
The Case Against Policy Advocacy Deregulation

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Introduction

Over the last year, many have argued in these pages that the rules restricting Canadian charities from intensive policy engagement should be relaxed or rescinded (Gibbins, 2015; Gibbins, 2016; McRae, 2016; Cave, 2016; Juneau, 2016; Northcott, 2016). Some go so far as to argue that restrictions on advocacy and political activity impose “unreasonable limits on democratic speech” (Sunderland, 2016), because it is “vital for a healthy democracy,” they say, that charities play an active role in political discussion (CCPA, 2016; Gray, 2016). This position has clearly gained consensus among sector leaders, who have responded with “resounding support” (Witt, 2015).

These arguments are predicated on the assumption that society is better served when charities are active in the policy sphere. The underlying idea is that charities sincerely promote the public good, whereas corporations, politicians, and other political actors intervene in policy discussions for more self-serving reasons. Another shared assumption holds that policy advocacy is inherently apolitical; many proponents believe that the political activity designation is a pretext used by government to harass its opponents.

While these arguments are well-intentioned, upon closer inspection they turn out to be largely unsubstantiated, logically compromised, and in some cases, ethically troubling. There are certainly cases in which charities have played a productive role in changing public policy for the better — successful campaigns to combat smoking and drunk driving come readily to mind. And though these contributions have produced clearly beneficial results, it does not necessarily follow that the general regulatory framework should be relaxed or amended to allow charities to engage more actively in public policymaking. This counterargument gets very little attention in

the sector, but I encourage well-meaning advocates to consider it as they work to support the public good to which we are mutually dedicated.

Why all the fuss?

When reading the pro-advocacy case, it is easy to forget that current regulations mostly permit policy advocacy by charities. According to the Canada Revenue Agency (2003), charities can “[make] a representation, whether by invitation or not, to an elected representative or public official.” They can release these representations or any research they conduct to the public and the media. They can give interviews to educate about their policies and promote them. The CRA does not consider these activities political. It even allows political activity, in measured quantities. CRA guidance details how a charity can “buy a newspaper advertisement to pressure government,” organize marches to “put pressure on Members of Parliament,” and conduct media campaigns to promote its positions when “elected representatives [are] not enthusiastic about [the charity’s] well-reasoned position.” The major limitation is not about *what* political activity charities can undertake, but rather *how much* is acceptable. So long as a charity devotes less than 10% of its resources to political activities, the CRA permits these activities (Parachin, 2008).

At its core, this debate is not about advocacy, *per se*. Rather, the debate hinges on three central questions: (1) Is it correct to consider policy advocacy political activity? (2) If it is, does charity advocacy advance the public good to such an extent that more of this political activity should be allowed? and (3) Should charities’ political activity be regulated differently to other political activity, where individual contributions are strictly limited, spending restrictions are shared by all parties, and donors are publicly disclosed?

Policy and politics

Many advocacy champions insist that policy advocacy and political activity are categorically different. They agree that it would be undesirable for charities to explicitly support political parties (Imagine Canada, 2015), but draw a sharp distinction between self-serving partisan politics on one hand, and publicly-minded policy advocacy on the other.

This distinction is neither semantically nor factually correct. Policy advocacy is undoubtedly political. The Oxford Dictionary offers eight primary definitions of “policy,” excluding insurance-related applications. Six refer explicitly to “government,” and “politics,” and the others are antiquated.^[1] For our purposes, “policy” is best defined as “[a] course of action adopted and pursued by a government, party, ruler, statesman [sic], etc.” Meanwhile, it defines “political” as “[of], belonging, or pertaining to the state or body of citizens, its government and policy.” In fact, the etymological relationship between “policy” and “politics” is so intimate that “policy” was once a synonym for “government.” The first entry for “policy” describes “[an] organized and established system or form of government or administration (of a state or city); a constitution, polity.” In French, “policy” translates to “politique.” These terms may have specific legal meanings in the context of charity tax law, but these niche definitions should not distract from the inextricable link between “policy” and “politics.”

Policy is the outcome of politics. Public policy is what the state decides to do and politics is the process by which policy is determined. One could even argue that democratic politics is nothing more than a structured forum in which policy advocates engage in productive debate. Even

Gibbins (2016) [uses the terms](#) “policy advocacy” and “political speech” interchangeably. The supposed distinction between these concepts is linguistically and logically specious. It is therefore extremely difficult to argue that we should consider policy advocacy apolitical. As we shall see below, parties are just one aspect of politics. Politics is ultimately about deciding which policy the state should pursue, and anybody who competes to have their policy ideals adopted is engaged in inherently political activity.

