

Unsettled Standing:
Who (Else) Should Enforce the Duties of Charitable Fiduciaries?¹

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I am speaking all the while of private individuals. For if there are now any magistrates of the people, appointed to restrain the willfulness of kings (as in ancient times the ephors were set against the Spartan kings, or the tribunes of the people against the Roman consuls, or the demarchs against the senate of the Athenians; and perhaps, as things now are, such power as the three estates exercise in every realm when they hold their assemblies), I am so far from forbidding them to withstand, in accordance with their duty, the fierce licentiousness of kings, that, if they wink at kings who violently fall upon and assault the lowly common folk, that I declare that their dissimulation involves nefarious perfidy, because they dishonestly betray the freedom of the people, of which they know that they have been appointed protectors by God's ordinance.

John Calvin, in a treatise prefaced with an address to "the Most Mighty and Illustrious Monarch, Francis, Most Christian King of the French."³

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³ 4 *INSTITUTES OF THE CHRISTIAN RELIGION*, Chapter 20, Section 31 (John T. McNeill, ed., 1536, & Ford Lewis Battles, trans., 1975).

I reckon I'll be at the beck and call of folks with money all my life, but thank God I won't ever again have to be at the beck and call of every son of a bitch who's got two cents to buy a stamp.

William Faulkner, upon being dismissed from the U. S. Postal Service for playing cards out back while customers were waiting up front.⁴

⁴ JOSEPH BLOTNER, *FAULKNER: A BIOGRAPHY* 118 (one-volume ed. 1984).

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I. Introduction.

Calvin, the author of my first epigraph, considered political power a sacred trust. God was the grantor, the ruler (almost universally a monarch) was the trustee, and the citizens were the beneficiaries. Whatever its merits in theory (and I'm inclined to think they were many), this presented an obvious practical problem: once the grantor is out of the picture, legally or theologically, who enforces the terms of the trust? If the grantor can't or won't act, who should?

In discussing standing to sue charitable fiduciaries, we face a parallel problem. On the one hand, we don't want charitable management to become latter-day Louis XIVs, living in unreviewable opulence at the expense of those placed in their care. On the other hand, we don't want conscientious managers to be too easily denounced as enemies of the people and deposed -- or worse.

In the face of this dilemma, the traditional law of charity reflects a mediating position very much like Calvin's. Basically, there are clearly defined tribunals of the plebs who can sue: typically, the attorney general; frequently, co-fiduciaries. With narrow exceptions, everyone else is barred.⁵ The law of charity, like the Institutes of Calvin, forbids private individuals as such to act as champions of the public good. This preclusion may reflect, at least in part, the sentiment of my second epigraph, muttered by the recently ca

⁵ Mary Grace Blasco, Curt S. Crossley, David Lloyd, NEW YORK UNIVERSITY SCHOOL OF LAW, 4 TOPICS IN PHILANTHROPY, Standing to Sue in the Charitable Sector 1-15 (1993) [hereinafter NYU, *Standing*]; MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 194-202 (1965); EDITH FISCH, CHARITIES AND CHARITABLE FOUNDATIONS 553-66 (1974).

shiered postmaster of Oxford, Mississippi. To paraphrase Faulkner, standing to raise questions of fiduciary misconduct takes more than the price of a postage stamp, even if that stamp is attached to an envelope addressed to a court of general jurisdiction.

But how much more, and on the part of whom? The modern law of charity, again like the Institutes, somewhat begrudgingly acknowledges the need for default enforcers. This paper explores who they should be and the circumstances under which they should be empowered to act.

As Harvey Dale loves to remind students of philanthropy, with his quote from H. L. Mencken, "For every complex problem, there is a solution that is simple, elegant -- and wrong."⁶ The question before us is no different. In the first part of my paper, I want to carefully pose that question, then unpack its implicit complexities. In the next part, which is the body of my paper, I will criticize three sets of answers that, for all their elegance, fail because they are too simple, because they ignore important complexities. Each of these answers, however, sheds important light on the question. Taken together, they suggest a certain circularity in the question: who should have standing to sue charitable beneficiaries turns very much on what sort of charity we want.

II. The Complexity of the Question.

Our question is this: Should we expand the traditional categories of those with standing to sue to enforce the duties of charitable fiduciaries? To avoid both undue com

⁶ Mark Hall and John Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 328, 330 (1991).

plexity and over-simplification, we need first to define the field this question covers, then to scope out difficulties in the surveyed field itself.

A. Defining the Field.

Several aspects of our question need to be made explicit in order to reduce unnecessary complexity, to ensure that we don't accidentally try to solve problems that are not properly before us or try to solve a different kind of problem with the kind of solution that we are considering. We have a hard row to hoe, and it is important that we don't wander off into the surrounding woods.

1. Who is Suing: Standing Versus the Merits.

The first thing to note about our question is that it involves standing. Technically speaking, standing questions are "who" rather than "what" questions. Standing analysis proper focuses on the parties who may bring a particular claim; the existence of the underlying claim is presupposed.⁷ But that basic point is subject to several critical qualifications. In the first place, determining who gets to bring the claim may properly involve an analysis of the nature of the claim; more generally, the nature of the claim is not necessarily irrelevant to the identity of the permitted claimant. Standing is essentially the question of who is an appropriate party to assert a claim, and answering that question involves looking at the relationship between the party and the claim.

An important corollary is that a denial of standing is not a denial of the existence of a meritorious underlying claim. It is, technically speaking, merely a determination that the

⁷ See LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 107 (2d ed. 1988); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 55-56 (1997).

claim, however meritorious it may be, should be asserted by someone else. Speaking technically, however, will not adequately account for all of what seems to be going on in standing analysis. In the context of suits to challenge actions of government, scholars widely suspect that denials of standing are really sub rosa rejections of the underlying claim, and thus disguised decisions on the merits.⁸

Something like the converse of that seems to be going on in discussions of standing to sue to enforce charitable fiduciary duties. Those who urge an expansion of such standing are often urging the creation of new classes of claims, or at least changes in the scope of pre-existing claims, rather than merely expansion of classes of permitted claimants. Courts, for their part, are also sometimes obscure about whether they are expanding standing or creating new causes of action.⁹

Just as it is important to distinguish between new claims and new claimants, so it is important to distinguish among old claims. In our central question the phrase "enforce the duties of charitable fiduciaries" points to this distinction. The kind of suits we are addressing are those that assert a breach of fiduciary duties, and fiduciary duties of distinct kinds. These suits are but one subset of the many kinds of cases that might be brought against charities, many of which lie outside our concern. Charities may be sued on a wide range of claims that implicate fiduciary duties only indirectly, if at all.

⁸ See Tribe, *supra* note 7, at 111 (faulting the Court for using standing doctrine to disguise implicit decisions on the appropriate role of the federal courts). *Cf.* Chemerinsky, *supra* note 7, at 56 ("many commentators believe that the Court has manipulated standing rules in order to hear particular cases."). Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1402 (1995).

Thus, for example, creditors might sue charities for failure to pay their debts, accident victims might sue them for the ordinary negligence of their employees, and employees might sue them for violations of their contracts or of statutes regulating the employment relationship. The secretary with the now-forgotten name can sue Jim Bakker for sexual harassment, presumably even if he becomes president of a bigger operation than the PTL Club, and Prayer Partners who thought they were getting a heavenly deal on terrestrial time shares can make the same kinds of cases as investors in more obviously for-profit fools' paradises. None of these cases necessarily involves the fiduciary duties of charities as charities.

Quite often, calls for expanding standing to enforce charitable fiduciary duties are better understood as simply the assertion of garden variety claims like these. Conversely, denial of expanded standing to enforce the duty of charitable fiduciaries should not be mistaken either for a denial of standing to raise existing, garden variety claims or for a refusal to let the scope of such claims expand. The hoary doctrine of charitable immunity can continue its over-due decline without any need for expanded standing.

2. Who is Being Sued: Standing in Three Sectors.

Understanding standing to sue charitable fiduciaries requires a bit of elementary sectoral geography. We need to remind ourselves that the organizational world is divided into three sectors: the for-profit, the nonprofit, and the governmental. These distinctions matter because questions of standing turn not only on who is suing, but also on who is

⁹ See NYU, *Standing*, supra note 5, at 5 (noting tension in judicial action between reforming substantive law and expanding standing).

being sued. The appropriateness of a particular kind of party plaintiff may well turn at least in part on the nature of the party defendant. Among defendants from the three major organizational sectors there may be important similarities or differences. This is especially important to bear in mind with respect to the nonprofit sector, in which standing law is relatively less well developed. Before we borrow from precedents in the other sectors, we must make sure that the asserted analogies are genuinely apt.¹⁰

Just as we should remember that nonprofits are only one organizational sector, so we should bear in mind that charities are not the whole of the nonprofit sector. Even within that sector, important differences between organizations may counsel in favor of different criteria for standing to sue the organizations' fiduciaries. Particularly important here, as we shall see in more detail later, are differences between charitable organizations and mutual benefit organizations.

