

A SENSIBLE ALTERNATIVE TO REVOKING THE BOY SCOUTS' TAX EXEMPTION

MICHAEL J. BARRY*

I.	INTRODUCTION.....	137
II.	BACKGROUND ON TAX EXEMPTION IN THE UNITED STATES	144
	A. <i>Legal History of Charity</i>	144
	B. <i>Role of Nonprofit Organizations</i>	146
III.	FROM NONPROFIT TO TAX EXEMPTION (UNDER § 501(C)(3)).....	149
	A. <i>Principle Rationale for Exemption</i>	149
	1. <i>Subsidy Rationale</i>	149
	2. <i>Income Definition Rationale</i>	150
	3. <i>Other Rationales</i>	151
	B. <i>Rationales for the Charitable Contribution Deduction (Under § 170(c))</i> ...	152
	1. <i>Subsidy Rationale</i>	152
	2. <i>Income Defining Rationale</i>	153
IV.	FROM "CHARITABLE" TO EXEMPTION: THE PUBLIC POLICY REQUIREMENT.....	154
	A. <i>Bob Jones University v. United States</i>	154
	B. <i>The Public Policy Requirement</i>	155
	C. <i>Justice Rehnquist's Dissent</i>	156
	D. <i>Problems with the Public Policy Requirement</i>	156
V.	EXPLORING OTHER EXEMPTION PROVISIONS.....	157
	A. <i>I.R.C. § 501(c)(3) vs. I.R.C. § 501(c)(4)</i>	157
	B. <i>Social Welfare Organizations under I.R.C. § 501(c)(4)</i>	158
	C. <i>The Dual Structure in Regan v. Taxation With Representation</i>	160
VI.	RECLASSIFYING THE BSA	161
	A. <i>Preservation of Exemption</i>	162
	B. <i>Revocation of the Charitable Contribution Deduction</i>	162
	C. <i>The Ineffectiveness of Revocation of Tax Benefits for Achieving Non-Tax Goals</i>	163
VII.	CONCLUSION	165

I. INTRODUCTION

Most members were outraged when their colleagues stood on the floor of the United States House of Representatives to support an act that would repeal the Boy Scouts of America's (BSA) congressional charter.¹ Eleven weeks earlier the BSA had won a landmark victory before the Supreme Court in *Boy Scouts of America v. Dale*,² which arguably recognized a constitutional right to discriminate against homosexuals. Proponents of the repeal measure wanted Congress to

* J.D., Florida State University College of Law, 2002; B.S., Economics & History, Florida State University, 1999. I would like to thank Professor Steven Bank for suggesting this topic and for his invaluable contribution to this effort as both mentor and critic. Thanks to my classmates for their input during our Tax Policy Seminar and to Dr. Randall Holcombe for sharing his expertise. I appreciate the efforts of Chasity Frey and the Law Review staff in preparing this Comment for publication. Most importantly, I thank my wife, Courtney, for her love, support, and friendship.

1. 146 CONG. REC. H7448, 7450 (daily ed. Sept. 12, 2000) (statement of Rep. Woolsey) (advocating the repeal of the BSA's federal charter).

2. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

send its own message to the BSA, and the rest of the country, that such discrimination was unacceptable.

In *Dale*, an openly gay scout leader challenged his termination and the BSA's underlying policy of discriminating against homosexual scout leaders.³ The challenge was brought primarily under a New Jersey public accommodations statute, which prohibited discrimination based on sexual orientation in places of public accommodation.⁴ The New Jersey trial court rejected Dale's complaint, finding that the BSA was not a place of public accommodation.⁵ The court also held that Dale's forced inclusion in the BSA would violate that organization's First Amendment right to freedom of expressive association.⁶ After losing both appeals in New Jersey, the BSA appealed to the United States Supreme Court.⁷

Prominent organizations and advocate groups joined forces with the litigants, involved in what one commentator described as a "microcosm of the cultural war."⁸ Somewhat ironically, a prominent gay rights organization backed the BSA.⁹ The case was the legal manifestation of de Tocqueville's "conflicting passions":¹⁰ Dale demanded governmental protection from discrimination, while the BSA responded by asserting its freedom of association. Of course, the Court could only satisfy one "passion" at the expense of the other. Regardless of the outcome, it was clear that the repercussions of the decision would be profound.¹¹

The core of the BSA's argument was that the New Jersey statute infringed upon its freedom of expressive association.¹² The Court

3. *Id.* at 645. For relevant background information on James Dale, see *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1204-05 (N.J. 1999), *rev'd on other grounds*, 530 U.S. 640 (2000).

4. *Dale*, 530 U.S. at 645.

5. *Id.*

6. *Id.* at 646.

7. *Id.* at 646-47.

8. Joe Loconte, *The Boy Scouts' Day in Court: The Supreme Court Hears a High Stakes Case over Gay Scoutmasters, Will Freedom of Association Prevail?*, THE WKLY. STANDARD, Apr. 24, 2000, at 30, 31 (noting that the BSA was supported by such groups as the Mormon Church and the U.S. Catholic Conference, while Dale was backed by the American Civil Liberties Union and the National Organization for Women).

9. George F. Will, *The Boy Scouts' Unlikely Friends*, WASH. POST, Mar. 26, 2000, at B7 (reporting that Gays and Lesbians for Individual Liberty filed an amicus brief on behalf of the BSA).

10. What de Tocqueville described as "conflicting passions" are two basic desires: the desire to be led and the desire to remain free. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 338 (Henry Reeve trans., Arlington House 1966) (1835). In our context, Dale's anti-discrimination claim may be considered as the former, while the BSA's freedom of association defense more logically identifies with the latter.

11. Loconte, *supra* note 8, at 35 (quoting Professor Robert George who, in contemplating the ramifications of a Dale victory, predicted that associational freedom would ultimately be extinguished; that, "[i]n the name of freedom [courts] will wipe out freedom").

12. *Dale*, 530 U.S. at 646.

agreed, holding that the New Jersey statute violated the BSA's first amendment right to associate.¹³ It stated that, in pursuing its goals and beliefs, the BSA has the constitutional right to discriminate based on sexual preference in determining and implementing the standards for its scout leaders.¹⁴ Writing for the majority, Chief Justice Rehnquist accepted the BSA's assertion that it did not want to promote homosexual conduct, concluding "[w]e need not inquire further."¹⁵ Justice Souter's dissent echoed *Roberts*,¹⁶ insisting that the majority's treatment of the case afforded too much deference to the BSA's own characterization of its expressive purpose. To be satisfied with the organization's own appraisal of its mission, he continued, "would convert the right of expressive association into an easy trump of any antidiscrimination law."¹⁷

Dale immediately attracted a great deal of national,¹⁸ and even international,¹⁹ attention to the BSA and its discriminatory policy. The decision has been subjected to the exhaustive scrutiny of legal commentators,²⁰ with many of them criticizing various aspects of the opinion and the result it reached.²¹ Some of them, including Justice

13. *Id.* at 647-48 (reiterating the rule articulated in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), that the right to associate necessarily includes the right to not associate).

14. *Id.* at 656.

15. *Id.* at 651.

16. *See Roberts*, 468 U.S. at 627-28 (rejecting the Jaycees' contention that the admission of women would compromise its expressive purpose).

17. *Dale*, 530 U.S. at 701-02 (Souter, J., dissenting).

18. *See, e.g., Excerpts From the Supreme Court's Ruling on Gays and the Boy Scouts*, N.Y. TIMES, June 29, 2000, at A28 (providing portions of the opinion); Edward Walsh & Hanna Rosin, *Court Says Boy Scouts Can Expel Gay Leader*, WASH. POST, June 29, 2000, at A1 (briefly discussing the decision and its possible implications); Roger Wilkins, Editorial, *The Court's Term Is Over, but Not the Discord*, N.Y. TIMES, June 30, 2000, at A24 (criticizing the decision).

19. David Osborne, *Setback for Gay Movement as Court Rules Against Sacked Scoutmaster*, THE INDEP. (London), June 29, 2000, at 14, available at LEXIS, News Library, Major Newspaper File (writing that "[t]he gay movement in the United States suffered a setback" with the Court's ruling) (on file with author).

20. *See generally* David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121 (2001); John C. O'Quinn, *Recent Developments, "How Solemn is the Duty of the Mighty Chief": Mediating the Conflict of Rights in Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 24 HARV. J.L. & PUB. POL'Y 319 (2000); Elizabeth A. Powers, Comment, *Constitutional Law: The Freedom of Expressive Association, an Organization's Right to Choose What Not to Say: Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 53 U. FLA. L. REV. 399 (2001); John Fonte, *Why There is a Culture War, Gramsci and Tocqueville in America*, POL'Y REV., Dec. 1, 2000, at 15 (characterizing the reasoning in *Dale* as quintessentially Tocquevillian).