Therefore, when we ask whether it is desirable for charities to wield more influence over public policy, we are actually asking whether it is desirable for them to wield more power over the decisions of government — over politics.

Whither the public good?

While Gibbins and others believe that charity policy advocacy should be more widely allowed because it advances the public good, their arguments cannot withstand scrutiny. Below, I examine and critique three of the main arguments used to support this claim.

Marginalized voices

A frequently cited argument holds that charities should have a greater say in policymaking because they give voice to the marginalized. For [Gibbins \(2016\)](#), “giving voice to inadequately represented segments of the community goes to the very heart and soul of the charitable mission.” Likewise, the Ontario Nonprofit Network (ONN) argues that restrictions on advocacy “stifle voices not often heard during public debate” (Sunderland, 2016). In a participatory democracy, greater participation surely serves the public good. However, the argument, as presented, is thoroughly unpersuasive. Many charities do not serve marginalized people, and those that do cannot credibly claim to be their representatives.

To begin, we must acknowledge that many charities do not represent marginalized people, nor are they required to. Indeed, many charities contribute to public life in ways other than serving marginalized people. Upper Canada College, one of Canada’s most exclusive private schools, is a charity charging more than \$39,000 for kindergarten (Upper Canada College, 2016). Tax-assisted donations to the College provide wealthy students with indoor tennis courts, ice rinks, film studios, and many other luxuries. More than 70 Humane Societies are registered charities and their beneficiaries are not even humans, let alone marginalized ones! By pretending that charities predominantly serve marginalized people, pro-advocacy campaigners overlook the risk that the marginalized may be drowned out by charities representing dominant groups, who would be equally empowered to advocate for their constituents’ policy interests if policymakers relax political activity restrictions.

Yet even when charities do serve the marginalized, the pro-advocacy camp cannot demonstrate that they accurately represent marginalized groups in political speech. Some advocacy proponents have strenuously opposed measures that would require charities to be more accountable to the beneficiaries they exist to serve. For example, while the ONN cites the marginalized voices argument, it recently (2013, p.4) urged the Ontario government to deny the extension of voting rights to a charity’s full membership. The ONN argued that “member resolutions should not be binding on Boards of Directors,” because these “may be at odds with an organization’s contracts and agreements with funders and community obligations.” They “anticipate serious challenges from a small number of disaffected or radical members who

[would] have the tools to disrupt” the board, and worry that if decision-making is democratized, “organizations will find themselves unable to recruit qualified [board] candidates.” Presumably, these “qualified candidates” will provide better care to the marginalized, so this exclusion is for their own protection.

This statement was made in another context, but it is relevant inasmuch as it obeys a storied anti-democratic tradition, steeped in elite distrust for what Burke called “the lower orders.” Hirschman (1991) documents how leading aristocrats have long feared “the despotism of the masses.” The ONN is not the first to argue that the marginalized are best represented when they stay silent.

I do not mean to suggest that the ONN supports restricting the franchise to male landowners or anything absurd like that. Yet the fact remains that boards are not accountable to their members or beneficiaries. Consequentially, it is simply false to suggest that charities represent these groups in political speech. Members are meant to provide some oversight, beyond strict adherence to the law. But in many cases, the board and the membership are identical, producing a façade of accountability — an unconvincing one, at that.

Until the marginalized have an impact on the decisions charities make in their service, charities cannot credibly claim to be their representatives. Given this simple fact, the thinking mind strains to understand how allowing charities more influence over government policy will empower the marginalized.

Democratic balance

Another argument in favour of advocacy deregulation holds that charities broaden the range of perspectives in public debate, [alleviating “inherent inequalities in political speech”](#) (Gibbins, 2016). To argue this case, one must first prove that such an imbalance exists — a serious accusation in a stable democracy. If this is true, then democratic change does not meaningfully exist: any government will hold the same bias, irrespective of election results or public opinion.

In addressing this question, advocates reveal their partiality. Gibbins (2016) names Stephen Harper’s Conservative governments as an example of how charities serve the public good with balancing “political speech” when the “lens [of] social justice, or sustainability, or peacekeeping, or even compassion” is missing. He posits that “the charitable voice tends to fall to the left on the ideological spectrum,” a positive thing, in his view, which could help to “balance the interplay between public and private interests” (Gibbins, 2015).