3. Expanding Standing Versus Alternative Remedies.

The question of whether to expand standing to sue to enforce charitable fiduciary duties implies a larger question: Are there other means of ensuring that those duties are carried out? Two broad sets of alternatives present themselves: On the one hand, we could enhance enforcement by those who already have standing to sue. On the other hand, we could employ a potentially wide range of alternative dispute resolution meas

¹⁰ See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 657 (1985) (calling for reforms in the law of nonprofit corporations to reflect differences both between nonprofits and for-profits and among nonprofits themselves).

ures,¹¹ or we could rely more on prevention and less on correction. The more we are willing to rely on some such alternatives to expanded standing to sue, the less imperative that expansion will be. Conversely -- and this seems to be the trend, both in the commentaries and in the courts -- the less reliable alternatives seem, the more attractive expanded standing will appear.

B. Marking the Stumps.

Raising these three points -- that standing to sue is distinct from the merits of the suit, that standing doctrine may differ among the three organizational sectors, and that expanded standing is only one route to ensuring fiduciary fidelity -- reduces unnecessary complexity. Drawing these distinctions delineates the field of our inquiry, fencing out distracting side issues. Now, however, we must turn to the unavoidable complexities within our chosen field.

1. The Trinity of Fiduciary Duties.

The first unavoidable complexity to note is that charitable fiduciary duties are plural, not singular. Charitable fiduciaries must consider not one, but three distinguishable duties: the duty of loyalty, the duty of care, and the duty of obedience.¹² The most fundamental of these, the duty of loyalty, is essentially prohibitory: charitable fiduciaries are

¹¹ At the risk of ignoring my own warning against borrowing too freely from the standing law of other sectors, I should point out that, in the governmental sector, courts frequently relegate litigates to legislative or political relief. *See Laird v. Tatum*, 418 U.S. 208 (1974).

¹² *See* DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 21; Laura Brown Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6 NONPROFIT MANAGEMENT & LEADERSHIP 141, 144-46 (1995).

forbidden to profit at the expense of the charity they ostensibly serve.¹³ This is the fiduciary equivalent of thou shalt not steal.

The second duty, that of care, concerns, as its name implies, the proper management of charitable assets.¹⁴ Its basic directive is "be careful." Optimally, charitable fiduciaries should use or invest the talents committed to their care wisely and well; at a minimum, they shouldn't bury them. (Or if they do bury them, they must use a jar that doesn't leak, lest moth and rust corrupt.)

The third duty, generally referred to as obedience, has to do with maintaining the charity's purpose.¹⁵ It tends to be retrospective, the charitable equivalent of "honor thy father and thy mother," with the organization's founders and donors standing in loco parentis. Under this duty, the uses to which charitable fiduciaries may properly put assets entrusted to them are said to be constrained, not only by the outer limits of charitability, but also by specific purpose provisions in the charity's organizational documents or the terms of particular gifts.

As an illustration of how these duties differ, consider a frequently challenged action by charitable fiduciaries: the sale of a charitable hospital to a for-profit health care organization. If we are worried about the charitable board's securing lucrative jobs in the new regime, or accepting outright bribes to approve the deal, our concerns implicate the duty

¹³ See KURTZ, *supra* note 12, at 59-68.

¹⁴ See *id.* at 22-30.

¹⁵ See *id.* at 84-86.

of loyalty. If our fear is not that the board is feathering its own nest, but rather simply selling the hospital at a stupidly low price, we are concerned with the duty of care. Finally, if we object to the purposes to which the sales proceeds will be put -- no longer to run a hospital, but perhaps to fund medical research or education -- our concerns come under the heading of the duty of obedience. As we shall see, the location and scope of standing must take the differences between these three duties into account.

2. The Multiplicity of Candidates for Expanded Standing.

Just as the duties of charitable fiduciaries are plural, so are the categories of those who might be given standing to enforce them. Obvious candidates include donors to the charity, beneficiaries of charitable activities, and members of charitable organizations.¹⁶ Juxtaposing these two sets of factors compounds complexity. If there are identifiably different fiduciary duties and potential enforcers, it is conceivable that we would place the enforcement of different duties in different hands. Similarly, we could be relatively generous in granting standing to enforce some duties but relatively chary as to others, and the degree of generosity might also vary among categories of candidates for standing.

To return to our hospital example, the reasons for allowing donors to raise questions about the duty of obedience -- how the proceeds of the sale will be used -- may differ substantially from those relevant to their raising questions about the duties of loyalty and care, how the hospital was run by the charity as a hospital. And still other reasons might apply to each duty in the case of hospital patients. We can draw these lines even more

¹⁶ See NYU, *Standing*, supra note 5, at 6.

finely. As to donors, we can distinguish between the donor of large, earmarked gifts for particular capital assets -- the building that houses the hospital, for example -- and small donors whose gifts have no obvious strings attached: a patient's visiting brother-in-law who buys an over-priced brownie from a candy-striper at their annual bake sale. As to patients, we can distinguish between those who pay and those who don't (more precisely, perhaps, between those whose insurance companies pay and those for whom other people's insurance premiums or taxes pay).

3. The Multiplicity of Remedies.

The permutations possible by combining the three fiduciary duties and the various categories of those who might enforce them must be multiplied by a third factor, the range of available remedies. The panoply of remedies includes restitution, damages, injunctions, disclosure of information, and removal and replacement of the fiduciary.¹⁷ Some remedies may be more appropriate for the breaches of some duties than others. More directly relevant here, some remedies are likely to be more disruptive than others, and the degree of disruptiveness is likely to vary with both the kind and the number of parties who have standing to invoke them. In assessing the wisdom of whether to expand standing to assert a particular kind of fiduciary violation to a new class of claimants, it thus makes sense to take into account what the risk of their winning particular remedies will cost the charity.

¹⁷ See Fremont-Smith, *supra* note 5, at 107-110, 150-52; Fisch, *supra* note 5, at 549-50.

4. The Diversity Among Charitable Organizations.

Identifying the different candidates for expanded standing implicates yet another complexity. Without a legal legerdemain that fairly obviously places the rabbit in the hat, some categories of candidates for standing cannot be found in some forms of charitable organization. In our discussion of hospitals, for example, we made no mention of members. Most hospitals don't have them. Moreover, in the context of hospitals, donors are becoming increasingly less significant as sources of revenue. Yet in the case of churches, to take another paradigmatic class of charities, the role of both members and donors tends to loom large, and identifying purchasers of the charity's product produces serious conundrums (not to mention Supreme Court cases).

Nor are the only significant differences here between different charitable categories like hospitals and churches; the respective roles of donors, members, and beneficiaries differ greatly within categories of charity as well. A university teaching hospital may differ markedly from a hospital run by a religious order, and both differ from the pseudo-charities derisively referred to as doctor co-ops.¹⁸ Being a member of a Quaker meeting is quite different from being a Roman Catholic parishioner, and paying for a private mass may not be the economic or legal equivalent of having a Scientological audit.

These distinctions among internal modes of organization suggest the final complexity, on which the most elegant monolithic theories of expanded standing break down. The organizational variety of charities themselves necessarily complicates the question of

¹⁸ See Pauly and Redisch, *The Not-For-Profit Hospital as a Physicians' Cooperative*, 63 AM. ECON. REV. 87 (1973).

who should have standing to sue their fiduciaries for breaches of their duties. In the next part, I shall try to show how ignoring these complexities seriously infects the most elegant of the solutions to the problem before us.

Before turning to these very real organizational complexities, however, I need to address a traditional distinction in organizational form that most commentators find unhelpful. Charitable organizations traditionally have one of three legal forms: charitable trusts, charitable corporations, and unincorporated associations.¹⁹ On the critical issue of fiduciary duties, the law traditionally distinguished between charitable trusts and charitable corporations. But these two formally and historically distinct sets of fiduciary standards have tended to merge.²⁰ Although debate continues over which set is better for charity, even that debate assumes that the better standard should apply to both predominant forms of charitable organization, trusts and corporations.²¹ And on questions of standing to enforce fiduciary duties, as opposed to the substance of those duties, courts do not generally distinguish between trusts and corporations.²²

Accordingly, in what follows I generally ignore the formal distinction between trusts and corporations, treating them as essentially alike. As a matter of terminology, I

¹⁹ See Fisch, *supra* note 5, at 141.

²⁰ See Kurtz, *supra* note 12, at 22-23; Fishman, *Agenda for Reform*, *supra* note 10; James J. Fishman, *Standards of Conduct for Directors of Nonprofit Corporations*, 7 PACE L. REV. 390, 404 (1987).

²¹ See Kenneth Karst, *Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 435-6 (1960); Fisch, *supra* note 5, at 145-46; Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 623 n. 408 (1981); Fremont-Smith, *supra* note 5, at 42-43.

²² See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 606.

group trustees of charitable trusts with directors and officers of charitable corporations under the term charitable fiduciaries. Where necessary, I rebut suggestions that the difference between trust and corporate form should matter in questions of standing to sue charitable fiduciaries.

C. Summary.

We have before us a complex question: Should we expand the categories of those with standing to sue to enforce the duties of charitable fiduciaries? To answer that question adequately, we must not oversimplify. We must not collapse the issue of standing into the merits of the underlying claims, and we must not borrow standing doctrines from other organizational sectors without appreciating what may be very different policy rationales. We must not lose sight of alternative means to the ultimate end: upholding fiduciary duties. We must remember that those duties are tripartite, rather than unitary. And we must bear in mind overlapping complexities: the multiplicity of available remedies, the various candidates for expanded standing, and, perhaps most importantly, the formal and functional diversity of charitable organizations.