21. Taylor Flynn, *Don't Ask Us to Explain Ourselves, Don't Tell Us What to Do: The Boy Scouts' Exclusion of Gay Members and the Necessity of Independent Judicial Review*, 12 STAN. L. & POL'Y REV. 87, 87-88 (2001) (contending that *Dale* weakens the Court's ability to uphold state anti-discrimination laws); Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 WAKE FOREST L. REV. 973, 1020-26 (2000) (claiming that the majority improperly utilized purposivism, rather than pragmatic textualism, in construing the New Jersey statute); Darren Lenard

Stevens, claim the Court was too easy on the BSA.²² Moreover, criticism was not confined to law review articles; *Dale* also sparked opposition from those in the media and the general public who disagreed with the BSA's policy. Many considered the decision to be an endorsement from the Court of the BSA's policy.²³ There is even an organization primarily devoted to ending that policy.²⁴

While the decision brought the BSA and its anti-gay policy to the headlines, criticism of the policy existed prior to *Dale*.²⁵ But the decision has certainly fueled the fire, leading some critics²⁶ to question whether it is appropriate for the BSA to continue to profit from the

Hutchinson, "Closet Case": *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 87-88 (2001) (expressing concern that *Dale* ignored important considerations of gay and lesbian identity issues that may contribute to "the silencing of sexually oppressed classes"); N. Nicole Endejann, Note, *Coming Out is a Free Pass Out: Boy Scouts of America v. Dale*, 34 AKRON L. REV. 893, 899-908 (2001) (arguing that the Court gave too much deference to the BSA's claim that homosexuality was against its expressive purpose); Michael T. Osborne, Note, *Erecting Prejudice into Legal Principle: Boy Scouts of America v. James Dale*, 36 GONZ. L. REV. 515, 516-17 (2000) (criticizing the Court for failing to fully apply the balancing test of *Roberts*). *But see* O'Quinn, *supra* note 20, at 339-48 (praising the reasoning of the decision while attacking the dissenting opinions).

22. *Dale*, 530 U.S. at 676-78 (Stevens, J., dissenting) (determining that the "BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities is highly significant"); Endejann, *supra* note 21, at 899-908; Erica L. Stringer, Note, *Has the Supreme Court Created a Constitutional Shield for Private Discrimination Against Homosexuals? A Look at the Future Ramifications of Boy Scouts of America v. Dale*, 104 W. VA. L. REV. 181, 182-83 (2001) (arguing that the balancing test of *Roberts* was improperly abbreviated by the *Dale* Court).

23. *See, e.g.*, Todd Camp, *Scouts' Honor?*, FT. WORTH STAR-TELEGRAM, Apr. 29, 2001, at 1 (criticizing the BSA's discriminatory policy as "violating its own standards").

24. An organization called "Scouting for All" has been established with the purpose of ending the BSA's discrimination against homosexuals. It also advocates for gay rights in other areas as well. The organization can be located at <http://www.scoutingforall.org> (last visited Feb. 10, 2002) (on file with author), where it posts various information related to its cause. The site provides news and recent events related to the BSA.

25. Rick Cendo, Commentary, *Scouts' Honor?*, CHI. TRIB., Jan. 20, 1998, at N12 (stating that the BSA "market[s] themselves as a public service to all boys" but they "appear to think that part of their public service is to teach boys by example that it's good to shun and exclude those who have a different sexual orientation"); Robert V. Ritter, Editorial, *The Boy Scout Ban*, WASH. POST, Dec. 17, 1993, at A24. *But see* Timothy P. Smith, Editorial, *Is Political Correctness Worth Cost to Youth?*, FT. LAUD. SUN SENT., Sept. 25, 2000, at 17A (scoutmaster relating that the BSA is overwhelmingly a very positive influence in its scouts' lives).

26. *See generally* David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167 (arguing that tax exemptions should be granted and revoked in order to further social policy); Russell J. Upton, Comment, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793 (2001) (contending that the revocation of the BSA's exemption is the proper course of action for combating its controversial policy towards homosexuals). Another method that has been suggested to discourage the BSA's policy is the revocation of its monopoly status, which exists via federal charter. *See* Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, THE HUMANIST, Sept. 19, 1995, at 6.

various government benefits it receives.²⁷ In fact, not long after *Dale* was handed down, Congress was debating whether to repeal the BSA's federal charter, although the proposal was overwhelmingly rejected.²⁸ Other critics, perhaps mindful of nonprofit organizations' peculiar unaccountability,²⁹ have concluded that the organization's federal tax exemption should be completely revoked, just as Bob Jones University's exemption was revoked for the school's engaging in racial discrimination.³⁰ The common feeling among these critics, in

27. See Brennen, *supra* note 26, at 169-70 (relating that "despite calls for an end to tax benefits," the Boy Scouts will retain its favorable tax treatment); Upton, *supra* note 26, at 820-21 (stating that, by providing tax exemption, the government is "not only condoning, but also, effectively funding the organization's anti-gay policy"). This Comment uses tax-exempt status, tax exemption, and § 501(c)(3) interchangeably unless otherwise indicated.

28. The legislation was defeated in the House by a vote of 362-12. Apparently it was merely intended to send a message to the BSA that its long-held charter was not infallible. 146 CONG. REC. H7448, 7450 (daily ed. Sept. 12, 2000) (statement of Rep. Woolsey). See also *House Backs Boy Scouts in Vote Over Gay Issue*, N.Y. TIMES, Sept. 14, 2000, at A21 (reporting the failed proposal). For commentary prior to the House vote, see Carolyn Lochhead, *Bill to Sanction Boy Scouts Faces Likely Defeat Today: North Bay Lawmaker Wants to Punish Group for Barring Gay Leaders*, SAN FRANCISCO CHRON., Sept. 13, 2000, at A3 (relating that the proposal faced considerable opposition); Editorial, *No Honor for Intolerance*, SAN FRANCISCO CHRON., Aug. 7, 2000, at A22 (supporting proposal to repeal the BSA charter); Charley Reese, Editorial, *Take Scouts Charter? Madness*, ORLANDO SENT., Sept. 7, 2000, at A10 (blasting Democrats proposing repeal of BSA's charter as having "gone mad").

29. For a discussion of the accountability of nonprofit organizations, see RANDALL G. HOLCOMBE, WRITING OFF IDEAS: TAXATION, FOUNDATIONS, AND PHILANTHROPY IN AMERICA 171-95 (2000). Another commentator related that the nonprofit sector is "inhabited by a congeries of tribes who acknowledged fealty to neither Caesar nor the Invisible Hand, who were accountable in neither the arena of politics nor the marketplace of economics." Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 503 (1990). As a practical matter, nonprofit organizations are usually given only cursory review when applying for exemption, and they are rarely audited once it has been granted. See Rebecca Carr, *IRS is Too Lax in Screening Nonprofit Groups, Critics Say*, ATLANTA J. CONST., Oct. 24, 2000, at A4 (reporting criticism of the quality of IRS oversight of exempt organizations).

30. See Upton, *supra* note 26, at 803-04 (recognizing that revoking the BSA's federal exemption will require the involvement of the Court or Congress, but suggesting that revocation can be achieved more easily at the state level); Cendo, *supra* note 25, at N12 (questioning whether the BSA truly provides a public service that justifies a tax subsidy); Ritter, *supra* note 25, at A24 (concluding that "it is time for Congress and the states to revoke the tax-exempt status of the [BSA] and other discriminatory private nonprofit organizations"); Taylor, *supra* note 26, at 7 (asking rhetorically whether the BSA can "have it both ways," by being private for the sake of discrimination but public for the sake of eligibility for taxpayer support). *But see* Patrick J. Reilly, Editorial, *The Boy Scout Ban*, WASH. POST, Jan. 10, 1994, at A14 (writing to say that revoking the BSA's tax exemption "is not the logical reaction that Robert V. Ritter would lead us to believe," and that "while tax-exemption is not a right for any group, specifically targeting organizations with unpopular beliefs amounts to tyranny"); Smith, *supra* note 25, at 17A (scoutmaster arguing that the many positive aspects of the BSA should not suffer because of one unpopular policy). The Supreme Court, in upholding the revocation of a University's exemption in *Bob Jones University v. United States*, 461 U.S. 574, 585-86 (1983), stated that to qualify for exemption under § 501(c)(3), a charitable organization cannot be engaged in activity that is illegal or contrary to fundamental public policy.

light of the outcome in *Dale*, is that the unpopular policy is best addressed through the tax code.³¹

But is this a reasonable proposition? Should we take away an organization's exemption because it has an unpopular policy? The idea that we should revoke the tax exemption of one of the oldest charitable organizations in the country is certainly a startling proposal that deserves attention, but not because the proposal is practical. Admittedly, proponents of revocation represent a very small minority, and the BSA is not in any real danger of losing its exemption. Rather, the proposal deserves attention because it raises fundamental issues underlying the tax exemption policy. The proposal provides a context in which to explore policy options that are available for dealing with another *Bob Jones*.

On the one hand, we could decide, as many have, that the Internal Revenue Service should duplicate *Bob Jones* by simply revoking the BSA's tax exemption. However, that course of action would squander the chance to consider the policy alternatives that were not available to the Court when it decided *Bob Jones*. It would squander the opportunity to weigh policy considerations that the Court is neither empowered nor generally inclined to entertain. After all, the earliest criticism of the *Bob Jones* decision was that the Court wrongly decided a policy question that is reserved to the representative branches of government.³²

Resisting the gravitational pull towards *Bob Jones* in order to arrive at a novel approach for the BSA can help recapture the tax policy-making power from the Court. It affords policymakers the chance to do what their predecessors perhaps should have done almost twenty years ago: set the policy themselves rather than allowing the Court to do it for them. In short, the prospect of revoking the BSA's exemption presents the setting for an intriguing tax policy exercise.

The argument that the BSA's exemption should be revoked can be separated into three major components. First, that tax exemption should be contingent upon the organization's purpose being consistent with some notion of fundamental public policy, which is what the Supreme Court determined in *Bob Jones*.³³ Second, that discrimination against homosexuals is contrary to fundamental public policy³⁴ and therefore, under *Bob Jones*, warrants revocation of the

31. See *supra* notes 26-27.

32. *Bob Jones*, 461 U.S. at 612 (Rehnquist, J., dissenting).

