comprehensive doctrines in their petitioning of legislatures and in their speaking for or against candidates for elective office. This Essay does not allege that such is the design of § 501(c)(3), but some might understand its constraints on political speech to reflect such a design. Against any teleological justification of § 501(c)(3) along these lines, this Essay will demonstrate that wielding public reason as a sword, compelling adherence to its ethic by the power of the state through its tax law, is antithetical to the Rawlsian ideal. Public reason is a moral duty, not a legal duty.

Rawls advances public reason as a voluntary civic duty, not as a legal duty, in unmistakable terms:

[S]ince the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.⁵⁷

Rawls writes that to honor this civic duty of public reason “is not, of course, a matter of law.”⁵⁸ That the law must not impose the ideal naturally means

constraints do not rely on the concept of public reason. Thus, a serious Rawlsian critique of the political speech constraints should extend beyond the minimal claim.

⁵⁷ RAWLS, *supra* note 1, at 217.

⁵⁸ *Id.* at 213.

that society might never attain to the ideal of public reason, a possibility of which Rawls is fully cognizant.⁵⁹

To those desiring to enforce the ideal of public reason by law, Rawls offers the following somber reminder:

I stress that the limits of public reason are not, clearly, the limits of law or statute but the limits we honor when we honor an ideal: the ideal of democratic citizens trying to conduct their political affairs on terms supported by public values that we might reasonably expect others to endorse.⁶⁰

Rawls reaffirms this voluntary, non-legal nature of public reason in *The Idea of Public Reason Revisited*, where he conjoins the voluntariness of the ideal and constitutional rights:

[C]itizens fulfill their duty of civility and support the idea of public reason by doing what they can to hold government officials to it. This duty, like other political rights and duties, is an intrinsically moral duty. I emphasize that it is not a legal duty, for in that case it would be incompatible with freedom of speech.⁶¹

To justify § 501(c)(3)'s political speech constraints as necessary to ingrain public reason in society contravenes the very concept. To do so makes public reason subject to "the limits of law or statute,"⁶² against Rawls. To do so thereby deprives charitable institutions and those who speak for them the opportunity to carry out their civic duty voluntarily in the manner Rawls contemplates. Further, to endorse § 501(c)(3)'s political speech constraints as a salutary state tool for legislating public reason is to offend the free speech norms recognized by Rawls. Such an argument is quite odious under the First Amendment, for it essentially maintains that the state can and should single out for punitive taxation certain types of political speech by certain speakers just because the state presumes that those speakers will articulate their speech according to religious or other comprehensive doctrines. Any such rationale for § 501(3) therefore offends the Rawlsian concept of public reason at numerous levels.

This first Rawlsian critique applies only when the concept of public reason is teleologically linked to the lobbying limitation and the campaigning ban. But many arguments in favor of the political speech constraints are

⁵⁹ *Id.* ("As an ideal conception of citizenship for a constitutional democratic regime, it presents how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be, though no less fundamental for that.")

⁶⁰ *Id.* at 253.

⁶¹ *Id.* at 445.

⁶² *Id.* at 253.

expressed elsewhere, and it is far from clear that § 501(c)(3) reflects a design to implement the ideal of public reason. It is thus important to consider whether § 501(c)(3)'s constraints on political speech are suspect under the ideal of public reason simply because the statutory provision itself undermines what Rawls contemplates as constitutive of, or implied by, public reason. The remaining critiques of this part question the statute on its own terms, as interpreted by the IRS and the courts.

B. Public Reason Embraces Democratic Deliberation

The political speech constraints offend public reason at a fundamental level. Rawls's argument for public reason upholds the virtue of deliberation in a deliberative democracy.⁶³ The idea that key institutions forming the background culture of civil society should be disengaged from public deliberation over crucial issues in a democracy is antithetical to public reason.

Rawls unremarkably identifies the "definitive idea for deliberative democracy" as "the idea of deliberation itself."⁶⁴ He continues:

When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions. They suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or nonpolitical interests. It is at this point that public reason is crucial, for it characterizes such citizens' reasoning concerning constitutional essentials and matters of basic justice.⁶⁵

To deny a charitable, religious, or scientific speaker—whether an association, individual member of a religious group, or official representative of the group—the opportunity to engage fully in public reason is to deprive democracy of full deliberation.⁶⁶ Yet federal tax law does just that. Section 501(c)(3), under the penalty of taxation, forecloses or stifles some of the most relevant, meaningful types of deliberation in American democracy. A tax-exempt university must measure its grassroots appeals opposing immigration legislation that unfairly treats minors. An acute care hospital dare not invoke scientific evidence to oppose a gubernatorial candidate that mocks social

⁶³ *Id.* at 476.

⁶⁴ *Id.* at 448.