III. Simplifying Solutions.

Failure to attend to these complexities infects the calls for expanded standing to which we must now attend. The wrong assumption that charity is fundamentally like its siblings in either the for-profit or governmental sectors seriously undermines the elegant simplicity of the first two solutions. The proprietary model over-emphasizes the similarity between nonprofit organizations and for-profit firms; the citizenship models err in the

other direction, assimilating charities too closely to government. The sectarian model, my own preferred form of error, makes charity too distinctive and too independent of the other two sectors. All three models treat charity too monolithically; they have much to learn from each other.

A. The Proprietary Model.

The first (and I think the most elegant) solution is what I will call the proprietary model. This model builds upon Henry Hansmann's contract failure theory of nonprofits. Hansmann's general approach recognizes several critical differences among charitable organizations, only to ignore them in its treatment of the particular issue of standing. But Hansmann's theory is worth exploring in some detail. Its omissions offer important clues to a more adequate, if less simple, model, and its inclusions, if properly attended to, suggest significant limits to the scope of expanded standing.

1. Purchaser and Donor ("Patron") Standing.

Hansmann distinguishes among four basic kinds of charities²³ by examining the intersection of two variables: how the organizations are financed and by whom they are controlled. With respect to financing, he identifies two polar models, the donative and the commercial. Donative charities receive most of their revenues from grants or gifts; commercial charities depend upon the prices they charge for the goods or services they provide. With respect to control, the second factor in Hansmann's taxonomy, the critical

²³ See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 840-43 (1980). Hansmann's theory actually speaks of nonprofits as a whole, not just of charity. Since charity is a lesser included class, what Hansmann says about nonprofits generally is meant to apply to charities in particular, and I use the narrower term except when the context requires the broader.

question is whether governance lies in the hands of those whom Hansmann calls patrons. Patrons are either donors to the charity or purchasers of the goods or services it provides. In mutual charities, patrons exercise control; in entrepreneurial charities, others do.

Combining these two factors, locus of control and sources of finance, Hansmann generates a four-part division of charity into donative mutuals, donative entrepreneurial, commercial mutuals, and commercial entrepreneurial. Donative mutuals are supported principally by gifts, and the donors control the organization. Examples²⁴ are the National Audubon Society and congregational churches and synagogues.²⁵ Donative entrepreneurial also receive most of their revenues in the form of gifts, but their control is not in the hands of the donors. Art museums and international relief organizations like CARE and the Red Cross manifest this separation of control from donative sources; so, one might argue, do episcopal, as opposed to congregational, churches.

Commercial charities, like donatives, fall into two principal subclasses, depending on who controls them. Commercial mutual charities generate their revenues by the sale of goods or services to those who control them. If a congregationally-governed church relied for its revenues on bingo rather than the collection plate, it would fit this model. Finally, entrepreneurial commercial derive most of their income from sales, but are not controlled by their customers. Typical of this last but very important group are the National Geographic, the Educational Testing Service, community hospitals, and nursing homes.

²⁴ Some of the following examples come from Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 842; others are mine.

²⁵ See Giovan Harbour Venable, *Courts Examine Congregationalism*, 41 STAN. L. REV. 719 (1989).

Having drawn these very clear and useful distinctions, Hansmann does his best to blur them. Most significantly, he conflates donors and purchasers in the single category of "patron," and he tries to explain all of charity with a single, unifying theory of function and origin.²⁶ This theory is simple, elegant, and dangerously misleading -- at least for purposes of identifying standing to enforce fiduciary duties.

Hansmann's grand theory explains charities as a means of meeting "patron" demand for goods and services the provision of which involves a particular species of market failure. In the case of what Hansmann calls "contract failure," patrons are unable adequately to police the producers' performance by ordinary contractual devices. Faced with this difficulty, patrons of such goods and services turn to nonprofit suppliers. The reason for nonprofits' appeal lies in the very fact that they are nonprofit. Nonprofits' defining feature, the nondistribution constraint, forbids those who control them from keeping the organizations' net profits for themselves. This reduces their incentive to skimp on delivering goods and services, and thus helps redress patrons' concern that they themselves cannot independently assess what they are paying for.²⁷

From this descriptive theory of charities' function, Hansmann derives his account of standing to sue charitable fiduciaries. The duties of charitable fiduciaries, under Hansmann's theory, are all derived from the nondistribution constraint, and function essentially

²⁶ See Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 843-51.

²⁷ See *Id.*

to ensure that patrons get what they are paying for. Accordingly, Hansmann argues, patrons should be entitled to sue to enforce those duties.²⁸

There are several serious problems with this line of reasoning. Even if the premises are true (and they are very much disputed²⁹), universal patron standing of the sort Hansmann seems to contemplate does not necessarily follow. A closer look at Hansmann's own theory suggests some of the reasons why.

The most basic reason is a deep paradox: the better Hansmann's contract failure theory is as an explanation of charities' function and fiduciary duties, the less satisfactory patron standing is likely to be as a means of ensuring that function by enforcing those duties. If charities arise because patrons have problems monitoring contract performance, patrons are ex hypothesi hardly the best monitors of that performance. Hansmann's theory of patron standing, in combination with his contract failure of charity, oddly suggests that foxy fiduciaries are the principal risk to the charitable henhouse, and that the chickens themselves are the best guardians of their golden eggs.

Hansmann is well aware of this paradox. As he himself points out, the nondistribution constraint really operates as a kind of form contract enforced by the state.³⁰ If

²⁸ See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 606-11; See also Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 845 ("In the case of the nonprofit corporation ... the purpose of the charter is primarily to protect the interests of the organization's patrons from those who control the organization.").

²⁹ For general critiques of Hansmann's contract failure theory, see Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996); MARK HALL AND COLOMBO, *DONATIVE THEORY* (year?); and Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990).

³⁰ See Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 844, 853.

nonprofit patrons themselves must set and enforce the terms of this contract, most of its economic advantages -- the only advantages Hansmann is concerned with -- are lost.³¹ Thus, for Hansmann, patron enforcement is a decidedly second best means of enforcing charitable fiduciary duties. He comes to it only after bemoaning the fact that traditional state enforcement is chronically underfunded. At its strongest, accordingly, the proprietary model, resting as it does on Hansmann's contract failure theory, is really a brief for enhancing state policing of charity, rather than for expanding patron standing. Hansmann's limited enthusiasm for patron standing derives directly and explicitly from his despair of increased governmental scrutiny.³²

Even as a second-best solution, the proprietary model has serious limitations as a basis for donor and purchaser standing.

Hansmann's monolithic theory of patron standing overlooks or minimizes several of the complicating factors identified in Part II, some of which are tantalizingly incorporated into Hansmann's own four-part taxonomy. Most critically, the proprietary model conflates two distinct classes of potential private enforcers, donors and purchasers, into one, "patrons," thus collapsing its own promising distinction between two different kinds of charities, donative and commercial. As we have seen above, there may be good policy reasons

³¹ *See id.* at 853.

³² *See* Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 608. Curiously, he fails to consider what, under his own theory, would be a more plausible second-best alternative to state enforcement: monitoring of charitable fiduciary duties by other charitable organizations. We shall consider that possibility in greater detail below.

not only for treating these two categories differently with respect to standing, but also for subdividing them further.

Hansmann's own theory suggests why this might be so. As it turns out, there is not just one form of contract failure, but several. Furthermore, these different forms of contract failure tend to arise with respect to different kinds of patrons, donors and purchasers, and thus with respect to different kinds of organizations, donative and commercial. This is important because, as we have seen, patron standing for Hansmann is fundamentally a matter of contract enforcement. If the nature of different patrons' contracts differ, so, predictably, will the nature of their enforcement actions.

a. Donor Standing.

The first form of contract failure, "separation between the purchaser and the recipient of the service,"³³ arises in connection with donative nonprofits. Indeed, it is symptomatic of "the most traditional of charities -- namely those that provide relief for the needy."³⁴ Take, for example, the case of the typical donor to CARE, who is in effect "financ[ing] a relatively simple service, namely shipping and distributing foodstuffs and other supplies to needy individuals overseas."³⁵ The problem, as Hansmann sees it, is that

[i]f CARE were organized for profit, it would have a strong incentive to skimp on the services it promises, or even to neglect to perform them en

³³ Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 23, at 846 n. 52.

³⁴ *Id.*

³⁵ *Id.* (footnote omitted).

tirely, and, instead, to divert most or all of its revenues directly to its owners. After all, few of its customers could ever be expected to travel to India or Africa to see if the food they paid for was in fact ever delivered, much less delivered as, when, and where specified.³⁶

In the face of this inability to monitor the performance of a for-profit, the donor is likely to turn to a nonprofit, which is legally forbidden to pay out any of its receipts as "profits" and is thus less likely to skimp on the promised service.

The second form of contract failure also involves donors. This form occurs in the case of "public goods,"³⁷ which tend to be undersupplied by for-profits because, as in the case of listener-sponsored radio, it is difficult to exclude free riders, those who tune in without paying up. Some people, of course, are willing to pay for advertisement-free radio and other public goods. But if they try to buy them from for-profit firms, they will not be readily able to ensure that what they pay goes for greater output, rather than for higher profits at the same level of output. Thus, they are inclined to "buy" from a nonprofit, which is forbidden to pay out net revenues as profits. Listener-sponsored radio stations are for this reason invariably nonprofit, and, more generally, nonprofits tend to dominate the non-governmental provision of public goods.³⁸

³⁶ *Id.* at 847.