First, we must interrogate the notion that charities sit on the public side of the public-private divide. They do not. Charities are privately-controlled corporations, free from public direction. Private donations are subsidized at the public expense, providing goods and services for select beneficiaries to the exclusion of others, at the private donor’s sole discretion. Many donations come with strings attached and they allow the donor to buy recognition and social status for themselves (Brooks, 2001). Charities openly encourage this by naming programs and buildings and myriad other things after their largest patrons. Furthermore, many charities are transparently exclusive. Nearly 40% of charities are established to promote religion — that is, one religion and its adherents, to the exclusion of everybody else. To say that private charity inherently militates against private interest — even while it saps public funds without public consent — is to ignore the fundamental nature of the construct.

Next, Gibbins' assertion that the "charitable voice tends to fall to the left" is pure conjecture. To substantiate this claim he would have to inventory the political leanings of more than 85,000 Canadian registered charities — to my knowledge, no such inventory exists. There are numerous socially and economically right-wing charities, such as the Catholic Church or the Fraser Institute. The proportion of right-leaning to left-leaning groups is not known, and even if it were, this ratio could always change. It seems unwise to adjust the rules affecting all charities based on a guesstimate of the current ratio of left-leaning to right-leaning groups, a ratio that is always in flux. This is akin to changing the powers of high office based on support for the current office holder. Many supported President Barack Obama's use of executive authority in the United States (Posner, 2014), based on their determination that the President's character and temperament would prevent abuse. Now that these expanded powers are available to an officeholder with a different temperament, many are expressing regret (Posner, 2016; Goitein, 2017), just as Republicans predicted they would (Peters, 2013).

Yet, the bigger problem with the democratic balance argument lies in its denial of democratic change and its contempt for democratic choice. The argument insinuates that government is disproportionately focused on private interests, no matter the party in power, and that the supposedly left-leaning charitable sector must right the ship. When Gibbins claims that charities "balance the interplay between public and private interests," he insinuates that private charities are on balance more faithful representatives of the public interest than those politicians the public itself elects.

Notwithstanding the neo-liberalisation^[2] of the state, this claim is extremely contentious and factually inaccurate. Electoral results alter the ideology of power. In 2006, the Conservatives won on a promise to reduce corporate taxes and shrink government. In 2015, the Liberals won on a promise to increase personal income taxes for the highest earners and grow government. The Conservatives withdrew from the Kyoto Protocol. The Liberals championed the Paris Accord. The majority swung from right to left.

Is the pro-advocacy camp concerned with the structural legal framework governing charities' participation in politics, or is this a strategic effort by a selection of left-leaning groups to avoid the inconvenience of electoral defeat? Cave (2016) [offers case studies](#) of successful political advocacy as an example for others to follow. In each case, the advocating group took a left-leaning position the Harper government opposed. Harper's parliamentary majority allowed him to rebuff these appeals: one issue was settled in court and the others were settled by the 2015 election — demonstrating that elections matter. We might say that the disproportionate presence of right-leaning voices in politics drove Harper's opposition, but we might also say that the government and the advocates held different views of the public good. Of course, this contest of views was not balanced, nor should it have been. On one side sat small, self-initiated associations with a particular viewpoint. On the other side sat a government that won four consecutive elections in which tens of millions of citizens cast a ballot. This imbalance represents majority government, as determined by the citizenry. It smacks of arrogance and self-righteousness to argue that this imbalance hinders the public good when it happens to favour the right.

Politics versus partisanship

Most deregulation campaigners attempt to sidestep the partiality problem by branding themselves "non-partisan." When their policy advocacy is labelled political, they claim that the

rules are being capriciously enforced and reiterate their independence from political parties, even in cases where they espouse views that align or conflict with only one party. Concerns that policy advocacy is sometimes considered “indirect partisanship” (Imagine Canada, 2015) miss the point. The restriction is on political activity in general; partisanship is but a subcategory of this. Politics can exist without parties, as Ontario municipal councillors or independent MPs demonstrate. In essence, political parties are viewpoint aggregators. When parties advocate for their policies, we correctly consider this political activity. Politics is the business of policymaking (Kraft and Furlong, 2013). To say “Canadians look to environmental, health, international development, and social justice organizations to collectively express their views and advocate for a better world” (Gray, 2016) is to suggest that charities bring a vision of “a better world” to the table exactly like political parties do. The notion that advocating [charities should make government “uncomfortable”](#) (McRae, 2016) furthers the idea that charity advocates should play a role equivalent to that of the elected opposition.