⁶⁵ *Id.*

⁶⁶ *Cf.* HAMBURGER, *supra* note 5, at 337 (“[T]he substantial exclusion of the speech of religious and other idealistic associations seems to have accelerated the shallowness of American political life.”).

distancing and wearing a face mask in public during a deadly pandemic. A church must practice moderation in opposing legislation that would burden members of other faiths in performing their ritual prayers in public buildings, or which would incentivize abortion instead of increasing funding for the prenatal care of the poor.

Moreover, organizations described in § 501(c)(3) are at the forefront of learning, thinking, innovating, and inspiring. They are not simply hypothetically capable interlocutors; they offer valuable expertise and experience. That § 501(c)(3) restricts their ability to influence the public on legislative proposals and prohibits them from deliberating over candidates for public office in any persuasive manner deeply offends what Rawls has proclaimed the “definitive idea for deliberative democracy”—“the idea of deliberation itself.”⁶⁷

Any objection that Rawls’s elevation of deliberation in a deliberative democracy applies only to “citizens,” not to institutions themselves, is a non-starter. First, deliberation is dialogic. It involves an intellectual “exchange.”⁶⁸ Thus, those who benefit from the deliberative process are not just those who speak, but also those who hear. To effectively deny, through excessive tax penalties or other legal sanction, a wholly deliberative role to charitable institutions is to disserve not just charities, but also those democratic participants who otherwise would benefit from unrestrained deliberation with charitable institutions.

Secondly, as noted previously, institutions act through their agents, who typically are themselves citizens. To restrict the deliberative role of institutions is to restrict the citizens who speak for them. That these citizens are free to deliberate without constraint in their individual capacities is of only modest comfort, for many of them customarily spend most of their time and energy representing the charities that they serve. To restrain them from engaging in full deliberation when they speak on behalf of their institutions is to keep them from fully deliberating for much, if not most, of their time.

Thirdly, individuals forming associations often seek to speak through their associations. In such cases, the organizational form should not be thought to convert the speech of citizens into something drastically different as a matter of democratic theory.⁶⁹ Indeed, by associating and selecting a capable agent to represent the association (e.g., the pastor of a church, or the president of a legal aid society), citizens may improve the quality of the message they desire to communicate relative to what it would be had they spoken only individually. The most important point is not that the citizens’

⁶⁷ RAWLS, *supra* note 1, at 448.

⁶⁸ *Id.*

⁶⁹ See HAMBURGER, *supra* note 5, at 270 (“[A]ssociations are typically composed of individuals who associate in them and who retain their freedom as individuals to exercise their constitutional rights.”).

institutional message is improved, however, but that it is the message of *citizens*.

Finally, and building on the preceding line of thought, to refuse to listen to citizens who express themselves according to public reason is to disrespect them. Rawls explains that the ideal of public reason “expresses a willingness to listen to what others have to say and being ready to accept reasonable accommodations or alterations in one’s own view.”⁷⁰ He conceptualizes this willingness to listen to others as part of civic duty.⁷¹ Section 501(c)(3)’s political speech constraints, in contrast, represent an unwillingness to listen to others. Most obviously, by enacting the political speech constraints, Congress has shielded itself from too much bother in listening to what citizens, speaking through charitable associations, have to say to them. Moreover, Congress has relieved the democratic citizenry of a measure of the responsibility of listening to what citizens acting through their charitable associations would offer them in public reason. Citizens totally need not listen to charitable associations’ reasoned, but conclusive, assessments of political candidates, for § 501(c)(3) forbids the expression of such opinions. And citizens are relieved of the obligation to consider more than a few appeals to action on specific legislation by charities because of the lobbying limitation. “Silence, citizens of charity, we do not want to hear you!” is largely the import of the political speech constraints. This import does not bode well under the ideal of public reason.

Also unpersuasive is the objection that, because charities can engage in numerous forms of political discourse, current law is “good enough” when assessed under the ideal of public reason. True, charities that have made the Code § 501(h) election⁷² can announce a view on legislation without engaging in prohibited grass roots lobbying,⁷³ provided they do not encourage listeners to take action on specific legislation.⁷⁴ They can also defend themselves against existential threats before Congress⁷⁵ and broadly discuss solutions to major societal problems.⁷⁶ But they must not try to make a difference when it counts the most. Only to an “insubstantial” degree may charitable institutions encourage citizens to contact legislators to implement their policy preferences based on public reason. Charities must not limit their

⁷⁰ RAWLS, *supra* note 1, at 253.

⁷¹ *Id.* at 217.

⁷² *See supra* note 23.

⁷³ *See* Treas. Reg. § 56.4911-2(b)(2)(ii)(B) (1990).

⁷⁴ *See* Treas. Reg. § 56.4911-2(b)(2)(ii)(C).

⁷⁵ *See* Treas. Reg. § 56.4911-2(c)(4).