³⁷ *Id.* at 848-54.

³⁸ *See Id.* at 850-51.

The nature of each of these kinds of contract failure suggests that, even if all donors are to be granted standing, that standing should be limited in several related ways. The first is temporal; the time during which any particular donors have standing to sue should be defined by the duration of their gift. Gifts to CARE and public broadcast systems are generally destined, more or less explicitly, for immediate expenditure. Last year's donors thus have no contractual interest in next year's operations; their only interest, under the contract failure theory, is to ensure that their own individual gifts are spent as directed. Where, by contrast, the duration of the gift is longer, the duration of the donor's standing should correspondingly increase. Thus, under Hansmann's theory, those who make endowment gifts should have standing for the entire life of their gift.

The range of available remedies and the diversity of fiduciary duties is also relevant here. Even if the violation of a fiduciary duty occurs during the life of a donor's gift, when recognition of donor standing is proper, some remedies may not be appropriate. To return to our hospital example, it would be odd, under the contract failure theory, to allow either short or long term donors to enjoin the typical hospital sale. If the conversion violates a condition restricting the gift to nonprofit hospital purposes, an adequate remedy would seem to be the return of the gift.³⁹ Restitution, in other words, rather than an injunction, is the appropriate relief in the case of an alleged violation of the duty of obedi

³⁹ Somewhat surprisingly, Hansmann suggests that it might be appropriate to require patrons to pay over any recovery to the organization itself. See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 610. This would obviously diminish their incentives to sue, which, as Hansmann acknowledges, are probably very weak in the first place. The basis of this suggestion is an analogy to share-holder derivative suits against for-profit managers, *id.* As we shall see below, this analogy is fundamentally false.

ence. The same would seem to true if the donor's gift were threatened by a breach of the duty of care or loyalty.

In the case of non-endowment gifts to hospitals -- the profits from over-priced bake-sale brownies, for example -- this would likely be a very small amount.⁴⁰ In the case of endowment or capital gifts -- the stereotypical gift of a wing or ward -- the restitution remedy would be more costly. But even in the latter case, the costs need not be prohibitively high, as a practical matter. More significantly, whether it was prohibitive would be a practical matter; unlike an injunction of the sale, the final decision would be a matter not of judicial fiat, but of cost-benefit analysis. And, most significantly, that analysis and the attendant decision to sell would be in the hands of the hospital board, not the courts, as long as the attorney general approved and no one else had standing to object.

These limitations, never made clear in Hansmann's elaboration of patron standing, are implicit in another aspect of Hansmann's standing theory. Hansmann worries that sales of hospitals are not proceeding as quickly as the greater economic efficiency of for-profit purchasers seems to warrant. To promote a brisker transition of nonprofit hospitals to for-profit status, he offers an initially startling proposal: give prospective for-profit buyers standing to challenge the decisions of charitable hospital boards not to sell.⁴¹ This

⁴⁰ Addressing large numbers of small claims could, to be sure, incur high transaction costs, but consolidation in class actions and the use of other cost-limiting devices could help here, as Hansmann himself suggests. *See id.* at 610.

⁴¹ Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Services*, in *INDIVIDUAL AND SOCIAL RESPONSIBILITY* at 245, 256 (1996).

proposal is startling because it assumes that the problem in hospital sales is that hospital fiduciaries attend to their duty of obedience too much, rather than too little.

This proposal should ultimately be rejected, I believe, because it rests on the fundamental flaw of Hansmann's entire theory of charity, namely, the assumption that the *raison d'être* of charities, and the principal measure of their success, is efficiency as technically defined by economic analysis.⁴² The point to note here is a much more limited one: in its own terms, Hansmann's theory of patron standing allows charitable fiduciaries more latitude in the disposition of their assets than would a more monolithic, less carefully tailored understanding of donor standing. Implicit in Hansmann's call for purchasers' standing to challenge hospital board decisions not to sell is a concession of my point about appropriate remedies for donors: they should not be entitled to sue to enjoin the sale. Nor should they have any say in the disposition of any sales proceeds net of restitution costs.

b. Purchaser Standing.

Just as Hansmann's theory implies limits on donor standing, so it implies limits on the standing of his other class of patrons, those who purchase goods and services from charities. Those who buy from charities, according to Hansmann, experience a different kind of contract failure. This third form of contract failure occurs in connection with

⁴² What Hansmann is really importing, under the heading of standing, is a substantive notion of the duty of charitable fiduciaries. Specifically, Hansmann believes that charities should be providing goods and services in essentially the same way for-profits would, in the absence of market failure. But they might be doing something else, as defenders of charitable hospitals have frequently argued. They might be providing kinder, gentler care, or care combined with proselytization, or employment for a community of service.

what Hansmann calls "complex personal services."⁴³ Some services -- certain forms of health care and education are Hansmann's examples -- may be so complex that the purchaser will be unable to monitor quality effectively at a reasonable cost, even though the service is being supplied directly to the purchaser. In particular, purchasers may worry that the marginal dollar they spend for the service is not being used to improve the quality of the service, but rather to increase distributable profits. Here again, Hansmann maintains, this risk is lessened in the case of nonprofits, where such distributions are forbidden.⁴⁴

Even more obviously than donors, purchasers would seem to be adequately protected by remedies that give them what they pay for, or compensate them when they don't get it, or simply return to them the purchase price of a failed deal. As in the case of donors, it is hard to see how their status as purchasers who are trying to replicate ordinary market transactions would entitle them to a remedy requiring continued provision of a particular kind of service beyond the terms of their individual contracts. Patients of a for-profit hospital have no right to force its owners to keep that particular hospital open, or to stay in the hospital business at all. Hansmann's model, based on the analogy to such purchaser/ provider relations in the for-profit sector, implies the same for nonprofit patients as well.

⁴³ *Id.* at 862-72.

⁴⁴ *See Id.* at 862-63.

c. Derivative Suits.

The whole of these limits on the standing of patrons, donors and purchasers, is ultimately greater than the sum of its parts. Seen together, these particular analytic points produce a radically different conceptual picture from that offered by proponents of expanded patron standing. The focus of this new perspective is the distinction between suits to enforce private, quasi-contractual interests of patrons and a very different kind of suit. This latter is a derivative suit brought to enforce the duties of charitable fiduciaries to the charitable entity itself, rather than to the individuals bringing the suit. The more aggressive proponents of the proprietary model believe patrons should be able to bring such derivative suits, on the analogy of shareholder derivative suits against for-profit corporate officers and directors.⁴⁵ We are now in a position to see why that analogy is extremely dubious.

The basic distinction between patron suits under the contract failure theory and derivative suits to vindicate the charity's own interests lies deep in the contract failure theory itself. Under that theory, charitable fiduciary duties constitute a kind of form contract between patrons and charitable organizations. Suits to enforce those duties, accordingly, are just garden variety contract disputes. Patrons are allowed to sue charities, under Hansmann's theory, because charities have in some way violated the terms of a real, if only

⁴⁵ See Avner Ben-Ner and Theresa Van Hoomissen, *The Governance of Nonprofit Organizations: Law and Public Policy*, 4 NONPROFIT MANAGEMENT & LEADERSHIP 393, 398, 408-10 (1994). Hansmann himself is more cautious; although he cites the analogy between patron suits and shareholder derivative suits, it is principally to suggest that the limitations on the latter be applied to the former. See Hansmann, *Re-forming Nonprofit Corporation Law*, *supra* note 21, at 610. The shareholder analogy is also invoked by

implicit, contract. This positive foundation for patron suits has important negative implications: patrons have no basis for suing under Hansmann's theory unless they can demonstrate a breach of their contract. Bluntly put, patrons can sue when they are ripped off, but only when they are ripped off.

As we have seen, the contractual interests of donors and purchasers can be protected without any reference at all to derivative actions. Much of the power of the case for expanded standing lies in its appeal to fundamental fairness: without standing to sue, donors and purchasers have no way to ensure they get what they pay for, or, conversely, that charities perform as they promise. Once we recognize, however, that purchasers and donors can use garden variety suits to police their most obvious interests, along the lines I have suggested above, the case for patron derivative suits loses much of its force. The fairness argument, if anything, cuts the other way; letting patrons bring derivative suits gives them more, not less, than they bargained for.

The analogy between nonprofit patrons and for-profit shareholders breaks down at an absolutely fundamental point: patrons, unlike shareholders, have no proprietary interest in the organization's residual worth. Purchasers are merely parties to a commercial transaction with the seller; only by an extraordinary bootstrap with no parallel in the for-profit sector can sales be said to confer not only the goods or services bought, but also an ownership interest in the seller. The other kind of patrons, donors, are better analogized to for-profit bond-holders, who generally cannot bring derivative suits. When for-profit

commentators not committed to the proprietary theory, *see* NYU, *Standing*, *supra* note 5, at 35-44, and by courts, *see id.* (collecting and analyzing cases using the shareholder analogy).

shareholders bring suits in the name of the corporation, they are at least formally acting on behalf of an entity the residual worth of which they collectively own. It is that ownership interest that grounds the shareholders' standing; they are in reality suing to protect a critical part of their own investment. Patrons of nonprofits have, by definition, no such residual claim; giving them standing to sue derivatively is giving them an element of control over something they don't own.