33. See *id.* at 585-86 (holding that to qualify for exemption under § 501(c)(3), a charitable organization cannot be engaged in activity that is illegal or contrary to fundamental public policy); Upton, *supra* note 26, at 835-36.

34. 146 CONG. REC. H7448, 7448 (daily ed. Sept. 12, 2000) ("A policy of excluding homosexuals is contradictory to the Federal Government's support for diversity and tolerance and should not be condoned as patriotic, charitable, or educational."). *But see* Upton, *supra* note 26, at 835-36 (recognizing that there is currently no federal policy against discrimina-

BSA's exemption. Finally, that the revocation of I.R.C. § 501(c)(3)³⁵ status is the best course of action from a tax policy perspective when dealing with an activity that is contrary to public policy, particularly in the context of the BSA.³⁶ This Comment addresses the tax policy considerations involved in the context of the BSA in light of *Bob Jones*. As this is exclusively a tax policy exercise, the other components are assumed *arguendo* to exist, and only the last point is addressed in this Comment.

The purpose of this Comment is to identify a better way to use tax policy in response to the BSA's discriminatory policy, while considering the *Bob Jones* precedent, without running afoul of the tax policy reasons for granting exemption in the first place. The principle objection to outright revocation of the BSA's exemption is that it would fail to account for the underlying rationales for the exemption. The proposal rushes to invoke *Bob Jones* without contemplating intermediate solutions that may address the public policy issue while also preserving the integrity of the tax exemption provision. For purposes of this argument, this Comment makes two major assumptions:³⁷ first, that discrimination against homosexuals is contrary to fundamental public policy; and second, that tax policy is an appropriate vehicle for effectuating policy goals.

Proponents of revoking the BSA's exemption are pointing to the wrong place. Assuming that discrimination against homosexuals is contrary to fundamental public policy, warranting revocation under *Bob Jones*, the proper place for a change in tax status is the BSA's charitable contribution deduction rather than the exemption of the organization itself. The charitable contribution deduction is provided as a federal subsidy to encourage contributions to worthy causes and may properly be revoked for policy reasons.³⁸

tion based on sexual orientation, but noting that such a policy exists in twelve states and the District of Columbia). This point is clearly the weakest of the three, but it is far from inconceivable that this may not be the case in the near future. This Comment does not intend to express a viewpoint on this issue. Instead, the objective of this Comment is to assess the tax policy considerations that are presented under the hypothetical scenario that discrimination against homosexuals is against fundamental public policy.

35. I.R.C. § 501(c)(3) (2000).

36. See Brennen, *supra* note 26, at 170 (asserting that the tax exemption is a good way to achieve social policy goals); Upton, *supra* note 26, at 805 (claiming that the combination of the additional financial burden, the "stigma" of revocation, and the "backlash" from supporters may bring about a change in the BSA's discriminatory policy).

37. Implicit in the assumption that discrimination against homosexuals violates fundamental public policy is the additional assumption that the BSA's policy would not pass the *Bob Jones* test. The analysis and conclusions in this Comment are based on the assumption that the BSA would face the same fate as Bob Jones University and therefore attempts to avoid that result while addressing the unsatisfactory condition of the BSA's current tax status.

38. See *infra* notes 110-119 (discussing charitable contribution deduction rationale) and accompanying text.

The exemption, on the other hand, represents the recognition that nonprofits like the BSA do not realize taxable income.³⁹ Revoking its exemption on policy grounds is inconsistent with the reason for granting the exemption in the first place and therefore the total revocation of the BSA's exemption is unacceptable from a tax policy standpoint. As an alternative to total revocation, this Comment suggests that the BSA's charitable contribution deduction may be eliminated by converting the BSA to a § 501(c)(4) organization.⁴⁰ This solution would be consistent with tax policy theory as well as the public policy requirement imposed upon charitable organizations by *Bob Jones*.

II. BACKGROUND ON TAX EXEMPTION IN THE UNITED STATES

A. *Legal History of Charity*

The basic notion of a charity can be traced at least as far back as 1362.⁴¹ The legal history of charity extends to 1601, the year in which the English Statute of Charitable Uses was enacted.⁴² This Statute enumerated several causes deemed to be charitable, such as: "relief of aged, impotent and poor people . . . maintenance of sick and maimed soldiers and mariners' . . . and the 'aid and help of . . . persons decayed.'"⁴³

The implementation of the Statute by the English common law over the centuries had a great influence on what was considered "charitable."⁴⁴ Shortly before the American Revolution, the English Court of Chancery established the public benefit principle, which states that "a trust, in order to be charitable, must be of a public character; that is, it must be for the benefit of the community or an appreciably important section of the community."⁴⁵ In 1891, Lord McNaughten articulated that "[c]harity in its legal sense comprises four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling

39. See *infra* notes 92-103 (discussing exemption rationale) and accompanying text.

40. This Comment is not advocating any change in the BSA's tax status. It merely offers an intermediate solution as a sound policy alternative to total revocation.

41. Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 U. FLA. L. REV. 419, 425 (1998) (citing a poem written in 1362 that chronicles the means by which more fortunate citizens may give back to their community).

42. *Id.* at 425-26.

43. *Id.* (quoting JOHN P. PERSONS ET AL., CRITERIA FOR EXEMPTION UNDER SECTION 501(C)(3), RESEARCH PAPER SPONSORED BY COMM'N ON PRIVATE PHILANTHROPY & PUBLIC NEEDS (U.S. Dept. of Treasury 1977) at 1912-13).

44. See *id.* at 426.

45. SPENCER G. MAURICE & DAVID B. PARKER, TUDOR ON CHARITIES 4 (7th ed. 1984).

under any of the preceding head[ings].”⁴⁶ These principles remained prominent in English law and were ultimately inherited by American jurisprudence. They served as a foundation upon which the American law on charities was built.⁴⁷

The exemption of charities from income tax has been the practice in this country as long as there has been a federal income tax.⁴⁸ The charitable contribution deduction has been allowed since 1917.⁴⁹ After the Revolution, the United States began to develop its own law on charity,⁵⁰ which manifested itself in the tax exemption provisions of the first corporate income tax law, passed in 1894.⁵¹ The language of the Tariff Act of 1894 included the basic elements of the current version of § 501(c)(3). It exempted “corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes.”⁵² The Tariff Act of 1909 added the requirement that net income earned by such exempted organizations could not “inure[] to the benefit of any private stockholder or individual.”⁵³

There were a number of minor amendments over the years that enumerated additional types of eligible charitable organizations or otherwise amended the scope of eligibility, eventually arriving in 1954 at the current version of § 501(c)(3).⁵⁴ Although there have been

46. Crimm, *supra* note 41, at 426.

47. *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983) (acknowledging that Pemsel “has long been recognized as a leading authority in this country”); *id.* at 590 n.16 (stating that the “common-law requirement of public benefit is universally recognized”).

48. *Id.* at 615-16 (Rehnquist, J., dissenting) (tracing the legislative history of § 501(c)(3)). See also Crimm, *supra* note 41, at 427 (stating that the first federal corporate income tax, which was adopted in 1894, provided for an exemption for certain charitable organizations); Herman T. Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525, 525-26 (1958) (stating that the original exemption from federal income taxation was in 1894); Tommy F. Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects and Remedies*, 5 VA. TAX REV. 1, 8 (1985) (noting that the charitable exemption originated in 1894).

49. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344 (1972).

50. Crimm, *supra* note 41, at 427.

51. See *id.*

52. *Bob Jones*, 461 U.S. at 615 (Rehnquist, J., dissenting) (citing the Tariff Act of 1894, ch. 349, § 32, 28 Stat. 556 (1894)).

53. *Id.* at 616 (Rehnquist, J., dissenting) (citing ch. 6, § 38, 36 Stat. 113 (1909)).

54. The Tariff Act of 1913 (exempting scientific organizations); The Revenue Act of 1918 (exempting organizations that promote the prevention of cruelty to children and animals); The Revenue Act of 1921 (exempting literary endeavors and adding the “community chest, fund, or foundation” language); The Revenue Act of 1934 (prohibiting exempt organizations from engaging in propaganda and lobbying); The Revenue Act of 1954 (exempting organizations that conduct testing for public safety). See *Bob Jones*, 461 U.S. at 615-16 (Rehnquist, J., dissenting). The current version of § 501(c)(3) follows:

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

several changes, the core language in § 501(c)(3) is similar to the original exemption provision enacted over a hundred years ago.⁵⁵

B. Role of Nonprofit Organizations

In his famous reflection on American life, Alexis de Tocqueville observed:

If it be proposed to advance some truth, or to foster some feeling by the encouragement of a great example, they form a society. Wherever, at the head of some new undertaking, you see the Government in France, or a man of rank in England, in the United States you will be sure to find an association.⁵⁶

As de Tocqueville related, nonprofit organizations have always been very important and highly valued in the United States.⁵⁷ Nonprofit organizations existed in England long before they appeared in the New World, but their place in English society was never as fundamental as it has become in the United States.⁵⁸ De Tocqueville attributed this difference to a fundamental disparity between aristocratic and democratic society.⁵⁹ Commenting on the American transition to democracy from the old aristocratic order, he recognized that a society's population that loses "the power of achieving great things single-handed, without acquiring the means of producing them by united exertions, would soon relapse into barbarism."⁶⁰

Not long after *Democracy in America* was published, John Stuart Mill professed that nonprofit organizations were desirable from a societal standpoint based on a theory of pluralism, and he further emphasized the role of government in advancing their causes.⁶¹ He observed that:

mals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (2000).