⁷⁶ *See* Treas. Reg. § 56.4911-2(c)(2). A charity may also engage in nonpartisan research, *see* Treas. Reg. § 56.4911-2(c)(1), and respond to a governmental request for technical advice. *See* Treas. Reg. § 56.4911-2(c)(3).

candidate forums to those presidential hopefuls who will best advance justice and constitutional values.⁷⁷ And their reasoned issue advocacy must not lead to the inescapable conclusion that only one person running for office can handle the job.⁷⁸ (Doing that—let the reader brace herself—might influence someone’s vote.)

But the ability to make a difference in public deliberation is an essential part of the deliberative process characterized by public reason. Rawls envisions deliberation to involve “debate,”⁷⁹ not merely pedantic lectures or even dispassionate instruction. He argues that, through deliberation, citizens’ opinions may be “revised,” rather than constituting a “fixed outcome.”⁸⁰ The process envisioned by Rawls is highly interactive, and reason is used to persuade others as to how they should vote. To forbid a group of speakers from fully persuading others as to how the speaker believes they should exercise their civic duties is to undermine deliberation. The assault on deliberation is especially severe under the campaigning ban, which prohibits persuasive speech for or against political candidates.

To impair deliberation is to disserve public reason. The political speech constraints curtail deliberation. In this manner, § 501(c)(3) undermines public reason.

C. The Ideal of Public Reason Welcomes the Role of Comprehensive Doctrines in Public Discourse

Section 501(c)(3) diserves public reason in another respect. Rawls welcomes the introduction of comprehensive doctrines into public discourse as long as they are supplemented with public reasons. However, § 501(c)(3)’s political speech constraints limit the ability of ideologically based charities to argue for political action based on principles rooted in their comprehensive doctrines. For example, the members of a local church on the Texas-Mexico border might have both public and nonpublic reasons for opposing a mayoral candidate because of her views of Mexican day-workers lawfully residing in the U.S. Section 501(c)(3) precludes the church from arguing against the candidate, even if the argument is articulated according to principles of basic justice supported by the Bible’s teaching on how society should treat

⁷⁷ See Rev. Rul. 86-95, 1986-2 C.B. 73, 74. The ruling indicates that bias may be present, and thus the campaigning ban violated, if a charity hosting a candidate forum does not invite all legally qualified candidates to participate or limits questions to those of special concern to the sponsoring charity. See *id.*

⁷⁸ See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (stating that a charity must avoid issue advocacy that functions as intervention in a political campaign).

⁷⁹ RAWLS, *supra* note 1, at 448.

⁸⁰ *Id.*

immigrants.⁸¹ This legal roadblock deprives democratic voters of the secular benefits of hearing an argument linking comprehensive doctrines to an electoral choice, which are benefits that Rawls contemplates under the ideal of public reason.

To better appreciate this tension between § 501(c)(3) and public reason, consider a distinction raised by Rawls. He distinguishes two views of public reason: the exclusive view and the inclusive view.⁸² Under the “exclusive view” of public reason, which still applies only when the subject involves “fundamental political matters,” one should never introduce “reasons given explicitly in terms of comprehensive doctrines.”⁸³ In contrast, under the “inclusive view,” citizens are permitted “in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself.”⁸⁴

Rawls argues for the superiority of the inclusive view of public reason because it “best encourages citizens to honor the ideal of public reason and secure its social conditions in the longer run in a well-ordered society.”⁸⁵ Rawls posits that the inclusive view features greater flexibility in addressing the various socio-political contexts in which public reason will be exercised:

For under different political and social conditions with different families of doctrine and practice, the ideal must surely be advanced and fulfilled in different ways, sometimes by what may look like the exclusive view, at others by what may look like the inclusive view. Those conditions determine, then, how the ideal is best attained, either in the short or the longer run. The inclusive view

⁸¹ See, e.g., *Exodus* 23:9 (“Do not oppress a foreigner; you yourselves know how it feels to be foreigners, because you were foreigners in Egypt.”); *Leviticus* 19:10 (“Do not go over your vineyard a second time or pick up the grapes that have fallen. Leave them for the poor and the foreigner. I am the LORD your God.”); *Leviticus* 19:34 (“The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt.”); *Deuteronomy* 10:18-19 (stating that YHWH “defends the cause of the fatherless and the widow, and loves the foreigner residing among you, giving them food and clothing”; stating “you are to love those who are foreigners”); *Deuteronomy* 27:19 (“Cursed is anyone who withholds justice from the foreigner, the fatherless or the widow.”); *Malachi* 3:5 (“I will be quick to testify against sorcerers, adulterers and perjurers, against those who defraud laborers of their wages, who oppress the widows and the fatherless, and deprive the foreigners among you of justice, but do not fear me,” says the LORD Almighty.”).

⁸² RAWLS, *supra* note 1, at 247.

⁸³ *Id.* at 247.

⁸⁴ *Id.* at 247.