This points to another critical difference between for-profit shareholders and nonprofit patrons, a difference implicit in Hansmann's own four-part taxonomy but virtually ignored in his theory of standing. This difference lies in the locus of control. In the typical for-profit corporation, ultimate control resides in the common stockholders. They elect directors and officers, and they have the final say in fundamental matters of corporate governance, as a matter of law.⁴⁶ Moreover, the voting power of individual common stockholders is typically tied to the amount of stock each owns. The general rule is one stock, one vote.⁴⁷ Against this background, shareholder derivative suits can be seen as a kind of last-ditch exercise of corporate power by those in whose hands that power ultimately lies, and for whose benefit it is in the final analysis to be wielded.

In the charitable world, by contrast, governance is much less standardized. Hansmann's own distinction between entrepreneurial and mutuals barely hints at the real variety here. Not only are some charities controlled by those who finance them and some

⁴⁶ HARRY G. HENN, *LAW OF CORPORATIONS* Section 188, at 361 (2d. ed. 1970).

⁴⁷ *See id.* at Section 189, at 363.

controlled by others. Those who finance charities, as we have seen, are sometimes purchasers and sometimes donors. In the case of entrepreneurial charities, the controlling class of non-patrons could conceivably be almost anyone. Most significantly, the allocation of control admits of almost infinite variety, from the inclusive and democratic regimes of congregational churches and consumer co-ops to the exclusive and self-perpetuating boards of private foundations and bishoprics of episcopal churches.

Not only is the allocation of control much less standardized in charities than in for-profits; so, too, is the link between level of contribution and amount of voting power. The rule in for-profits, as we have seen, is essentially one stock, one vote, and hence something like a direct ratio of contributed capital to castable ballots. In entrepreneurial charities, both donative and commercial, there may be no such correlation at all. And even in a paradigmatically democratic mutual donative, the congregationalist church, the size of donation may be very poorly correlated with amount of voting power, as a matter of fundamental policy. In the ideal Quaker meeting, the dowager's millions bring no more votes than the widow's mite.

Interestingly, things often stand differently with respect to mutual commercial non-profits.⁴⁸ In these arrangements, voting power is often directly tied to capital contributions in the form of initiation fees and periodic dues. Here the parallel to for-profit firms is closest, and so, perhaps, is the case for allowing patrons to bring derivative suits. But this is clearly a limiting case, for several reasons. In the first place, mutual benefit non

⁴⁸ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 193 (1996).

profits that exist to provide goods and services to their members are at the margin of charity; more typically, charities exist to benefit others, or at least exhibit some element of altruism.⁴⁹ Some of the more typical mutual commercial nonprofits -- social clubs, professional organizations, labor unions, and trade and homeowners' associations -- are thus not recognized as charities at all.

Those mutual benefit organizations that most resemble for-profit firms are not only not charities; they are not even nonprofits, but consumer co-ops. Here, as in the case of for-profits, the correlation between voting power and financial contribution may be quite close. In the case of the typical co-op, voting power is based on amount of purchases. And there is an even deeper similarity to for-profits: in co-ops, members are entitled to pro-rata distributions of the organization's net assets on dissolution. In the case of charities, this is forbidden by both state organizational law and federal tax law. It is thus no accident -- but also no strength -- that the more aggressive calls for expanded patron standing take mutual benefit organizations as their paradigm.⁵⁰

⁴⁹ See Atkinson, *Altruism in Nonprofit Organizations*, *supra* note 29, at 538, 558-66.

⁵⁰ This is the problem with the position of Avner Ben-Ner and Theresa Van Hoomissen, *supra* note 45, at 395, "In essence, our proposal calls for transforming nonprofit organizations into something more akin to membership organizations or consumer cooperatives." *Id.* at 395. This proposal rests on very dubious descriptive and prescriptive assumptions. Descriptively, it assumes, more or less explicitly, that all nonprofits are essentially mutual benefit organizations. *Id.* at 398-406. Prescriptively, it forces the governmental structure of all nonprofits into the procrustean bed of what some, but by no means all, consumer co-ops might, left to their own devices, choose for themselves, a kind of grass-roots consumer democracy. *Id.* at 408-12.

d. Member Standing.

This focus on differences in the locus of control helps explain the proprietary model's implications for the standing of members. Resting as it does on contract failure theory, the proprietary model has little place for the standing of members who are not patrons.⁵¹ In particular, as we have seen, it calls into serious question the analogy to shareholder derivative suits, on which courts and commentators sometimes rely for member standing.⁵² Beyond that, Hansmann's distinction between entrepreneurial and mutual charities suggests that membership may be far from a monolithic status in the charitable world. When we examine the citizenship models of member standing, we will see that this very diversity may make standing appropriate only for some kinds members as to a limited range of matters.

2. Beneficiary Standing.

Before we turn to citizenship models, however, we need to examine the implications of the proprietary model for another frequently-mentioned class of candidates for expanded standing, the beneficiaries of charitable organizations. In the proprietary model, beneficiaries as such do not have enforceable rights of their own; their rights would have to be derivative from those of donors. As we have seen, Hansmann's contract failure theory, on which the proprietary model rests, sees charities as instruments of donor and pur

⁵¹ See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 613; See also Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 845 ("In the case of the nonprofit corporation ... the purpose of the charter is primarily to protect the interests of the organization's patrons from those who control the organization.").

chaser demand. In commercial nonprofits, there simply are no beneficiaries in the conventional sense of those who receive free goods or services. Even in donative nonprofits, the role of the ultimate donees to whom goods and services flow through the conduit of charitable organizations is secondary to the role of donors, those from whom the donations flow.⁵³ In accord with that theory, any standing on the part of donees is derivative from the contractual will of donors. Thus, to fit within the proprietary model, any expansion of beneficiary standing would presumably have to be grafted onto the stock of contract law. Two branches of contract law are relevant here, third party beneficiary doctrine and promissory estoppel.

a. Third Party Beneficiary Theory.

The most obvious source of beneficiary standing under the proprietary theory is the contractually expressed will of a donor.⁵⁴ As a matter of well-recognized (though relatively new) contract law principles, one party to a contract can confer benefits under the terms of the contract upon someone not party to the contract.⁵⁵ Along these lines, the proprietary model's contract between donors and charities could be expanded to include those third parties who are to receive the donor's gift through the conduit of the charity.

⁵² Note, *The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits*, 63 N.C. L. Rev. 999 (1985).

⁵³ See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 611 ("Standing for patrons need not be accompanied by standing for those who benefit from a nonprofit's activities but are not among its patrons....").

⁵⁴ See *id.* at 611 n.369 (suggesting, without elaboration, that charitable beneficiary standing might be grounded in general third party beneficiary principles).

⁵⁵ See ARTHUR CORBIN, CORBIN ON CONTRACTS Section 810 (1957 & Supp. 1971).

As a matter of general contract law, however, the status of third party beneficiary is not particularly easy to establish. Moreover, in the particular case of charities, the donor's intent should have to be quite explicitly expressed, contrary to the trend in several recent beneficiary standing cases.

To see why this explicitness is necessary, consider an oft-cited case of beneficiary standing, Hooker v. Edes Home⁵⁶. There the court held that the resident of a charitable home for elderly and indigent Georgetown widows had standing to challenge the fiduciaries' planned relocation of the home. Under the proprietary model, it is difficult to see what cognizable interest the resident had in the continued operation of the home. The proprietary model confers standing only on patrons, and the plaintiff was neither a donor nor a paying resident. Yet she might have had a claim under third-party beneficiary theory, if she could show that the home's founder⁵⁷ had her and others like her particularly in mind as beneficiaries and meant to make their continued benefit a condition of the gifts.

Even if that were the case, however, it is not clear why the beneficiaries' standing would necessarily follow, without more explicit provision on the part of the donor. Somewhat paradoxically, the donor's interest might actually be undermined by too free a granting of beneficiary standing. If this is so, third party beneficiary standing should be severely circumscribed by the theory on which it is parasitic.

⁵⁶ See *Hooker v. Edes Home*, 579 A.2d 608 (D.C. App. 1990).

⁵⁷ The home's founder, Margaret Edes, seems to have been its sole benefactor. See *id.* at 609.

To unpack this paradox, consider an elaboration of the Edes Home case. Suppose that the home's fiduciaries would like to pick up stakes and move to Anacostia, where they hope to serve more indigent widows -- widows both more numerous and more needy than in gentrifying Georgetown. Suppose, further, that the home had a single, and living, patron, who had not only donated all the home's capital assets, but also set up an endowment to cover all its operating expenses. The charity's fiduciaries approach their patron about the move, and she agrees, in effect re-negotiating a clause of her contract with the charity. The home's fiduciaries then approach the attorney general of the District of Columbia, who also agrees, eager to have charitable assets benefit the most needy of the District's citizens.