If it walks like a political party and talks like a political party, perhaps it should be regulated like one. After a lengthy review of the jurisprudence, Parachin (2008, p.898) finds that “the categorization of [a charity’s] purpose as political is simply a mechanism by which the benefits of charitable status are rationed,” based on a determination that “political purposes do not warrant one or more of the benefits of charitable status.” Charities are not subject to contribution limits and disclosure requirements that apply to political parties, even when they behave in a similar fashion. Lifting the 10% rule or switching from a test of political activity to a far more permissive test of political intent would open the door to private donors spending unlimited amounts on tax-assisted donations to charities that advance their political views.

Gibbins (2016) himself acknowledges the inevitable convergence between policy advocacy and partisanship, calling advocacy “the gateway drug to partisanship.” Gibbins (2015, p.35) concedes that it is difficult for a charity to convincingly say: “We are neutral, even though the election of the Liberals would be beneficial to our cause and the election of the Conservatives would mark the end of civilization as we know it.” Yet his awkward solution to this dilemma is that “we broaden the range of acceptable political activities by charities.” That is like saying: “X is ethically wrong, so to ensure we act ethically, let’s change our ethics to make X okay.” It is an absurd line of thinking that dodges the crucial question: *should* it be okay? *Should* charities be engaged in political activity to an extent that inevitably encroaches on the realm of government?

Historical perspective

Charitable status confers myriad legal and tax advantages but these advantages come with a price: namely, that charities restrict themselves to a limited sphere of pre-approved objectives. Gibbins (2016) claims that “achieving social change is what charities are all about.” The historical record suggests otherwise, demonstrating the existence of a charitable contract whereby independent associations restrict themselves to a limited sphere of government-sanctioned activity in exchange for favourable tax and legal treatment. The *Statute of Charitable Uses* set the legal definition for charitable activities in 1601 by listing a very specific set of qualifying activities, the cost of which would otherwise fall to government.

The Canadian government introduced the charitable donations deduction as a substitute for direct spending. Legislators enacted it in 1917 to incentivize donations to support WWI veterans, an undertaking the government could not afford to finance alone. As Watson (1985)

observes: “Providing incentives to the populace to donate to private charities was a measure the government could introduce without itself assuming responsibility for relief.” Government repealed the exemption in 1920, and reintroduced it in the 1930s to help meet the soaring costs of social care brought about by the Great Depression. The historical record reveals the sector’s heritage as a filler of specific gaps in social programming, not a counterbalance to the dominant ideology of power.

A neo-liberal surprise

Of course, it is possible that the charitable principle has evolved over the last 100 years. Charitable tax deductions became more generous as neo-liberalism took hold in the 1980s, culminating in the 1996 federal budget that increased the maximum deduction from 20% of an individual’s taxable income to 50% — a move made possible by billions in prior spending cuts. The neo-liberal political ethos privileges individual choices over government legislation, preferring private charity to direct state spending. This “small government” ideology has resulted in increasingly generous charitable deductions to compensate for reductions in public spending, effectively creating an independent “shadow state” onto which governments offload their responsibilities, and with them, the burdens of accountability (Wolch, 1990).

Milton Friedman, a key progenitor of neo-liberalism, argued that government should stop funding public parks through taxation. He reasoned that if a community cares enough about parks, they would donate the required amount voluntarily or pay sufficient usage fees. If the community is not prepared to cough up the money, Friedman (1962) objected to the taxman taking it from them under threat of force.

In a sense, the pro-deregulation camp claims that the nature of the charitable contract has evolved such that charities now form a private, independent counterweight to state power. In doing so, they are situating themselves inside Friedman’s right-wing neo-liberal paradigm that privileges the decisions of private individuals over those of the democratically-elected state. To the extent that the contract has evolved, it has done so as result of a neo-liberal project that is openly hostile to electoral democracy. The neo-liberal project envisions a parallel power structure existing outside of electoral democracy that cannibalizes the legitimate state. Private charities are an integral part of that structure because in the neo-liberal utopia, all social care is funded voluntarily instead of by coercive taxation. When Gray (2016) claims that Canadians rely on private charities to express their political views, he is invoking this neo-liberal configuration. Inasmuch as they call the legitimate state into question and anoint themselves its regulating equal, Gray and his supporters echo Friedman’s far-right ideology.