⁸⁵ *Id.* at 248.

allows for this variation and is more flexible as needed to further the ideal of public reason.⁸⁶

In *The Idea of Public Reason Revisited*, Rawls affirms the propriety of introducing into public political discourse “our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.”⁸⁷ Designating the condition as the “*proviso*,”⁸⁸ Rawls repeats the assertion that comprehensive doctrines are appropriately invoked in public political discourse “*at any time*,” subject to the *proviso*.⁸⁹ To illustrate, Rawls approves of introducing a public proposal with the Gospel story of the Good Samaritan,⁹⁰ provided the proponent justifies the proposal through political values consistent with public reason.⁹¹

Rawls identifies a number of reasons to allow the introduction of comprehensive doctrines into public policy deliberations in *The Idea of Public Reason Revisited*. First, Rawls argues that “mutual knowledge of one another’s religious and nonreligious doctrines expressed in the wide view of public political culture recognizes that the roots of democratic citizens’ allegiance to their political conceptions lie in their respective comprehensive doctrines.”⁹² This mutual awareness of others’ comprehensive doctrines strengthens one’s “allegiance to the democratic ideal of public reason.”⁹³ Reasonable comprehensive doctrines thereby confer “enduring strength and vigor” to “reasonable political conceptions.”⁹⁴ Rawls illustrates this bolstering of political justice through comprehensive doctrines with the abolitionist and civil rights movements.⁹⁵ Second, by declaring how one’s comprehensive doctrines support reasonable political conceptions, such as how the parable of the Good Samaritan supports reasonable political values, citizens who hold other comprehensive doctrines “are reassured, and this strengthens ties of civic friendship.”⁹⁶ Third, the idea of public reason is bolstered when a citizen sincerely invokes the comprehensive doctrine of

⁸⁶ *Id. see also id.* at 251 (“the appropriate limits of public reason vary depending on historical and social conditions”).

⁸⁷ *Id.* at 453.

⁸⁸ *Id.*

⁸⁹ *Id.* at 462 (emphasis added).

⁹⁰ *Luke* 10:25–37.

⁹¹ Rawls, *supra* note 1, at 456.

⁹² *Id.* at 463.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 464.

⁹⁶ *Id.* at 465.

another citizen to show the latter that such doctrine “can provide a basis for public reason.”⁹⁷

Rawls’s reliance on abolitionism and the fight for civil rights for African Americans is instructive. He observes that, as the antebellum South maintained the institution of race-based slavery, abolitionists argued that slavery violated God’s law.⁹⁸ Rawls argues that in this context “the nonpublic reason of certain Christian churches supported the clear conclusions of public reason.”⁹⁹ Rawls analyzes the argument of Dr. Martin Luther King, Jr. for civil rights similarly.¹⁰⁰ Rawls recognizes King’s appeal to the “moral law or the law of God,” his invocation of St. Thomas Aquinas and natural law, and his affirmation of the existence of the human soul.¹⁰¹ “Religious doctrines clearly underlie King’s views and are important in his appeals,”¹⁰² writes Rawls. Nonetheless, he opines that King’s religious statements “are expressed in general terms,” and they comport with public reason and “fully support constitutional values.”¹⁰³ Indeed, he notes, King often relied on constitutional political values.¹⁰⁴

⁹⁷ *Id.* at 465–66.

⁹⁸ *Id.* at 249.

⁹⁹ *Id.* at 249–50.

¹⁰⁰ *Id.* at 250.

¹⁰¹ *Id.* at 250 n.39.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 250, n.39 (purporting to analyze the issue “conceptually and not historically” to conclude that the abolitionists and Dr. King acted in a manner consistent with public reason. *Id.* at 250–51.

Surely they [the abolitionists] hoped for that result [the end of slavery] and they could have seen their actions as the best way to bring about a well-ordered and just society in which the ideal of public reason could eventually be honored. Similar questions can be raised about the leaders of the civil rights movement. The abolitionists and King would not have been unreasonable in these conjectured beliefs if the political forces they led were among the necessary historical conditions to establish political justice, as does indeed seem plausible in their situation.

Id. (explaining that in arguing for the compatibility of public reason and the abolitionist and civil rights movements, Rawls does not fret over the possibility that the religious leaders might not have fully understand their advocacy’s relationship to public reason. He is willing to look both to the actual state of mind of the movements’ leaders and to their hypothetical, reasonable state of mind)

On this account the abolitionists and the leaders of the civil rights movement did not go against the ideal of public reason; or rather, they did not provided they thought, or on reflection would have thought (as they certainly could have thought), that the comprehensive reasons they appealed to were required to give sufficient strength to the political conception to be subsequently realized. ... The abolitionists could say, for example, that they supported political values of freedom and equality for all, but that given the comprehensive doctrines they held and the doctrines current in their day, it was necessary to invoke the comprehensive grounds on which those values were widely seen to rest. Given those historical conditions, it was not unreasonable of them to act as they did for the sake of the ideal of public reason itself.

Id. at 251 (footnotes omitted).