But what if one of the Georgetown widows objects? This is the critical turn. The home's patron might well be surprised to learn that, without specifically saying so, she had conferred on her intended beneficiaries a veto over a decision that she now wants to exercise herself. Moreover, under both the proprietary model and prevailing law in most jurisdictions, this is clearly a decision she could have reserved to herself and her successors in interest forever. Thus, unless beneficiary standing is carefully circumscribed, beneficiaries may be able to exercise rights their benefactors never intended, against the very wishes of the benefactors themselves⁵⁸ (and, less critically for the proprietary model,

⁵⁸ This is a possibility that Hansmann fails to foresee; he assumes that expanded beneficiary standing, although not theoretically necessary to protect donor interests, will generally have that effect, and thus should be liberally expanded. See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 611-12.

against both the charitable fiduciaries and the attorney general's conception of the best interest of charity as a whole).

b. Promissory Estoppel.

There is one notable exception here. It is, however, an exception that tends to derive from and reinforce the policies underlying the proprietary model's contractual rule. In the wider world of bargaining and exchanging, one can become bound to confer benefits upon another without incorporating those benefits into a full-blown contract. Under the doctrine of promissory estoppel, one can be estopped by one's words, and occasionally even by one's deeds, on which others reasonably rely to their detriment.⁵⁹ Under that doctrine, charities might well become liable to beneficiaries, those who in the normal course of their relationship with charity have no claim on charity's continuing munificence. But, here again, the scope of that claim is, under the proprietary model, severely limited by its very nature.

Consider again the Edes Home case. Even if the residents could not make out a claim as third party beneficiaries of the donor, they could perhaps show that the home had led them to rely to their detriment on a representation that they would receive a lifetime of care at the facility in Georgetown. In electing to move into the Georgetown home, they may have foregone other options now foreclosed. Never forget Florida (at least as a retirement option). In any event, moving to a new home could be quite disruptive, economically as well as emotionally. In light of these considerations, the present residents

⁵⁹ CORBIN, *supra* note 55, at Sections 193-209.

might well be entitled to some form of relief under the general doctrine of promissory estoppel.

Any relief under that doctrine, however, would almost certainly not entail a permanent injunction of the home's move. Much more appropriate would be a damage remedy designed to compensate the residents for their inconvenience and lost opportunities elsewhere, perhaps combined with guaranteed positions in the new Anacostia facility. Some such combination of damages and specially tailored injunctive relief could nicely balance the interests of all concerned. The home's board, with the approval of the donor and the Attorney General, would be permitted to undertake a change to better serve the poor of metropolitan Washington; the home's current residents would be compensated for the harm that the move causes them. The residents would not, however, be able to hold the future of the home hostage, in the absence of a very clear indication that the donor wished to confer such a veto upon them. In giving the residents standing to assert such a veto without any evidence of such intent, the decision in the Edes Home case is radically at odds with the proprietary model.

3. Summary.

On the issue of standing to enforce charitable fiduciary duties, as elsewhere in the law of charity, Hansmann's contract failure theory is extremely enlightening. It implies a basis for donor standing that, if properly unpacked, would both rationalize and expand current doctrine. In particular, the proprietary model makes sense of decisions recognizing the standing of endowment donors and calls seriously into question decisions running

the other way.⁶⁰ On the other hand, the proprietary model suggests that the standing of purchasers and the donors of short-term gifts should be carefully circumscribed, both as to duration and appropriate remedy. Perhaps more importantly, the proprietary theory, if pressed to its premises, reveals that donors and purchasers do not ultimately own charity, in the way that stockholders residually own for-profit corporations. Accordingly, the case for derivative suits by charities' donors and purchasers must stand on a very different foundation -- if it is to stand at all.

The proprietary model also calls seriously into question the standing of members and beneficiaries. Hansmann's focus on diversity of the loci of control serves as a much-needed reminder that membership in charitable organizations is not a monolithic category invariably carrying with it a specific set of powers. Before we extend standing to members as such, we must attend to what membership entails in particular contexts. The proprietary model is similarly enlightening on beneficiary standing. Hansmann's focus on the proprietary interests of donors strongly suggests that beneficiary standing is not only derivative from donor wishes but also potentially damaging to both donor desires and socially desirable charitable change. For a defense of expansive member and beneficiary standing, we will have to look elsewhere. These constituencies fare much better under of the citizenship models of charity, our next topic.

⁶⁰ See, e.g., Carl J. Herzog Foundation, Inc., v. University of Bridgeport (Ct. S. Ct., August 20, 1997) (reaffirming that donors lack standing to enforce the terms of their endowment gifts in the absence of explicit reversionary interests).

B. The Citizenship Models.

Analytically, my citizenship models are structural complements of the proprietary model. Just as the proprietary model assimilates charity to parallel arrangements in the for-profit sector, so the citizenship models analogize to key relationships in the governmental, or public, sector. Similarly, just as there is a contract-failure theory that explains charities as making up for deficiencies in the market supply of goods and services, so there is a government failure theory that sees their *raison d'etre* as meeting the demand for public goods above that of the median voter.⁶¹

In other ways, however, the proprietary and citizenship models are not so nicely parallel. The proprietary model, as we have seen, has identifiable proponents, who rest their case on a rigorous social science model and employ a standard methodology. Their model is a systematic outworking of explicit premises, and as such can be critiqued at exactly the points where its conclusions about standing do not logically follow. The challenge in that critique is to make clear the implications that flow from the premises. Sometimes these premises imply expanded standing; sometimes, not.

My citizenship models, by contrast, have no Hansmann. This is largely because current political theory is much less monolithic than neo-classical economic theory. But there is something else as well. My citizenship models derive more from a mood than a

⁶¹ See Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY AND ECONOMIC THEORY (Phelps ed., 1975); BURTON A. WEISBROD, THE VOLUNTARY NONPROFIT SECTOR (1977).

theory or methodology. Their roots, I am convinced, lie more in the odd and amorphous populism of the sixties than in any rigorous theoretical model.

If the proponents of the proprietary model are to be faulted for not fully working out the implications of their premises, the fault of the citizenship models lies in the other direction. The conclusions -- dramatically expanded standing -- are clear enough. What needs to be made clearer here is the basic role for charities that these conclusions imply. This difference will produce a very different critique. In the proprietary model, a narrow theory of charity implies a narrow theory of standing, narrower than some of the expansive language of its proponents suggest is appropriate. In the citizenship models, a broad conception of standing implies a very different notion of charity from what we have now. It is, I shall try to show, a notion that omits or excludes aspects of charity that many of charity's proponents, myself among them, believe are charity's greatest strengths, if not quite its essence.

These differences between the proprietary and citizenship models imply a qualification that, in all fairness, I must make explicit. The models I am about to sketch are for the most part my own constructs, not those of any particular proponent. Although I believe they are a fair interpolation of the conclusions of many proponents of expanded standing, it must be admitted that they are for the most part nothing more than interpolations. Those who support expanded standing on other foundations than the proprietary model have not been particularly careful to set out the theoretical foundations of their po

sition. In what follows, I have tried to make their case for them, ever mindful of the danger of erecting strawmen.

1. Donor and Purchaser Standing: The Taxpayer Model.

Those who fund charity, whether through gifts or through purchases, can be compared to the ultimate source of most government revenues, individual taxpayers. On that analogy, charity's patrons arguably deserve a say in how its revenues are expended, even as taxpayers deserve a say in the expenditures of their governments.

The most compelling aspect of this argument is its critical, and demonstrably dubious, premise: good charities, like good government, are or should be democratic. As Hansmann's distinction between mutual and entrepreneurial charities makes clear, this is not, as a descriptive matter, the case.⁶² On the contrary, control in entrepreneurial charities is by definition not in the hands of patrons. Many charities fit this model, and their mode of operation is not only entirely legal, but apparently in keeping with the wishes of patrons themselves. If one argues, out of general democratic convictions, that charities should be more democratic than they actually are, one encounters a deep paradox: charities seem to be as democratic as their patrons want them to be. The desire to make them more democratic is, accordingly, a sentiment less democratic than paternalistic.

This raises a second weakness of the taxpayer analogy: taxes are involuntary contributions from constituents whose only alternative to paying is expatriation or imprisonment. To use a now-classic distinction, we can say that citizens are given "voice" because

⁶² See Hansmann, *Nonprofit Enterprise*, *supra* note 23, at 841-42.

the alternative, "exit," is too costly to be considered a fair alternative. In charities, by contrast, donations and purchases are essentially voluntary, and exit is relatively easy. If patrons don't like the way one charity is run, they can leave. They can patronize a competitor in any one of the three sectors, nonprofit, for-profit, or governmental, or they can form a new organization of their own, again, in either of the three sectors. Taxation without representation may be tyranny; patronage without representation is at most masochism.

And there is a final, and I think ultimately insurmountable, problem with the taxpayer analogy. The case for voice is, as we have seen, quite strong in the case of taxpayers. But even in that case, voice is not generally considered to imply standing to sue. As citizens, taxpayers collectively can call their government to account at the ballot box, but they are almost completely barred as taxpayers to call it to account in court. As a matter of federal constitutional law, taxpayer standing is virtually a dead letter.⁶³ Thus, even if we were to ignore the differences between government's taxpayers and charity's patrons, the latter would not gain standing to sue by standing in the shoes of the former.