When government walks out, money speaks up. To run with Friedman’s example, access to public parks would depend not just on the community’s will but also its wealth. It is not hard to see how this kind of thinking turns the principle of “one person, one vote” into “one dollar, one vote.” Even under the current regime, donation tax credits direct “substantial sums” of government money “to areas that some wealthy individuals feel deserve funding” (Brooks, 2001), with no public oversight. Deregulation campaigners are quick to describe themselves as enriching democratic debate and creating new pathways for participation (CCPA, 2016; Cave, 2016; Gibbins, 2015; Gibbins, 2016; Gray, 2016; Sunderland, 2016). Is this unregulated, neo-liberal free-for-all the democratic ideal they aspire to?

Able hands

Another argument deployed in favour of expanded advocacy holds that charities are well-positioned to provide practical policy guidance because of their hands-on experience delivering frontline programs. This argument fails on several points. First, most charities are not in the business of delivering social programs. Many are grant-making foundations, and others, like those in the performing arts or religious institutions, do other types of work.

It is also crucial to remember that there is no competency requirement for charitable status. While charities may be “required, by law, to act in the public interest” (Imagine Canada 2015, p.3), they do not have to prove that they are good at advancing the public interest. Some charities will employ leading experts, but that is not an inherent characteristic of charity itself. It is difficult to argue that government should deregulate charities’ political activities because of practical expertise they do not necessarily have.

Gibbins (2016) even suggests that more political leeway is in order because charities know more than bureaucrats. Bureaucracies cannot be trusted, he says, since “career paths within the public service are built through . . . cross-departmental mobility” where “today’s in-house expert in social support could easily be tomorrow’s expert in endangered species.” This may be so, but charities face identical constraints. A recent report on the sector’s labour force highlighted “recruiting and retention issues” as a major challenge, often because other employers, including the government, offer higher wages that attract more competent candidates (McIsaac *et al*, 2013). Even if Gibbins were correct, his is a pernicious argument: neo-liberalization thrives on the progressive devaluation and demonization of the democratic state.

There is a better way

The arguments made in support of deregulating charities’ political activities leave much to be desired. These arguments are plagued by inconsistencies, rely on false assumptions, and are liable to accusations of being partisan and undemocratic. Here are three ways in which the pro-advocacy camp could achieve its stated goals while avoiding the ethical challenges that their current strategy engenders.

Forego charitable status

One way to resolve the many ethical problems raised above is for aspiring advocacy groups to relinquish the privileges and subsidies that come with charitable status. In doing so, these groups would reinforce their independence because any donations received would not impose reimbursement costs on the public purse. This would likely depress revenues in the short term but the situation is not irredeemable. As a poignant comparator, the National Rifle Association of America has had tremendous success achieving its advocacy goals. It does so with the power of more than five million paying members, none of whom receives a tax receipt (NRA, 2016). Greenpeace is a good example of how this can work in Canada.

Adopt contribution limits and disclosure requirements

Another way to resolve the various ethical dilemmas presented here is to enhance transparency. If charities accepted strict individual contribution limits, they could prevent their political activity from providing real or perceived cover for private donor interests. They could act like political parties without issue because they would be regulated like political parties. This

course would be even stronger if charities accepted rules requiring them to disclose all their donors, the amount donated, and any conditions or stipulations agreed to in exchange.

Become political parties, or join them

Political parties are independent associations of private citizens that are formed to persuade the public to endorse certain positions over others. If charities want to engage in civic debate, they can do so more intensively by registering as political parties and abiding by the attending rules. Canadians could validate, or discredit, their policy agendas at the ballot box. Alternatively, charity sector leaders could volunteer their intellect to established parties, outside of their paid working time. It would help if they brought their audience and donors along too. By entering the political arena, the success of their advocacy would depend on the merits of their positions and the persuasive power of their arguments, not on the private money, public subsidy, personal influence, or a benevolent halo they can marshal to their cause.

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[1] One describes the maintenance of estates and the other is a synonym for "polished."

[2] See, for example, David Harvey's (2005) assessment of the "neoliberal state" as a facilitator of capital accumulation.

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