The reasoning of Rawls does not bode well for the political speech constraints. Just as in the dark days of race-based slavery followed by state-sponsored racial segregation, even today the United States has work to do in securing basic justice. American citizens remain deeply divided over the proper political response to numerous issues involving fundamental notions of justice, including immigration, abortion, religious freedom, and policing techniques. How the nation addresses them politically will depend not just on the votes of legislators, but also on the votes of citizens who elect candidates to public office. In a Rawlsian world, citizens have the benefit of hearing precisely how the comprehensive doctrines of the institutions of civil society pertain to these issues and how they inform their vote, subject only to the *proviso*. But in the world as we know it, § 501(c)(3) limits how the institutions of civil society can voice their comprehensive doctrines in the public square. The church in the Rio Grande Valley must not take a principled stand against a candidate who would harshly detain immigrant children. The human rights organization must not say too much against legislative proposals to restrict asylum for refugees of war. The crisis pregnancy center must not give reasons for supporting the only gubernatorial candidate who would increase public funding for ultrasounds and maternity care for the poor.

Rawls understands that articulating comprehensive doctrines in the public square is not just compatible with, but can also buttress, public reason. By limiting the ability of institutions founded on, and conversant in, these doctrines to articulate them persuasively in important political contexts, § 501(c)(3) undercuts this legitimate and valuable role they serve in a constitutional democracy. Once again, the ideal of public reason cuts against the political speech constraints.

D. Public Reason Preserves the Unrestrained Internal Discourse of Ideological Associations

Even as Rawls does not intend the ideal of public reason to foreclose the introduction of comprehensive doctrines into public discourse for the reasons explained in Part II.C of this Essay, so also he rejects the notion that the ideal of public reason should dictate the internal life of ideological associations. In tension with this notion of the bounded jurisdiction of public reason, the political speech constraints of § 501 invade the internal life of institutions, specifying what leaders can and cannot say to members of the institution on its behalf. Section 501(c)(3) is interpreted by the IRS to authorize the government to revoke tax exemption when associational leaders say the wrong words to members, even when appeals are justified by the nonpublic

reasons embraced by everyone involved.¹⁰⁵ So interpreted, the political speech constraints infringe upon the ability of associations and their members to communicate based on their nonpublic reasons. This muting of associations and their members is not what Rawls envisions for a liberal, democratic society ordered by public reason.

Rawls stakes out the sanctity of the internal life of associations in civil society as follows:

Another feature of public reason is that its limits do not apply to our personal deliberations and reflections about political questions, or to the reasoning about them by members of associations such as churches and universities, all of which is a vital part of the background culture. Plainly, religious, philosophical, and moral considerations of many kinds may here properly play a role.¹⁰⁶

In *The Idea of Public Reason Revisited*, Rawls emphasizes that public reason does not constrain the internal discourse of those affiliated with nonprofit organizations. These elements of civil society help form the “background culture,”¹⁰⁷ which is not governed by the moral restrictions on the public political forum:

Distinct and separate from this three-part public political forum is what I call the background culture. This is the culture of civil society. In a democracy, this culture is not, of course, guided by any one central idea or principle, whether political or religious. Its many and diverse agencies and associations with their internal life reside within a framework of law that ensures the familiar liberties of thought and speech, and the right of free association. The idea of public reason does not apply to the background culture with its many forms of nonpublic reason nor to media of any kind.¹⁰⁸

Rawls includes in the background culture that of “churches and associations of all kinds, and institutions of learning at all levels, especially universities and professional schools, scientific and other societies.”¹⁰⁹

¹⁰⁵ See, e.g., Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (Situation 6) (finding a violation of the campaigning ban).

¹⁰⁶ RAWLS, *supra* note 1, at 215.

¹⁰⁷ *Id.* at 443.

¹⁰⁸ *Id.* at 443–44 (footnote citations omitted).

¹⁰⁹ *Id.* at 443 n.13.

Rawls's distinction between the moral self-regulation of the "public political culture" and that of the "background culture" is sharp.¹¹⁰ The latter is subject to "no restrictions."¹¹¹ *No restrictions*, says Rawls, apply to discourse within the background culture of churches, universities, and other associations. Indeed, in responding to some of those "who appear to reject the idea of public reason," Rawls surmises that they "actually mean to assert the need for full and open discussion in the background culture," a point with which "political liberalism fully agrees."¹¹²

More broadly, Rawls argues that the very principles of political justice "are not to apply directly to the internal life of the many associations" within the basic structures of society.¹¹³ His thinking reaches numerous nonprofit institutions of civil society described in multiple paragraphs of § 501(c),¹¹⁴ including § 501(c)(3):

Much the same question arises in regard to all associations, whether they be churches or universities, professional or scientific associations, business firms or labor unions. The family is not peculiar in this respect. To illustrate: it is clear that liberal principles of political justice do not require ecclesiastical governances to be democratic. Bishops and cardinals need not be elected; nor need the benefits attached to a church's hierarchy of offices satisfy a specified distributive principle, certainly not the difference principle. This shows how the principles of political justice do not apply to the internal life of a church, nor is it desirable, or consistent with liberty of conscience or freedom of association, that they should.¹¹⁵

Thus, Rawls affirms the liberty interests of associations, generally and under the ideal of public reason, specifically.¹¹⁶ As to the former, he understands that political liberalism broadly seeks to protect the liberty

¹¹⁰ In contrasting the background culture with the public political forum, Rawls approvingly cites Kent Greenawalt's distinction between a religious leader's preaching and seeking public office. RAWLS, *supra* note 1, at 443 (citing Kent Greenawalt, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 226–27 (1988)).