55. Compare Crimm, *supra* note 41, with sources cited, *supra* note 54 and accompanying text.

56. DE TOCQUEVILLE, *supra* note 10, at 114.

57. *Id.*

58. *Id.* at 115 (noting generally that in England "the principle of association was by no means so constantly or so adroitly used").

59. *Id.* at 115-16 (noting that in an aristocracy there are a small number of very powerful members of society with control over the majority of the population; whereas in a democracy, "citizens are independent and feeble" and therefore require the ability to associate).

60. *Id.*

61. See JOHN STUART MILL, *On Liberty*, in THREE ESSAYS 135 (1912).

Government operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience. What the State can usefully do, is to make itself a central depository, and active circulator and diffuser, of the experience resulting from many trials. Its business is to enable each experimentalist to benefit by the experiments of others; instead of tolerating no experiments but its own.⁶²

The idea of pluralism was also discussed in *Green v. Connally*,⁶³ in which the court described pluralism “as a prime social benefit of general significance.”⁶⁴ It noted that the advantage of “decentralized choice-making” is that it is “more efficient and responsive to public needs than the cumbersome and less flexible allocation process of government.”⁶⁵ The *Dale* Court apparently subscribed to the rather convincing logic that “[a] society in which each and every organization must be equally diverse is a society which has destroyed diversity.”⁶⁶

However, recent arguments concerning the importance of nonprofit organizations have focused on economic theory rather than pluralism. Professor Henry Hansmann authored the seminal work in the area, in which he articulates his contract failure theory⁶⁷ and discusses various reasons why the nonprofit sector is superior to the for-profit sector in some cases.⁶⁸ Others have come to the same conclusion in specific industries.⁶⁹

Hansmann’s contract failure theory states that profit-seeking firms will choose not to supply certain goods and services even

62. *Id.*

63. 330 F. Supp. 1150, 1162 (D.D.C. 1971).

64. *Id.*

65. *Id.*

66. Brief for Petitioners at 19-20, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

67. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 844-45 (1980) (arguing that the contract mechanism that exists in the for-profit sector fails to provide adequate incentive and protection to support the provision of goods and services that are provided by the nonprofit sector).

68. *Id.* at 846-49 (explaining the “nondistribution constraint” inherent in nonprofit organizations, the higher amount of trust that results from the inability to distribute profits, and the general notion of the “free rider” problem with public goods being reasons why the nonprofit sector is better suited for providing certain goods and services); *id.* at 845 (noting that the absence of shareholders in nonprofit organizations constitutes a major difference in structure and incentives between the nonprofit and for-profit enterprise). See also HOLCOMBE, *supra* note 29, at 197-214.

69. See, e.g., James T.Y. Yang, *Collaboration Between Nonprofit Universities and Commercial Enterprises: The Rationale for Exempting Nonprofit Universities from Federal Income Taxation*, 95 YALE L.J. 1857, 1874-76 (1986) (arguing that nonprofit organizations are better than government in the area of research universities, and noting that nonprofits are free of bureaucracy and therefore more efficient and responsive to ideas and change).

though there is some demand for them.⁷⁰ This is particularly apparent in areas where conventional market forces—supply and demand—are distorted, as in the case of “public goods.”⁷¹ Where government fails to do so, nonprofits are particularly well-suited to provide public goods, such as national defense, which are unattractive or impractical in the for-profit sector.⁷² The failure of government to provide certain public goods completes the so-called twin-failure theory, which “describes nonprofit [organizations] as a response to social and economic challenges beyond the capabilities of for-profit firms on the one hand and government on the other.”⁷³

Hansmann’s market failure theory implies that the role of nonprofits is confined only to areas in which such a failure exists.⁷⁴ But such confinement may be neither necessary nor appropriate.⁷⁵ Perhaps the role of nonprofit organizations extends beyond the realm of (for-profit) market failure, and even intrudes to some extent on the traditional stomping grounds of the market economy.⁷⁶

The critical difference between the contract failure and market failure theories is that market failure theory assumes that nonprofit goods and services are indistinguishable from those provided by for-profit firms.⁷⁷ Others reject this assumption, arguing that nonprofit organizations provide something different than their for-profit counterparts: nonprofit organizations do not simply provide goods and services, they provide the altruistic supply of goods and services.⁷⁸ While there is disagreement over the scope of the role of nonprofit

70. Hansmann, *supra* note 67, at 843-45.

71. *Id.* at 843-48.

72. *See Id.*, *supra* note 29, at 201-08. National defense has two characteristics common to goods and services that are more appropriately provided by the public or non-profit sector: joint consumption and nonexcludability. *Id.* at 202-03. National defense is consumed by one person without detracting from consumption by fellow users. *Id.* Also, national defense is nonexcludable in that it is difficult or impossible to prevent individuals from consuming the good or service, i.e., it would be exceedingly difficult to adequately protect certain citizens while not affording the same protection to their neighbors. *Id.*

73. *See Id.*, *supra* note 29, at 206-08; Atkinson, *supra* note 29, at 505; Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1391 (1991).

74. Hansmann, *supra* note 67, at 844-45.

75. *See* Atkinson, *supra* note 29, at 510.

76. *Id.*

77. Hansmann, *supra* note 67, at 844-45. Beyond his general discussion of the topic, Hansmann called attention to different types of nonprofit organizations. “Donative” nonprofits are those that receive most of their income or funding from grants and donations. “Commercial” nonprofits are those that raise most or all of their income or funding from prices charged for goods and services. Examples of commercial nonprofits include most hospitals, the American Automobile Association, and nursing homes. As is the case with most attempts at categorization, many nonprofit organizations are somewhere between the two categories, deriving a significant portion of their revenues from donations and the sale of goods and services. *See id.* at 840-41.

78. Atkinson, *supra* note 29, at 510. This theory represents the essence of Professor Atkinson’s altruism rationale for exempting charitable organizations from income taxation.

organizations, it is generally acknowledged that the nonprofit sector serves a critical role alongside the for-profit and public sectors in the United States.

III. FROM NONPROFIT TO TAX EXEMPTION (UNDER § 501(C)(3))

The discussion of exemption under § 501(c)(3) concerns more than exemption; an equally important benefit afforded by § 501(c)(3) is the charitable contribution deduction. Although (c)(3) organizations receive both, the two benefits are distinct. And while the reason for granting the exemption and charitable contribution deduction is often considered to be the same, the rationales underlying the two benefits are not identical. The difference between these rationales reveals why the argument for outright revocation of the BSA's exemption is unsatisfying from a tax policy standpoint, and it suggests an alternative tax policy in the BSA situation that is consistent with tax policy theory.

A. Principle Rationale for Exemption

Several different theories attempt to explain the rationale for the tax exemption of charitable organizations. The subsidy rationale has been the prominent explanation, and it is usually the one cited by courts.⁷⁹ Other scholars have offered capital formation, altruism, or donative rationales.⁸⁰ However, this Comment contends that the best rationale for the exemption, put forth to refute the subsidy rationale, is the income definition rationale offered by Professors Bittker and Rahdert.⁸¹

1. Subsidy Rationale

The Supreme Court has stated that exemption "is intended to encourage the provision of services that are deemed socially beneficial."⁸² It is also "intended to aid" charitable organizations that provide some public benefit.⁸³ Tax exemption is based on the notion that government is relieved of a portion of its public burden by the activi-

79. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 590 (1983) (citing H.R. REP. NO. 75-1860, at 19 (3d Sess. 1938)).

80. See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981); Atkinson, *supra* note 29; Hall & Colombo, *supra* note 73. Professor Nina Crimm has suggested a "Risk Compensation" theory, but this explanation seems to be a variation of the "Subsidy" theory and therefore it has not been recognized as an independent rationale. See Crimm, *supra* note 41.

81. See Boris J. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976).

82. *Portland Golf Club v. Comm'r*, 497 U.S. 154, 161 (1990).

83. *Trinidad v. Sagrada*, 263 U.S. 578, 581 (1924) (adding that considering the new language, a tax subsidy is only appropriate when the activity is "not conducted for private gain").

ties and services of charitable organizations and should therefore facilitate those private activities by providing a tax exemption.⁸⁴

Charitable organizations provide goods and services that would otherwise have to be supplied by the government;⁸⁵ in other words, they provide a public service or benefit.⁸⁶ The notion is that instead of demanding taxes from charitable organizations that provide a public service or benefit, the government should compensate these private organizations in the form of a tax break.⁸⁷ In this way, the amount of taxes that would otherwise be paid by charitable organizations represents an indirect subsidy from the government. The exemption is designed to facilitate or encourage exempt activities by relieving some of the costs otherwise associated with such activities.⁸⁸

However, in *Walz v. Tax Commissioner*,⁸⁹ the Court disapproved of advancing this rationale too far, stating that exemption should not be likened too closely to a government subsidy.⁹⁰ Rather than viewing the exemption as a form of government support, the Court stated that the government “simply abstains from demanding that the [organization] support the state.”⁹¹ Furthermore, Justice Brennan added that tax exemptions and subsidies are “qualitatively different.”⁹² The *Walz* Court seemed to be pulling in the reins on the subsidy rationale by emphasizing the distinction between exemption and direct government support, suggesting that there is a more satisfying explanation for the exemption.