One could, of course, argue that taxpayer standing should itself be broader, thus not only better approximating a democratic ideal of government, but also providing a better model for the democratization of charity. But, here again, there is a paradox: proponents of taxpayer standing are seeking to make government more democratic by sub

⁶³ Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

jecting it to greater scrutiny by the courts, government's most counter-majoritarian component.

2. Member Standing: The Citizenship Model Proper.

As charities' patrons can be compared to taxpayers, so their members can be compared to citizens. In the latter comparison the essential relationship is assumed to be political, not economic. Once again, however, the analogy is far from perfect. And, once again, even where the analogy is closest, it does not compellingly imply standing to sue to enforce charities' fiduciary duties.

Citizens obviously have important and legally recognized roles in democratic polities. As we saw in connection with the taxpayer model, however, charities are not necessarily democratic, and they cannot be made more democratic without paternalistic interference in their internal affairs. Moreover, even in democratic polities, the rights of citizens do not necessarily include the right to challenge governmental actions that do not bear on the suing citizen in an immediate and personal way. Thus the public law doctrine of standing is replete with requirements that the citizen who wants to bring government to judicial account must show an appropriate personal interest in the matter to be litigated.

With respect to the core right of voting, citizens may generally complain to the courts when their participation is denied or when elections are procedurally irregular. They cannot, of course, question the outcome of a procedurally proper election, nor can they generally question the actions of elected officials, either as individuals or as a governing body. By analogy, members of even the most democratic charities could sue to en

force the charities' internal voting procedures without being given standing to challenge either the outcome of elections or the substantive decisions of fiduciaries.⁶⁴

3. Beneficiary Standing: Charity and the New Property.

This particular citizenship model (ideal, really) took an especially vigorous form in the area of social welfare, where it may have enjoyed its greatest and most lasting success: the Due Process Revolution. The ur-text here is "The New Property," a 1964 article in the Yale Law Journal by Charles Reich.⁶⁵ Reich lumped a wide range of government benefits -- welfare, Social Security, cab medallions, professional licenses, government contracts -- under the heading of "largesse."⁶⁶ This label reflected the traditional notion that citizens received such benefits as a matter of privilege, rather than of right. Reich argued, both reflecting and influencing the course of federal law, that largesse should be treated as a new form of entitlement, hence "the new property." Unlike the old property, the new could be legislatively abolished without compensation (as, for example, in last year's welfare "reform").⁶⁷ But, like the old property, the new could be removed administratively only after extensive notice and hearing opportunities, hence the "Due Process Revolution."

⁶⁴ See *Weaver v. Wood*, 680 N.E.2d 918, 923 (Mass. 1997) (re-affirming propriety of member suits to vindicate voting rights but rejecting a member suit to challenge managerial decisions).

⁶⁵ See Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

⁶⁶ *Id.* at 733.

⁶⁷ See *id.* at 746.

And hence, also, the link with the case for beneficiary standing to sue charities. If, as Weisbrod suggests, charities function essentially as government surrogates,⁶⁸ and if, as Reich suggests, recipients of government benefits should have due process rights before their benefits are fundamentally altered by administrators, then (presto?) we have a case for letting charitable beneficiaries sue to keep on getting what they are getting now.

But this case is not so comprehensive or compelling as it might at first appear. In the first place, it is, in its own terms, fairly narrow. This narrowness follows from the fact that what the due process model protects is *ex hypothesi* the process by which an entitlement is removed, not the substance of the entitlement itself. Recall, again, the welfare analogy. A particular recipient can complain of an improper administrative denial, but not of a legislative removal of the underlying entitlement plan. This has important implications for cases like Edes Home and, more generally, the typical sale of a charitable hospital. Under the new property model, beneficiaries could sue to assert that existing eligibility criteria for free care were not being properly applied to them. But they could not complain, as they did in Edes Home, that an otherwise proper change in the program itself left them out in the cold.⁶⁹

⁶⁸ See Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, *supra* note 61; WEISBROD, *THE VOLUNTARY NONPROFIT SECTOR*, *supra* note 61.

⁶⁹ *Hooker v Edes Home*, 579 A.2d 608 (D.C. App. 1990) and the typical hospital conversion suggest another implicit limit to the expansion of standing under the new property model: many charities, those Hansmann identifies as commercial nonprofits, do not confer their benefits without compensation, and thus don't fit the social welfare model. Tuition-driven schools and fees-financed nursing homes are prime counter-examples. This limit is not as serious as it seems, however. Reich's new property itself includes some governmental benefits that are purchased, not just those that are conferred for free, even when government is acting as an agent in the market rather than as a regulator of the market. This is the case, for example, with government contracts. See Reich, *supra* note 65. As the text following this note indicates, however,

Most fundamentally, charity differs from government at precisely the point on which the new property model depends. Citizens may well need the new property as a basis for effective political independence, as the modern equivalent of forty acres and a mule, the Jeffersonian yeoman farmer's farm. But charity has no such general social role. Unlike government in Reich's model, charity is neither the ultimate source of property nor the ultimate threat to individual freedom. In at least tacit recognition of this difference, the federal courts have consistently held that the actions of charities are not state action for purposes of the due process clause of the fourteenth amendment.⁷⁰

This is not to deny that charitable largesse looms very large in the lives of some individuals. Again, the residents of the Edes Home are a prime example. Without their place in the home, they may literally be in the cold. But, as we have seen, they are not without a garden variety remedy, promissory estoppel. That remedy may at least ensure that the actions of their charitable benefactors don't leave them worse off than they were before the benefaction. And estoppel is notable absent on the government side; estoppel does not generally run against the government.

This raises a final point: even though charity could conceivably be treated like a social welfare arm of the government, that treatment would obviously come at a cost in its independence. One can easily enough love the Due Process Revolution in the public sec

this analogy is not particularly helpful to those who buy their benefits from government because charity, whether it confers its benefits for free or for compensation, is different from government in ways that make Reich's argument inapposite.

⁷⁰ National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988); San Francisco Arts & Athletics, Inc., v. United States Olympic Committee, 483 U.S. 522 (1987).

tor (as I, for one, do) without loving its colonization of the charitable sector (as I, for one, don't). In an odd way, the great private foundations fit this governmental model quite nicely, as a descriptive matter. They do indeed dole out massive amounts of largesse, though their methods may more often resemble Bismarck and Kaiser Wilhelm's Prussia than Hillary and Bill Clinton's America. Perhaps to my discredit, I rather like the idea of a measure of even very radical paternalism in the world (so long as it can be kept to a minimum in government itself!), for all the reasons John Simon and others have put forward in their defenses of private foundations as engines of innovation.⁷¹

Although I can envision Bangladeshi farmers suing the Ford Foundation for another line of miracle seeds, it's not a picture I especially like. And the reason is not that I have any particular distrust of Bangladeshi farmers, nor any great faith in the Ford Foundation. I rather suspect that Bangladeshi farmers, like residents of the Edes Home and most of the rest of us most of the time, are more concerned about their own immediate needs than about the fate of humanity as a whole. My faith that the fiduciaries of the Ford Foundation can better focus on the welfare of humanity as a whole, their self-assigned province, rests on the belief that their basic needs are already met, not that they have a greater share of altruism. The folks at Ford are better fed, not better bred.

4. Standing Naked: Private Attorneys General.

None of the analogues to citizenship standing that we have considered thus far works very well. Each merely offers a limited form of garden-variety standing to assert

⁷¹ John Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. LAW 1 (1978).

rights having little to do with charity's fiduciary duties, or calls for an expansion of the substantive rights of one of the several potential plaintiff classes.

Within the citizenship model, there is, however, an answer to these criticisms, though an answer with problems of its own. This is the private attorney general model. The simplicity and elegance of this model is that it steers clear of the fatal confluence of standing and the merits, the very confluence that sinks other versions of the citizenship model. The private attorney general model admits that the various possible candidates for standing -- members, donors, beneficiaries, and purchasers -- are not asserting their own substantive rights, traditional or novel. Instead, they are suing only as surrogates for the public to redress violations of the charity's fiduciaries' duties of loyalty, care, and obedience. In their own right, they stand naked of substantive entitlements, and they ask to be cloaked with the mantle of the attorney general as spokesfolk of the public benefit, the defining duty of charity itself.

In the very nakedness of this position lie both its strength and its weakness. Its strength is that its scope is neither limited by the fairly narrow traditional scope of "constituent" claims against charity nor dependent upon an expansion of those claims. Rather, its scope is coterminous with that of the most expansive standing to police charitable fiduciaries, that of the attorney general. The reason the scope is coterminous is that those who seek such standing are seeking it precisely as attorneys general, albeit private rather than public.

And therein lies the weakness: for the standing of private attorneys general to be recognized, we must be convinced that the public attorneys general are not doing an adequate job of policing charity now, and cannot be expected to do any better soon. Among commentators who call for expanded standing, that is a virtually universal conviction,⁷² and among courts that grant such standing, that is a very common finding.⁷³ On close scrutiny, however, it is a conclusion that generally rests on unarticulated premises and hidden policy choices.

First, this call rests on an unproved premise: that the current level of governmental supervision is too low. The evidence generally cited is that serious problems go uncorrected, serious malefactors uncaught. But this evidence tends to be doubly flawed. On the one hand, it tends to be anecdotal, based on salient horror stories, sometimes with the implication that if we know about this or that atrocity, there must be much worse undiscovered.⁷⁴ But the reverse may be true; we may be hearing the worst cases, and even taking care of them. Statistics on unreported crime are at best a bit paradoxical.