¹¹¹ RAWLS, *supra* note 1, at 463, 463 n.51. "I emphasize there are no restrictions" on the background culture, says Rawls. *Id.*

¹¹² *Id.* at 443–44 (footnote citations omitted).

¹¹³ *Id.* at 468.

¹¹⁴ The institutions mentioned by Rawls include (1) religious, educational, and scientific organizations (I.R.C. § 501(c)(3)); (2) professional associations (I.R.C. § 501(c)(6)); and (3) labor unions (I.R.C. § 501(c)(5)). *See id.* at 468.

¹¹⁵ *Id.* at 468.

¹¹⁶ *Cf.* Griffin, *supra* note 16, at 313 ("Rawls encourages open discussion of comprehensive doctrines in many of society's 'nonpublic' organizations, e.g., universities, churches, and associations.").

interests of both associations and individuals.¹¹⁷ As to the latter, Rawls argues for the compatibility of public reason and “the many forms of nonpublic reason,” which “belong to the internal life of the many associations in civil society.”¹¹⁸

The political speech constraints violate the sanctity of the internal associational life upheld by Rawls. Far from implementing the Rawlsian norm of imposing “no restrictions” on how associations discuss and urge compliance with comprehensive doctrines, § 501(c)(3) requires state intrusion into their internal life. I have previously written of how the campaigning ban invites state interference with the internal operation of churches, a point that extends to all charitable institutions:

As interpreted by the IRS, the ban requires the agency to monitor and decide such matters as whether a pastor is speaking on behalf of himself or on behalf of a church; whether a sermon or newsletter discussing pressing moral issues of the day is really a disguised endorsement of a candidate; whether a forum for candidates sponsored by a church features a sufficient breadth of questions; and whether a church has invited a public figure to speak in a “candidate” or in a “non-candidate” capacity. Policing these messages and invitations to speak never ends, and it theoretically requires the agency to scrutinize every word of a sermon and to monitor every guest in a pulpit. The entanglement is severe.¹¹⁹

Although more freedom exists for associations to opine upon proposed legislation, the lobbying limitation still imposes restrictions that infringe upon the full range of internal communication that associations might well prefer, and thus, the lobbying limitation prompts similar objections.¹²⁰

Little purpose is served in belaboring the point that the political speech constraints stand condemned under the Rawlsian notion that “no restrictions” should apply directly to intra-association affairs, including persuasive, reasoned discourse. Instead, the remainder of this part of the Essay will briefly identify and respond to two possible objections to the discomfiting conclusion that the political speech constraints defy the Rawlsian principle of intra-association autonomy under the ideal of public reason.

¹¹⁷ RAWLS, *supra* note 1, at 476, 221 n.8 (“[L]iberty of conscience and other liberties such as freedom of association protect churches from the intrusions of government.”).

¹¹⁸ *Id.* at 482.

¹¹⁹ Buckles, *Church and State*, *supra* note 11, at 473 (internal citations omitted).

¹²⁰ *See* Buckles, *The Penalty of Liberty*, *supra* note 11, at 170–71, 182.

First, one might conjecture that the political speech constraints do not transgress Rawlsian principles—other than by invoking the power of the state to enforce the restrictions—because Rawls was not contemplating “political issues” when he removed intra-association discourse from the moral dictate of public reason. This objection is erroneous. The objection would render Rawls’s argument incoherent. Rawls argues that the ideal of public reason governs discourse and decision-making only over political issues, and only over a limited class of political topics—essential constitutional questions and matters of basic justice. Rawls argues that public reason is what must justify the coercive exercise of power by the state:

[In] a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.¹²¹

Intra-association “non-political” subjects, such as deciding whether to baptize by immersion or through sprinkling, or whether to select green or pink carpet in the boardroom, are not the type of issues justifying the rationale for public reason. There is simply no potential application of public reason to such non-political matters that invite no coercion by government. Thus, when Rawls argues that the ideal of public reason does not restrict in any way the ability of associations to employ non-public reason, he means that public reason should not restrict the ability of associations internally to discuss and determine positions on political questions exclusively through their comprehensive doctrines. Rawls even says so explicitly.¹²² Any notion that associations must not invoke comprehensive doctrines in their internal political discourse is therefore demonstrably contrary to Rawls.