2. *Income Definition Rationale*

Professors Bittker and Rahdert offer the income definition rationale as an alternative to the subsidy rationale.⁹³ They conclude that the subsidy rationale is inadequate as a complete rationale for tax exemption.⁹⁴ Bittker and Rahdert argue that the subsidy rationale does not provide an affirmative reason for exempting charitable organizations instead of having government provide their services; in-

84. See *Portland Golf Club*, 497 U.S. at 161; *Bob Jones*, 461 U.S. at 590; *Trinidad*, 263 U.S. at 581; *Duffy v. Birmingham*, 190 F.2d 738, 740 (8th Cir. 1951).

85. See Hansmann, *supra* note 80, at 66-67.

86. *Trinidad*, 263 U.S. at 581 (public benefit); *Duffy*, 190 F.2d at 740 (public service).

87. See *Bob Jones*, 461 U.S. at 590; see also Hansmann, *supra* note 80, at 66-67.

88. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 9-11 (7th ed. 1998) (enumerating six rationales for the tax exemption under § 501(c)(3), the last three of which could be categorized under the subsidy rationale).

89. 397 U.S. 664 (1970).

90. *Id.* at 675 (dealing with tax exemption within the context of the Establishment Clause).

91. *Id.* (alteration in original) (determining that exemption does not constitute government sponsorship of churches in violation of the Establishment Clause).

92. *Id.* at 690 (Brennan, J., concurring).

93. See Bittker & Rahdert, *supra* note 81.

94. *Id.* at 332-33.

instead it merely illustrates that exemption and government funding are equivalent and interchangeable.⁹⁵ They argue that the subsidy rationale does not assert any justification for a preference between an exemption and government funding or a reason why one is superior to the other.⁹⁶ The income definition rationale proposes that the real reason for the exemption of charitable organizations involves the problem or inability of defining taxable income for charitable organizations.⁹⁷ Essentially, the income definition rationale contends that charitable organizations are exempt because they do not have “income” under the Code.⁹⁸

The trouble with taxing charitable organizations is reflected in two dilemmas. First, should a charitable organization be taxed as an entity or, alternatively, be allowed to pass its income through to its beneficiaries (much like a partnership)?⁹⁹ Under the income definition rationale, charitable organizations cannot be taxed at the entity level because there is no accession to wealth; it is all passed along to its beneficiaries or the public, or reinvested.¹⁰⁰ Even if charitable organizations can be taxed as entities, IRS guidelines for business expenditure deductions apply unfavorably to charitable organizations.¹⁰¹ The exemption exists, therefore, because the earnings of charitable organizations cannot be considered income in the usual sense under the Code.¹⁰²

The second reason for the exemption under this rationale is that, even if there is definable taxable income, there are no methods for determining a suitable tax rate.¹⁰³ Neither the “ability to pay” concept nor the “net income” rationale for income taxation apply very well to charitable organizations.”¹⁰⁴

3. *Other Rationales*

As a result of dissatisfaction with the rationale offered by Bittker and Rahdert, Professor Hansmann has proposed that the proper rationale for charitable organizations’ tax exemption is that “it helps to compensate for the constraints on capital formation that nonprofits

95. *Id.*

96. *Id.*

97. *Id.* at 307-14.

98. *Id.* at 305.

99. *Id.* at 309-11.

100. *Id.*

101. *Id.* at 310 (stating that the IRS does not allow deductions for “expenditures not motivated by the desire for profit”).

102. *Id.* at 305, 309-11.

103. *Id.* at 314-16.

104. *Id.* at 333.

commonly face.”¹⁰⁵ Hansmann contends that, because nonprofit organizations are less attractive to traditional investors, the tax exemption offsets this disadvantage with the ability to retain a greater portion of its earnings.¹⁰⁶

Professor Atkinson states that government should subsidize these organizations because charitable organizations are altruistic and provide something to society that is desirable.¹⁰⁷ Atkinson argues that the exemption represents an “affirmative preference” for what the organization is doing.¹⁰⁸ The altruism rationale rejects the market failure as it applies to tax exemptions.

The market failure rationale asserts that nonprofits should only receive an exemption where there is a failure in the market—when the for-profit sector fails to satisfy the demand for a good or service.¹⁰⁹ However, rather than merely filling in the gap left by the for-profit sector, the altruism rationale argues that charitable organizations should be granted an exemption for *everything* they do, including providing goods and services that are also provided by for-profit firms.¹¹⁰ Under the altruism rationale, charitable organizations do not provide identical goods and services like the for-profit sector; the altruistic nature of nonprofits is what distinguishes the two.¹¹¹

B. Rationales for the Charitable Contribution Deduction (Under § 170(c))

1. Subsidy Rationale

The Supreme Court has stated that the charitable contribution deduction is “a form of subsidy that is administered through the tax system.”¹¹² A charitable contribution deduction is a subsidy to charitable giving, which indirectly constitutes a subsidy to charitable organizations.¹¹³ Much like the rationale for an exemption, the reasoning underlying the charitable contribution deduction has been that government is relieved of some part of its public burden by charitable organizations—that which would otherwise “fall on the shoulders of

105. See Hansmann, *supra* note 80, at 55. Professor Hansmann offers his theory in response to the theory put forth by Professors Bittker and Rahdert. His own contribution is premised on the rejection of Bittker and Rahdert’s conclusion that charitable organizations do not realize “income.” See *id.* at 58-62; Bittker & Rahdert, *supra* note 81, at 305.

106. Hansmann, *supra* note 80, at 56.

107. Atkinson, *supra* note 29, at 618.

108. *Id.*

109. *Id.* at 510; Hansmann, *supra* note 67, at 844-45.

110. Atkinson, *supra* note 29, at 510.

111. *Id.* at 509-10.

112. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

113. Andrews, *supra* note 49, at 344.

the [g]overnment”—and the government should compensate for that relief with favorable tax treatment.¹¹⁴

The Court has recognized that favorable tax treatment is “intended to aid” charitable organizations that provide some public benefit.¹¹⁵ Therefore, where the government is relieved of a responsibility, it provides favorable tax treatment to those organizations that provide the relief.¹¹⁶ The provision for the charitable contribution deduction has been extended in order to subsidize these contributions.¹¹⁷ The deduction has also been recognized as an effective way to support charitable giving.¹¹⁸

The Treasury Secretary once stated that the charitable contribution deduction is an appropriate way to encourage charitable organizations.¹¹⁹ Professor Bittker describes the deduction as “rewards for praiseworthy behavior.”¹²⁰ Whether it is characterized as encouragement or reward, people seem to agree that the compelling reason for the deduction is to support or subsidize charitable contributions and the organizations that receive them.

2. *Income Defining Rationale*

The income defining rationale has been offered in this area to suggest that contributions made to charitable organizations are not to be considered “consumption” by the contributor and, therefore, are not included in taxable income.¹²¹ Professor Andrews argues that the provision for the charitable contribution deduction, as well as other types of deductions, is attributable to a refinement of the notion of income rather than a departure from it.¹²² Andrews labels the distinguishing factor between taxable personal consumption and nontaxable charitable contribution as that of “preclu[sive] enjoyment”: the former involves private, non-divisible goods or services that preclude

114. *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972). See also *Bob Jones Univ. v. United States*, 461 U.S. 574, 590 (1983); Hansmann, *supra* note 80, at 66-67.

115. *Trinidad v. Sagrada*, 263 U.S. 578, 581 (1924) (considering new language added in the exemption provision by the Tariff Act of 1909, the Court added that a tax subsidy is only appropriate when the activity is “not conducted for private gain”).

116. See *Bob Jones*, 461 U.S. at 590; see also Hansmann, *supra* note 80, at 66-67.

117. See John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 661 (2001) (stating that the deduction under § 170(c) is an indirect subsidy to charitable organizations).

118. See *McGlotten*, 338 F. Supp. at 456; DEPARTMENT OF THE TREASURY, PROPOSALS FOR TAX CHANGE 75 (1973) [hereinafter PROPOSALS].

119. PROPOSALS, *supra* note 118, at 75. Secretary George P. Shultz stated that “existing deductions for charitable gifts and bequests are an appropriate way to encourage [charitable] institutions.” *Id.*

120. Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 60-61 (1972).

121. Andrews, *supra* note 49, at 313-15.

122. *Id.* at 312-13.

others from consuming that good or service, while the latter is collective and does not preclude others.¹²³

Andrews states that the reason for the charitable contribution deduction is that charitable contribution is not really personal consumption, but rather it is for “common goods whose enjoyment is not confined to contributors nor apportioned among contributors according to the amounts of their contributions.”¹²⁴ Yet, while this argument has been generally accepted as a sound theory for charitable contribution deductions, even Andrews has conceded that the prominent explanation for the deduction is that it is a subsidy to charitable giving.¹²⁵ Therefore, this Comment proceeds on the basis that the subsidy rationale is the primary rationale for the charitable contribution deduction.

IV. FROM “CHARITABLE” TO EXEMPTION: THE PUBLIC POLICY REQUIREMENT

The word “charitable” has been prominent in § 501(c)(3) of the Internal Revenue Code and its predecessor since the exemption provision was first enacted.¹²⁶ The creation of a precise definition of “charitable,” however, has eluded judges, scholars, and legislators for years. One commentator has noted that “[i]ts definition is historically based but has defied precision.”¹²⁷ There is very little congressional guidance regarding what “charitable” is supposed to mean.¹²⁸ However, in a dispute challenging a private school’s exemption, the Supreme Court has been faced with the issue of defining the scope of “charitable” within the context of § 501(c)(3).