Another possible protest to the conclusion that § 501(c)(3) defies Rawls by imposing restrictions directly on intra-association discourse over political issues is that the conditions for federal income tax exemption should not be viewed as “restrictions,” as Rawls understood the term. The objection would reason that charities are not compelled to limit their political speech under federal tax law, for they can simply opt out of tax exemption and the ability to receive tax-deductible charitable contributions. They have a choice—speak freely but pay taxes and probably collect less in donations, or instead, stifle internal discourse but pay no taxes and receive greater gifts. The problems with this line of reasoning are myriad.

One problem with the objection that § 501(c)(3) imposes no real “restrictions” is that it ignores the statute’s coercion. Section 501(c)(3) does not simply require charitable institutions to bear the full economic cost of

¹²¹ RAWLS, *supra* note 1, at 214.

¹²² *See id.* at 215.

their lobbying and campaign-related discourse, such as by including the amount of income devoted to such ends in the entity's unrelated business taxable income and then denying a deduction for the expenditure.¹²³ Code 501(c)(3)'s restrictions disproportionately restrict speech because they subject all of an entity's net income to taxation, no matter the amount spent on political speech. Similarly, an entity that dares to utter prohibited political speech is not entitled to receive donations that are deductible by any donor under Code § 170; even if the prohibited political speech costs less than 1% of total donations, the statute denies a deduction to donors equal to 100% of donations. Federal tax law thereby imposes a tax penalty on speech that is disproportionate to the amount of expenditures for speech.¹²⁴

This current system of taxing charities is not elective in any reasonable sense of the term. Consider how individuals are taxed on their political expenditures. Under current law, individual taxpayers may not deduct various political expenditures in computing their federal taxable income.¹²⁵ Thus, these expenditures remain in the individual income tax base. Imagine the outcry if, in addition to being nondeductible, political expenditures resulted in the denial of the deduction for accelerated depreciation on business assets,¹²⁶ the inclusion of personal gifts¹²⁷ and qualified scholarships¹²⁸ in gross income, the unavailability of favorable rates of taxation on net capital gain,¹²⁹ and the denial of any deduction for medical expenses,¹³⁰ real property taxes,¹³¹ and charitable contributions.¹³² That a taxpayer has the theoretical choice of spending nothing on political speech or making expenditures on political speech and incurring a massive tax increase hardly renders the choice voluntary. The tax penalty is just too steep; the disproportionate tax burden on speech is coercive, providing many taxpayers

¹²³ See I.R.C. § 511(a)(1) (imposing a tax on a charitable organization's unrelated business taxable income).

¹²⁴ Cf. Leff, *supra* note 11, at 696 (arguing that the IRS's interpretation of § 501(c)(3) is unconstitutional if the Constitution permits the government only to bar using tax-deductible funds for electioneering).

¹²⁵ See, e.g., I.R.C. § 162(e)(1).

¹²⁶ See I.R.C. § 168(a) (providing for an accelerated cost recovery system for depreciation allowed under Code § 167).

¹²⁷ See I.R.C. § 102(a) (excluding gifts from gross income).

¹²⁸ See I.R.C. § 117(a) (excluding certain qualified scholarships from gross income).

¹²⁹ See I.R.C. § 1(h).

¹³⁰ See I.R.C. § 213(a) (allowing a deduction for certain expenses paid for medical care).

¹³¹ See I.R.C. § 164(a) (allowing a deduction for the payment or accrual of specified taxes).

¹³² See I.R.C. § 170(a) (allowing a deduction for charitable contributions).

no reasonable choice.¹³³ And that is the effect of Code §§ 501(c)(3) and 170(c)(2)(D) on the political speech of charities.¹³⁴

A second problem with the retort that § 501(c)(3) imposes no real “restrictions” because charities can simply forego the tax benefits of complying with § 501(c)(3) is that the objection rips the term “restrictions” from its Rawlsian context. When Rawls argues for “no restrictions” on the internal deliberations of charitable associations, he is speaking of restrictions under the ideal of public reason. These restrictions are a matter of civic duty—moral restrictions, not legal restrictions. Rawls is unwilling to impose even non-legal *moral* constraints on the internal political deliberation of civil society’s associations. The constraints of § 501(c)(3) far surpass these moral constraints, for they impose a duty to comply enforced by the penalty of law under a coercive tax system. That Rawls argues against imposing the lesser restriction on charities counsels against imposing the greater restriction on charities.