A. *Bob Jones University v. United States*¹²⁹

In *Bob Jones*, the Supreme Court was confronted with the issue of whether a private school that engaged in racial discrimination qualifies for tax-exempt status under § 501(c)(3).¹³⁰ In accordance with its religious belief, the University enforced a strict policy forbidding in-

123. *Id.* at 314-15.

124. *Id.* at 346. Andrews recognized that critics of the charitable contribution deduction disagree with this point and would argue that such contributions are no different than other personal expenditures that do not qualify for the deduction. *See id.* at 362-63.

125. *Id.* at 344.

126. *See, e.g.,* *Bob Jones Univ. v. United States*, 461 U.S. 574, 615-16 (1983) (Rehnquist, J., dissenting) (tracing the history of the exemption provision).

127. Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-for-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 39 (1995).

128. *Id.*

129. 461 U.S. 574 (1983).

130. *Id.* at 577.

terracial dating among its students.¹³¹ No other policy was considered to be discriminatory.¹³² The Court determined that there was an implicit public policy requirement in § 501(c)(3) and the University's discrimination failed to satisfy that requirement, therefore rendering the school ineligible for tax-exempt status under that provision of the Code.¹³³

B. *The Public Policy Requirement*

In its opinion, the Court immediately recognized both the need and the properness of looking beyond the language of § 501(c)(3) to gain insight as to the intended requirements of that provision.¹³⁴ After considering "Congressional purpose" and its effect on the IRS, the Court concluded that a public policy requirement existed under the current provision.¹³⁵ The Court reasoned that, under § 501(c)(3), "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."¹³⁶

The Court found that an implicit public policy requirement in the definition of "charitable" was not novel; it had been recognized for over a century.¹³⁷ In *Perin v. Carey*, the Court held that charities must be "consistent with local laws and public policy."¹³⁸ Not long after *Perin*, the Court ruled that "[a] charitable use, *where neither law nor public policy forbids*, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."¹³⁹

Turning its attention to more recent rulings, the Court determined that the basic common law concept of charity meant that charitable organizations may not be illegal or contrary to public policy.¹⁴⁰ This meant that there were two requirements under § 501(c)(3): first, that the organization must fit under one of the eight

131. *See id.* at 580.

132. The University's other discriminatory practices of prohibiting the admission of blacks, and later unmarried blacks, had been phased out by May of 1975. *See id.*

133. *Id.* at 595-96.

134. *Id.* at 586 (stating that "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute").

135. *Id.*

136. *Id.* at 591.

137. *Id.* at 588 (citing *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1861)); *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303, 311 (1877)).

138. *Bob Jones*, 461 U.S. at 588.

139. *Ould*, 95 U.S. at 311 (emphasis added) (citing 2 JAIKUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 687 (George F. Choate ed., Little, Brown, and Co. 3d ed. 1882) (1874)).

140. *Bob Jones*, 461 U.S. at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).

categories enumerated in the provision; and second, that the organization does not act contrary to law or to settled public policy.¹⁴¹ The Court cautioned that only in cases in which “there can be no doubt that the activity involved is contrary to fundamental public policy” should exemption be revoked on these grounds.¹⁴²

Having determined that there is a public policy requirement implicit in the definition of charitable under § 501(c)(3), the Court then addressed the issue of whether the University’s policy satisfied that requirement. In light of past congressional action on the matter, the Court determined that “there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice”¹⁴³ and, therefore, institutions practicing such discrimination do not qualify for tax-exempt status under § 501(c)(3).¹⁴⁴

C. Justice Rehnquist’s Dissent

Justice Rehnquist agreed that the University’s discriminatory policy was against public policy, but he stated that the Court is “not constitutionally empowered” to decide policy matters that are reserved to Congress.¹⁴⁵ He observed that the majority was perhaps exceeding its judicial authority by relying upon the public policy requirement. He recognized that:

With undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status. An entity must be (1) a corporation, or community chest, fund, or foundation, (2) organized for one of the eight enumerated purposes, (3) operated on a nonprofit basis, and (4) free from involvement in lobbying activities and political campaigns. Nowhere is there to be found some additional, undefined public policy requirement.¹⁴⁶

He added that only Congress possessed the power to add a public policy requirement and may readily do so if it chooses, but it had not.¹⁴⁷

D. Problems with the Public Policy Requirement

Some commentators have echoed the observations contained in Justice Rehnquist’s dissent. They strongly criticized the Court for improperly deciding a policy issue reserved to the other branches of

141. *Id.* at 585.

142. *Id.* at 592.

143. *Id.*

144. *Id.* at 595-96; *See, e.g., Bob Jones U Trounced, 8-1*, WASH. POST, May 25, 1983, at A24.

145. *Bob Jones*, 461 U.S. at 612 (Rehnquist, J., dissenting).

146. *Id.* at 613 (Rehnquist, J., dissenting).

147. *Id.* at 612 (Rehnquist, J., dissenting).

government.¹⁴⁸ They agreed with the dissent that, regardless of the merits, it was beyond the authority of the Court to adjudicate a policy question.¹⁴⁹ Furthermore, employing a common law concept of charity in order to create a public policy requirement may be undesirable from a practical standpoint. The IRS may applaud the decision to bestow broad discretion upon it (as well as the courts), but the ambiguity associated with the broad notion of charity would surely make its job more difficult.¹⁵⁰

V. EXPLORING OTHER EXEMPTION PROVISIONS

A. *I.R.C. § 501(c)(3) vs. I.R.C. § 501(c)(4)*

Up to this point, tax exemption has been treated as a general concept, and the charitable contribution deduction has largely been ignored.¹⁵¹ However, there are several different sections in the Code providing tax exemption other than § 501(c)(3).¹⁵² There are a myriad of exempt organizations that do not qualify under § 501(c)(3). In addition to the exemption afforded under § 501(c)(3), the other subsections provide an exemption to civic leagues or organizations;¹⁵³ labor, agricultural, or horticultural organizations;¹⁵⁴ business leagues;¹⁵⁵ clubs organized for pleasure or recreation;¹⁵⁶ fraternal beneficiary societies;¹⁵⁷ voluntary employees' beneficiary associations;¹⁵⁸ local teachers' retirement fund associations;¹⁵⁹ local benevolent life insurance associations;¹⁶⁰ and some cemetery companies.¹⁶¹ While § 501(c)(3) provides the broadest exemption and is the primary exemption provision,¹⁶² it is by no means the only exemption provision.

148. See Thomas McCoy & Neal Devins, *Standing and Adverseness in Challenges of Tax Exemption for Discriminatory Private Schools*, 52 *FORDHAM L. REV.* 441, 464 (1984). See generally Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 *VA. TAX REV.* 291 (1984) (arguing that the Supreme Court has "misread the common law into Code while confusing the public policy and public benefit strands of charitable trust law").

149. See McCoy & Devins, *supra* note 148, at 464.

150. See Thompson, *supra* note 48, at 54.

151. Deductibility of contributions under I.R.C. § 170(c).

152. See I.R.C. § 501(c) (2000).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. In 1992 it was estimated that there were 1.4 million exempt organizations in the United States. Of that total, 887,000 were exempt under § 501(c)(3). The other 513,000 organizations were spread out among the several other subsections of 501(c). See generally VIRGINIA ANN HODGKINSON ET AL., *NONPROFIT ALMANAC 1992-1993: DIMENSIONS OF THE*

The next most prominent exemption provision appears to be § 501(c)(4).¹⁶³ That provision provides an exemption to the following organizations:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.¹⁶⁴

Both § 501(c)(3) and § 501(c)(4) provide for exemption from federal income taxation.¹⁶⁵ Yet there are two principal differences between the two provisions. The most significant difference is that, unlike contributors to (c)(3) organizations, contributors to (c)(4) organizations are not permitted to deduct their contributions. However, (c)(4) organizations are permitted to engage in substantial lobbying activity to advance their exempt purpose while (c)(3) organizations are not.¹⁶⁶ Section 501(c)(3) organizations must be “charitable,” while § 501(c)(4) organizations are those “[c]ivic leagues or organizations” that are “operated exclusively for the promotion of the social welfare.”¹⁶⁷

B. Social Welfare Organizations under I.R.C. § 501(c)(4)

The most significant advantage that a social welfare organization (SWO) has over its (c)(3) counterpart is the ability to directly influence legislation, or “lobby.”¹⁶⁸ Neither section permits involvement in

INDEPENDENT SECTOR (1992) (providing statistical information regarding charitable organizations in the United States).

163. In 1992 there were 143,000 social welfare organizations, with 396,000 spread out over the several other subsections. *Id.*

164. I.R.C. § 501(c)(4)(A) (2000). This provision can be traced to the Tariff Act of 1913, which added a new provision providing for the exemption of social welfare organizations. It read, in part, any “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.” Tariff Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172.

165. See *supra* notes 54, 164 and accompanying text. § 501(c)(3) organizations, “(c)(3) organizations,” and “charitable organizations” are referred to interchangeably. § 501(c)(4) organizations, “(c)(4) organizations,” and “social welfare organizations” are also referred to interchangeably.

166. See *Regan v. Taxation with Representation*, 461 U.S. 540, 543 (1983); Bittker & Rahdert, *supra* note 81, at 345-48; Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 239 (1987) (noting that (c)(3) organizations may engage in lobbying activities to some extent, but the permitted level is well below that which is permitted of (c)(4) organizations), 249-50 (conveying that the reason (c)(3) organizations are not permitted to lobby is the theory that government should avoid underwriting participation in political debate).

167. See *supra* notes 54, 164 and accompanying text.

168. See *HOPKINS*, *supra* note 88, at 293; Chisolm, *supra* note 166, at 239.

elections or the campaigns of candidates for public office.¹⁶⁹ But the price for the ability to lobby is substantial: the loss of the charitable contribution deduction under § 170(c).¹⁷⁰ The stated reason for this difference in treatment is that Congress did not wish to subsidize lobbying as extensively as it chose to subsidize other activities that promote the public welfare.¹⁷¹ Stated differently, Congress considers lobbying worthy of exemption but has also determined that it should not be extended to the second tier of favorable tax treatment represented by the charitable contribution deduction.¹⁷² Hence, Congress has afforded SWOs engaged in substantial lobbying half of the total tax benefit: an exemption but no deductions for its donors.

The lesser amount of tax benefit seems to be offset to some extent by the greater freedom with which SWOs operate. Although SWOs share some of the same basic restrictions with (c)(3) organizations,¹⁷³ they have greater latitude in their activities.¹⁷⁴ The IRS has recognized that an organization formed to provide “for the social improvement and welfare of the youths of the community” is a SWO under § 501(c)(4).¹⁷⁵ Of course, SWOs are not permitted to engage in illegal activities “which violate the minimum standards of acceptable conduct necessary to the preservation of an orderly society” because that is “not [a] permissible means of promoting social welfare.”¹⁷⁶

169. See Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990) (relating that (c)(3) organizations may not engage in election-related activity, even via a (c)(4) arm that it controls, because (c)(4) organizations are also subject to a prohibition on election participation).

170. See *Taxation with Representation*, 461 U.S. at 546-47.

171. See *id.* at 544.

172. See Chisolm, *supra* note 166, at 237 (summarizing the Court’s description of congressional intent in *Taxation with Representation*, 461 U.S. 540 (1983)). But see Note, *IRS Denials of Charitable Status: A Social Welfare Organization Problem*, 82 MICH. L. REV. 508, 511-12 (1983) (arguing that there should be no distinction between the treatment of (c)(3) and (c)(4) organizations, so that social welfare organizations are treated as charitable and receive the charitable contribution deduction).

173. See HOPKINS, *supra* note 88, at 293 (noting that SWOs must not be operated primarily for the economic benefit or convenience of its members); *id.* at 279 (noting that SWOs must satisfy some notion of public benefit or “civic betterment”). But see Gen. Couns. Mem. 39,694 (Jan. 21, 1988) (suggesting that (c)(3) organizations might well be jeopardized by election-related activities of its (c)(4) affiliate even though the affiliate is permitted to engage in such activities).

174. See HOPKINS, *supra* note 88, at 290 (pointing out that SWOs can actively participate in the legislative process and directly advocate for desired legislative and executive policies); Crimm, *supra* note 127, at 33 (noting that the IRS and the courts have applied more stringent requirements under (c)(3) than under (c)(4), but also that the standards applied under (c)(3) are clearer than those utilized with respect to (c)(4)).

175. See Rev. Rul. 68-118, 1968-1 C.B. 261.

176. See Rev. Rul. 75-384, 1975-2 C.B. 204.

C. *The Dual Structure in Regan v. Taxation with Representation*¹⁷⁷

In *Taxation With Representation*, the Court was confronted with a challenge to the disparate tax treatment afforded by §§ 501(c)(3) and (c)(4).¹⁷⁸ In that case, Taxation With Representation of Washington (TWR) was a nonprofit corporation that ran two other nonprofit organizations, one of which was exempt under § 501(c)(3) and the other under § 501(c)(4). The (c)(3) organization published a journal and engaged in litigation, while the (c)(4) organization pursued the same goals through lobbying.¹⁷⁹ The issue presented in the case arose when TWR merged the two organizations and applied for (c)(3) status for the newly formed entity.¹⁸⁰ Because the former (c)(4) branch of TWR continued to lobby heavily within the new entity, the IRS denied the application due to the prescription found in § 170(c) against substantial lobbying activity by § 501(c)(3) organizations.¹⁸¹

In addition to addressing TWR's claims,¹⁸² the Court acknowledged the validity and desirability of TWR's previous dual structure, under which the two distinct activities—non-lobbying and lobbying—operated in compliance with the respective provisions of the tax code.¹⁸³ The Court suggested that TWR revert back to its previous structure, delegating all of its lobbying activity to the (c)(4) affiliate,¹⁸⁴ thereby indicating approval of such an arrangement.¹⁸⁵ In his concurrence, Justice Blackmun went a step further, stating that the dual structure is necessary to avoid rendering § 501(c)(3) unconstitutional.¹⁸⁶ Blackmun characterized the § 501(c)(3) prohibition on lobbying activities as a “defect” that § 501(c)(4) conveniently rectifies by

177. 461 U.S. 540 (1983).

178. *See id.* at 544.

179. *See id.* at 543.

180. *See id.* at 542.

181. *See id.*

182. The bulk of the opinion dealt with (and rejected) TWR's constitutional claims and is not relevant to the tax policy discussion.

183. *See Taxation with Representation*, 461 U.S. at 544; *see also* Thomas A. Troyer & Albert G. Lauber, Jr., *Supreme Courts TWR Decision Provides Guidance in 501(c)(3) Lobbying*, 59 J. TAX'N 66 (1983) (providing a contemporary account of the impact of *Taxation with Representation*, 461 U.S. 540). *But see* Chisolm, *supra* note 166, at 239-40 (pointing out the downside to the dual structure discussed in *Taxation with Representation*, 461 U.S. 540, is that it would still need to be determined where to draw the line between (c)(3) and (c)(4) activities).

184. *Taxation with Representation*, 461 U.S. at 544.

185. *See id.* *But see generally* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding the revocation of the University's exemption under § 501(c)(3) without even mentioning § 501(c)(4) or the dual structure approach, despite having just endorsed the dual structure approach in *Taxation with Representation* the day before). The major distinction is that *Taxation with Representation* involved lobbying, whereas there was racial discrimination in *Bob Jones*. Perhaps the Court determined there was no way to separate the racial policy into a (c)(4) affiliate because such discrimination pervaded the entire organization.

186. *See Taxation with Representation*, 461 U.S. at 552 (Blackmun, J., concurring).

allowing (c)(3) organizations to establish (c)(4) affiliates created exclusively to handle lobbying efforts.¹⁸⁷

VI. RECLASSIFYING THE BSA

The BSA currently enjoys tax-exempt status under § 501(c)(3) and likewise enjoys the charitable contribution deduction under § 170(c). One alternative to revoking its tax-exempt status under § 501(c)(3) is to convert it to a § 501(c)(4) organization.¹⁸⁸ This conversion would change the BSA's classification from a "charitable" organization under (c)(3) to a "social welfare organization" under (c)(4).¹⁸⁹

This proposal addresses the inconsistency of the BSA's discriminatory policy with *Bob Jones*,¹⁹⁰ but it also stays within the parameters of tax policy. It serves as a more reasonable compromise between the calls for total revocation of the BSA's favorable tax treatment and the perhaps unpopular alternative of continuing to afford all of the tax benefits that the BSA currently enjoys.¹⁹¹ Furthermore, this proposal communicates the appropriate message to the BSA regarding its disfavored policy while continuing to encourage the BSA with the subsidy provided by exemption.

The BSA would certainly meet the requirements of a SWO.¹⁹² The IRS has recognized that an organization formed to provide "for the social improvement and welfare of the youths of the community" is a SWO under § 501(c)(4).¹⁹³ On the BSA's website, it states that its purpose is "to provide an educational program for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness."¹⁹⁴ Basically, the

187. See *id.* (Blackmun, J., concurring).

188. This is what happened in *Alexander v. Americans United, Inc.*, 416 U.S. 752 (1974), in which the IRS revoked an organization's (c)(3) status because of substantial lobbying activity but soon thereafter issued a letter exempting the organization as a social welfare organization under (c)(4). The effect was to preserve the exemption while revoking the charitable contribution deduction by converting the organization from (c)(3) to (c)(4). See *Alexander*, 416 U.S. at 754-55. It also meant that the organization was liable for unemployment (FUTA) taxes under § 3301. *Id.* at 755.

189. An intermediate alternative would be to apply Justice Rehnquist's suggestion in *Taxation with Representation*: bifurcate the BSA into (c)(3) and (c)(4) components. See *Taxation with Representation*, 461 U.S. at 544. Consistent with the scenario discussed in *Taxation with Representation*, the BSA would be required to convert its scouting operation into a (c)(4) organization, while retaining (c)(3) status for its other operations that do not have the discriminatory policy, with both entities under the BSA umbrella but strictly separating their respective funds.

190. *Bob Jones*, 461 U.S. 574.

191. See *supra* notes 18-24 and accompanying text.

192. See *supra* notes 173-76 and accompanying text.

193. See Rev. Rul. 68-118, 1968-1 C.B. 261.

194. *Mission Statement of the Boy Scouts of America*, at <http://www.scouting.org/nav/about.html> (last visited June 12, 2002) (on file with author).

purpose is to instill values in young people.¹⁹⁵ It seems certain that the BSA could satisfy the requirements under (c)(4), so the question becomes whether this proposal is compatible with the policy rationales underlying the respective provisions.¹⁹⁶

A. *Preservation of Exemption*

The critical objective that this proposal seeks to achieve is the preservation of the BSA's exemption. Indeed, this objective is the sole departure from the arguments in favor of total revocation of the BSA's exemption. The reason for the disparity is a disagreement over the reason for an exemption.