Third, to object that charities can theoretically speak freely and incur the adverse tax consequences fails to appreciate Rawls’s reasons for not constraining charitable associations internally by the ideal of public reason. Rawls refers to “reflections about political questions” and “the reasoning about them by members of associations such as churches and universities” not as inconsequential or inevitable yet unfortunate realities but as “a vital part of the background culture.”¹³⁵ For Rawls, within the background culture of civil society, “religious, philosophical, and moral considerations of many kinds” serve an appropriate purpose.¹³⁶ Further, Rawls claims that “political liberalism fully agrees” with the argument that society needs “full and open discussion in the background culture.”¹³⁷ Rawls thus sees societal value in open political deliberation within charitable associations. But the political speech constraints chill discourse within associations. That § 501(c)(3) theoretically allows charities to opt out of its strictures does not change the fact that it coerces charities to comply with the lobbying limitation and the campaigning ban. The effect is to stifle discourse and debate within the

¹³³ On the coercive effect of § 501(c)(3) on political speech, see HAMBURGER, *supra* note 5, at 182–89; Buckles, *The Penalty of Liberty*, *supra* note 11, at Part II.A.2; Chisolm, *supra* note 11, at 332 (stating that Code § 501(c)(3) “puts the organization to an unavoidable choice” of either exercising its right to free speech and forfeiting its federal income tax exemption, or maintaining its tax exemption and forgoing its right to political speech).

¹³⁴ *Cf.* Houck, *supra* note 6, at 39 (stating that the political speech constraints “carry draconian penalties: loss of exempt income and deductible contributions constitute, for most nonprofits, the loss of life”).

¹³⁵ RAWLS, *supra* note 1, at 215.

¹³⁶ *Id.*

¹³⁷ *Id.* at 443–44 (footnote citations omitted).

background culture, an outcome contrary to the deliberative civil society that Rawls embraces.¹³⁸

IV. CONCLUSION

Certain arguments that have been or could be suggested to support the political speech constraints imposed on charities by federal tax law superficially sound Rawlsian, albeit vaguely so. However, one should let Rawls speak for Rawls. A close examination of his argument in *Political Liberalism* and *The Ideal of Public Reason Revisited* compels the conclusion that the political speech constraints imposed on charities find no real justification in public reason. To the contrary, the ideal of public reason counsels against these speech constraints as they exist under current law. This Essay, thus, disputes one potential philosophical justification for the political speech constraints and identifies a philosophical basis for questioning them.

Additional work remains, both within a Rawlsian framework and without it. First, a relevant question is how Rawls's doctrine of public reason may inform an analysis of arguments surrounding the political speech constraints on non-Rawlsian grounds. The academic literature commenting on the political speech constraints is extensive and continues to grow.¹³⁹ Analyzing the non-Rawlsian arguments that have been advanced to bless and curse the constraints through the prism of public reason would illumine the debate, at least for those who care about Rawls's thinking.

A second relevant question is how the principles advanced in *Political Liberalism* beyond the ideal of public reason interact with the ideal when undertaking a comprehensive Rawlsian analysis of § 501(c)(3). Rawls accepts regulating political campaign-related speech to some degree, although he argues for tailoring any such regulation to achieve the goal of securing "the fair value of the political liberties."¹⁴⁰ He recognizes that regulations of political speech could be unreasonable when superior alternatives exist.¹⁴¹ Although Rawls writes that no philosophical doctrine can specify every detail for "maintaining the fair value of the equal political liberties,"¹⁴² he nonetheless insists that political philosophy "must explain the

¹³⁸ The reality that some charities may disfavor internal political discourse, and that others are willing to forfeit unhindered internal deliberation in exchange for avoiding tax penalties, is not a compelling excuse for the political speech limitations. In a Rawlsian society, charitable associations should be making those decisions without state coercion, and those that prefer a free flow of persuasive political speech internally should not be burdened by a punitive tax regime.

¹³⁹ See generally *supra* note 11.

¹⁴⁰ RAWLS, *supra* note 1, at 358.

¹⁴¹ See *id.*

¹⁴² *Id.* at 357.

grounds upon which the necessary institutions and rules of law can be justified.”¹⁴³ Whether he is right or wrong about ensuring the “fair value” of political liberties is not the primary focus of this second relevant question. Rather, for those interested in a complete analysis of the political speech constraints under Rawls’s treatment of political liberalism, his principles generally governing the regulation of political speech should be analyzed in conjunction with his arguments for public reason. To extrapolate implications for § 501(c)(3) from Rawls’s general principles for regulating political speech without considering all that Rawls writes on the ideal of public reason likely guarantees a flawed, or at least incomplete, analysis. The same is true if one were to stop with the conclusions of this Essay.

One final thought is offered in conclusion. The argument of this Essay turns out to be ironic. After beginning with the question whether the Rawlsian concept of public reason might justify the political speech constraints, this Essay concludes that the concept counsels against the constraints. The direction in which one might initially suspect Rawls leads is opposite of that in which he really leads with public reason. One should remain open to the possibility that the same irony will emerge from a more comprehensive evaluation of Rawls’s principles of political liberalism. This possibility would not necessarily imply total abandonment of political speech limitations for charities under federal tax law. But it might suggest the imperative of major statutory reform.

143 *Id.*