Those advocating the revocation of the BSA's exemption mistakenly assume that exemption and the charitable contribution deduction are both primarily intended to be subsidies. Although the concept of subsidy makes sense in the context of the exemption, it is unsatisfactory as a complete explanation for it.¹⁹⁷ Rather, the "income definition" rationale of Professors Bittker and Rahdert articulates the more compelling explanation for exemption.¹⁹⁸

Under the "income definition" rationale, the argument for revoking the BSA's exemption runs afoul of the reason exemption is granted in the first place. Exemption is embedded in the Tax Code, and it should not be contingent upon some external condition such as public opinion.¹⁹⁹ Revocation of the BSA's exemption is unacceptable because it does not abide by that tax reality: the basis for the revocation is inconsistent with the basis for the provision of exemption.

B. *Revocation of the Charitable Contribution Deduction*

The primary rationale for the charitable contribution deduction is that government should subsidize contributions to charitable causes that provide a public good or benefit.²⁰⁰ The Supreme Court recognized that the charitable contribution deduction is essentially a subsidy that is provided through the tax system.²⁰¹ Unlike the rationale

195. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

196. It does not appear that total or partial conversion of the BSA from (c)(3) to (c)(4) status would infringe on the BSA's constitutional rights. Under similar circumstances, the Court rejected the contention that the disparate treatment of the two sections forces the taxpayer to forego constitutionally protected activity. *See Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983).

197. *See supra* notes 82-92 and accompanying text.

198. *See Bittker & Rahdert, supra* note 81, at 305, 307-14 (contending that nonprofit organizations are exempt because they do not have an "income" under the Code).

199. *See id.*

200. *See supra* notes 112-20 and accompanying text.

201. *See Taxation with Representation*, 461 U.S. at 544.

for an exemption,²⁰² the reason for providing the deduction is external to the tax code.²⁰³

The charitable contribution deduction is essentially a government subsidy, so it is the only provision that should be revoked in response to the BSA's discriminatory policy. Revocation of the BSA's charitable contribution deduction, by converting it to a SWO under § 501(c)(4), would effectuate this revocation while leaving the fundamental rationales of the tax provisions undisturbed. The government has great discretion in granting subsidies, and a logical course of action for the government to take in response to the BSA's discriminatory policy is to remove the subsidy afforded by the Tax Code to that organization. However, the revocation must be confined to the subsidy afforded by the charitable contribution deduction in order to be consistent with the underlying tax policy for the respective provisions.²⁰⁴

C. *The Ineffectiveness of Revocation of Tax Benefits for Achieving Non-Tax Goals*

One commentator calling for the revocation of the BSA's tax-exempt status recognized that it would likely be ineffective at discouraging or ending the BSA's discriminatory policy.²⁰⁵ Indeed, by far the largest source of the BSA's revenue is derived from fees and investment income, not charitable contributions.²⁰⁶ A change in the BSA's tax status would not likely affect contributions. Public opinion and financial pressure are the more likely catalysts.

In light of the negative publicity surrounding the BSA's policy towards homosexuals and the recent ruling by the Supreme Court,²⁰⁷ there are many reports suggesting that both financial and general support of the BSA is declining.²⁰⁸ The United Way, the BSA's largest

202. See *supra* notes 93-104 and accompanying text.

203. See *supra* notes 112-20 and accompanying text. *But see* Andrews, *supra* note 49 (arguing that the charitable contribution deduction can be explained as a refinement of the notion of taxable income).

204. See *supra* notes 93-104, 111-20 and accompanying text.

205. See Upton, *supra* note 26, at 800 (claiming that, despite the unlikelihood of revocation having a direct effect, the removal of the tax subsidy is still "a worthy goal in and of itself").

206. *Id.* at 798-99 n.18 (noting that only 1% of BSA's funds came from contributions and bequests in 1996). *Id.* at 798-99 (noting that, in 1996, 44% of income was derived from fees and 26% of income was derived from investment income).

207. See *supra* notes 18-24 and accompanying text.

208. See, e.g., Sheryl McCarthy, *Boy Scouts' Victory on Gays Cuts Contribution Flow*, NEWSDAY, July 24, 2000, at A26 (commenting that "[t]he Boy Scouts may have won their battle" but now they are facing a backlash from charities and politicians); Laura Parker & Guillermo X. Garcia, *Boy Scout Troops Lose Funds, Meeting Places*, USA TODAY, Oct. 10, 2000, at A1 (describing the loss of \$530,000 in southeast Florida as contributing to a "domino effect").

contributor, appears to be using its leverage against local BSA chapters to discourage the policy,²⁰⁹ although, perhaps, not without cost.²¹⁰ Despite these reports, it is still unclear whether the BSA is actually experiencing any substantial reduction in support, financial or otherwise.

This proposal, as well as any other measure, may prove unnecessary if the BSA changes its own policy²¹¹ under popular and political pressure,²¹² or if there is a change in the law. Indeed, almost fifteen years after the Court upheld the revocation of its tax exemption, Bob Jones University ended its prohibition on interracial dating largely due to public pressure.²¹³

There are two major variables involved in this issue: the BSA's anti-homosexual policy, and the public policy requirement of § 501(c)(3) as articulated in *Bob Jones*.²¹⁴ The elimination of either variable would also eliminate the need for the change proposed in this Comment. On the one hand, calls for revocation would presumably be silenced by a voluntary change in policy on the part of the BSA. On the other hand, contrary to an initial assumption of this Comment, *Bob Jones* may not affect the BSA after all.²¹⁵ That would presumably render the proposed change moot and eliminate the BSA's need to change its policy. However, it should be made clear

209. See Martin Luttrell, *United Way Toughens Anti-Bias Policy/Boy Scouts Facing Loss of Funding Because of Ban on Gays*, TELEGRAM & GAZETTE (Worcester), Feb. 15, 2001, at A1; Maria Newman, *United Way to Continue Aid to Central Jersey Scouts*, N.Y. TIMES, Aug. 31, 2001, at B5 (reporting that the United Way of Central New Jersey decided to continue its funding only after the local BSA council agreed in writing not to discriminate against homosexuals, a departure which appears to be an increasing trend among local councils).

210. Gwyneth K. Shaw, *United Way may Lose Donor Dr. Phillips Inc., Which has Given Millions Over the Years, Said it may Stop if United Way Drops the Boy Scouts*, ORLANDO SENTINEL, Jan. 23, 2001, at C1 (reporting that a major contributor to the United Way in Florida has threatened to cut off support if the United Way drops the local BSA chapter).

211. See, e.g., McCarthy, *supra* note 208, at A26 (speculating that the BSA's policy towards homosexuals will change due to political and financial pressure).

212. See *supra* notes 18-24, 208-10 and accompanying text.

213. *Bob Jones University Drops Its Ban on Interracial Dating*, NEWSDAY, Mar. 4, 2000, at A10 (reporting that the decision to eliminate the prohibition followed a campaign visit to the school from George W. Bush).

214. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1982).

215. Although unlikely, it might not be far-fetched to contemplate a change of direction or jurisprudence by the Court if it were again confronted with the public policy/exemption issue faced in *Bob Jones*. Short of that, the public policy argument, which would be essential in any case attempting to revoke the BSA's tax-exempt status, is certainly much weaker than the public policy argument used against Bob Jones University. With Chief Justice Rehnquist presiding over a narrow majority, one which may become larger if President Bush is afforded the opportunity to replace some of the more liberal justices, see Chris Bull, *Supreme Tug-of-War*, THE ADVOCATE, Oct. 10, 2000, at 30 (suggesting that Justices Stevens and Ginsburg may be nearing retirement), the judicial restraint of Rehnquist's dissent in *Bob Jones* may prevail and give even more breathing room to the BSA's policy. See *Bob Jones*, 461 U.S. at 612-17.

that the likelihood of the former scenario occurring seems much greater than the latter.

VII. CONCLUSION

In recent years, the BSA has come under fire for its discriminatory policy towards its homosexual scout leaders. Pointing to *Bob Jones*, many people favor the revocation of the BSA's tax exemption in order to remove public support afforded by the tax system and hopefully end the discriminatory policy. However, proponents of revoking the BSA's exemption are pointing to the wrong place.

If there should be a change, the proper place for that change is in the charitable contribution deduction currently afforded to BSA contributors rather than the BSA's exemption. Revoking the BSA exemption would be inconsistent with the rationale for exemption, which is based on the fact that organizations like the BSA do not realize taxable income. By contrast, the charitable contribution deduction represents a subsidy that may be granted or removed without jeopardizing the tax system.

Therefore, to address the incompatibility with *Bob Jones*, as well as protect the integrity of the tax system, this Comment suggests that the BSA should be converted to a social welfare organization under § 501(c)(4). This conversion would revoke the charitable contribution deduction while preserving the BSA's exemption pursuant to § 501(c)(4). This proposal preserves the benefit of exemption that the BSA deserves while satisfying the rationale of *Bob Jones* by making the public policy requirement of § 501(c)(3) no longer applicable to the BSA. The conversion would address the public policy concerns voiced by the media and the public. Finally, it would preempt the BSA from suffering the same fate as Bob Jones University by removing that organization from the reach of the ambiguously restrictive standard to which § 501(c)(3) organizations are currently held.