On the other hand, evidence of the need for more enforcement resources tends to be offered in isolation. We are entitled to ask what attorneys general are underfunded and understaffed in comparison to. The "what" commentators seem to have in mind is an op

⁷² See Fishman, *Agenda for Reform*, *supra* note 10, at 668 (Stating that "[a]ll commentators on the subject [of state regulation] agree that there is inadequate supervision of nonprofit corporations.") (citation omitted).

⁷³ See NYU, *Standing*, *supra* note 5.

⁷⁴ See Chisolm, *supra* note 12, at 149 (Arguing "[c]hange ... ought not be designed to revise rules of broad applicability in response to worst-case examples as though the worst-case examples are more representative of widespread problems than is actually the case.").

timal level of oversight that may fail to take into account what else attorneys general are doing. Other areas arguably need more attention than charity, and may properly be getting it. Capital markets, for example, may need policing more than donative transactions. The former certainly involve more money and more people, and thus predictably more opportunity for abuse. Beyond that, capital markets may be more at risk of serious reputational harm.⁷⁵ Large-scale capital markets are newer and maybe less steady than charitable giving. People have been giving to international charities since at least the early middle ages; people have been investing in multinational corporations, at least in comparable numbers, only much more recently.

A bit closer to home, people arguably need, first and foremost, security in their homes and on the streets. I'm a lot more disturbed that at this very moment my wife's grandfather's gold watch is in the hands of a burglar than I am that some deacon may be dipping into the collection plate at her ancestral church. Part of the reason I'm less concerned about the latter is that my mother-in-law is the clerk of their church's session (not a secretarial job, but a role analogous to that of the president of a synagogue or vestry).

This points to another reason why charities may need relatively little law enforcement attention: extra-legal methods are already in place here.⁷⁶ It is relatively easy for me to channel my charitable giving to a congregation where my mother-in-law is in charge,

⁷⁵ *But see* Fishman, *Agenda for Reform*, *supra* note 10, at 671 (arguing against expanded public standing to sue charities on the grounds that charities are more at risk of reputational harm than either individuals or business corporations).

even to a denomination where she is at least in touch with those who are; it is virtually impossible for me to do the same with a savings and loan. When ecclesiastical functionaries start selling sleazy indulges, sleeping with priestesses of the Baal cult, or slathering a bit too much gilding on the alter-pieces, we are accustomed to hearing from the likes of Luther, Elijah, and Savonarola.

Even if we inclined to credit accounts of attorneys general understaffing and discredit the possibility of extra-legal enforcement measures, private attorney general standing is not the only alternative. Most obviously, funding for state attorney generals enforcement could be expanded,⁷⁷ perhaps supplemented by a separate enforcement agency on the English model.⁷⁸ These calls, it must be admitted, have been made for decades now with little appreciable response, and proponents of expanded standing are understandably pessimistic about help from that direction.⁷⁹ Calls for increased federal supervision have fared little better,⁸⁰ though the enactment of intermediate sanctions in the Internal Revenue Code offers some hope.

⁷⁶ Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L. REV. 1111, 1121-34 (1993); Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILLANOVA L. REV. 433, 461-70; Chisolm, *supra* note 12, at 154.

⁷⁷ Chisolm, *supra* note 12, at 153.

⁷⁸ Karst, *supra* note 21, at 476-83 (1960); Ben-Ner and Van Hoomissen, *supra* note 45, at 409-10.

⁷⁹ See Fishman, *Agenda for Reform*, *supra* note 10, at 671; Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 608.

⁸⁰ See Adam Yarmolinsky and Marion Fremont-Smith, *Judicial Remedies and Related Topics*, in COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, *GIVING IN AMERICA, TOWARD A STRONGER VOLUNTARY SECTOR* 2697 (1975) (calling for increased monitoring by the Internal Revenue Service and the Federal Trade Commission.)

There is, however, a more traditional, and much more conservative, way of expanding standing: the relator action. In a relator action, the state attorney general in effect deputizes a private party to enforce charitable fiduciary duties on the part of the public.⁸¹ Such suits offer dual advantages. On the one hand, they allow the attorney general to tap into private resources, since the relator is generally responsible for the costs of bringing the suit. On the other hand, the attorney general retains control over the suit. Relators cannot sue without the attorney general's approval, and the attorney general can dismiss or settle the case at any time.⁸²

This retention of control is important to the attorney general's role as ultimate protector of the public interest in charity. In part, the attorney general can act as a filter of frivolous or nuisance suits,⁸³ or of ill-prepared or Quixotic knights-errant. More importantly, however, the attorney general may need to screen out entirely valid substantive claims by well-prepared litigants, particularly claims brought under the duty of obedience by charitable beneficiaries. As we saw in our discussion of the Edes Home case, the interest of beneficiaries in the continued operation of charity in traditional ways may seriously

⁸¹ See NYU, *Standing supra* note 5, at 27-28; Fishman, *Agenda for Reform, supra* note 10, at 671-73.

⁸² Fishman, *Agenda for Reform, supra* note 10, at 673-4. From this perspective, Fla. Stat. Ann. 617.09 fails in one respect and succeeds in another. It allows any citizen to compel the attorney general to sue to enforce a breach of charitable fiduciary duty, yet requires the complaining citizen to foot the bill.

⁸³ See Fishman, *Agenda for Reform, supra* note 10, at 674. Here Faulkner's example may be instructive. Those who wanted to put their two cents toward something other than the price of a postage stamp had to file their complaints with the inspector-general, whom Faulkner found to be a most understanding fellow even though he eventually forced Faulkner out of his job. See BLOTNER, *supra* note 4.

conflict with the attorney general's conception of the good of charity more generally.⁸⁴

Public and private interests are less likely to diverge with respect to the duties of care and loyalty. Even here, however, the attorney general's capacity to negotiate settlements would be trammelled by private attorneys general who hold out for more rigorous remedies than their public counterpart deems appropriate.

Some advocates of private attorney general standing regard the attorney general's veto power over private suits as a weakness, rather than a strength, of the relator action. They see the private attorney general not so much as a supplement to the state attorney general's budget, as a corrective to lapses in his or her judgment. In particular, they fear that attorneys general will be loath to prosecute politically sensitive cases: "They may well see no point to a much-raking investigation of charges against respectable trustees and corporate officers."⁸⁵ Implicit in this anxiety of betrayal by one governmental guardian of the public interest, the attorney general, is faith in another, the courts. As one of the earliest commentators on charitable accountability reminds us, "Judges, after all, are arms of the state."⁸⁶

⁸⁴ As Laura Brown Chisolm has observed, in *Accountability*: "The problem with trying to enhance charitable accountability by extending standing to 'most interested' constituencies is that their interests are not necessarily either congruent with or coextensive with general societal interests." Chisolm, *supra* note 12, at 151-52.

⁸⁵ NYU, *Standing*, *supra* note 5, at 27, 29.

⁸⁶ Karst, *supra* note 21, at 480.

5. Summary.

In this insistence on invoking judicial supervision of charity, the private attorney general model resembles all the other citizenship models. For all their surface appeal to public participation, their ultimate confidence rests not on the people, but on the courts. Against the spectre that nothing else ultimately stands between the public interest and private malfeasance, the sectarian model offers an alternative: charity itself.⁸⁷

C. The Sectarian Model: Charity Per Se and Pro Se.

The common flaw of the proprietary and citizenship models is their assimilation of charity too closely to its neighboring sectors, the for-profit on the right and the governmental on the left. By insisting that charity is, or should be, more like its sectoral siblings, these models either overlook or undermine what is unique about charity itself. A plague, then (though certainly not a famine!), on both their houses, the law-and-economists with their proprietary, patrons-own-charity notions and the sixties-sorts with their nostalgia for a world in which not only the public sector, but also the charitable, is administered by Earl Warren, if not Bill Douglas.

But what shall we put in their place? Implicit in the foregoing critiques is an alternative perspective. Rather than looking to the right or the left, for analogues to the pri

⁸⁷ Cf. Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 612 (expressing a preference for private suits, with all their problems, over "leaving nonprofit organizations largely free of effective oversight") *with* Chisolm, *supra* note 12, at 150 ("The fact that those who run nonprofit organizations are not politically accountable (at least, not through elections) is not an oversight or a defect but rather a deliberate policy choice.").

vate sector or the public, we could shift our focus to the middle, to the nonprofit sector generally and its charitable precincts in particular.

In this section I want to explore that alternative a bit, with particular attention to its implications for standing. I must emphasize that the particular approach I sketch out is not the only one that might run in this direction. It is, however, an approach I have described and recommended in detail in two related contexts. It can, moreover, ground a theory of standing that illuminatingly contrasts with those we have already considered. Like them, it is seriously flawed by its simplicity. But, also like them, this very partiality helps complete a larger and more complex picture.

1. Sectarianism and the Empowerment of Charitable Communities.

I have argued that the principal function of charity is neither to correct market failures nor to supplement governmental largesse, but rather to serve as the institutional outlet of individual altruism.⁸⁸ On the descriptive side, I have tried to demonstrate how Hansmann's four-part taxonomy of nonprofits can be disaggregated into nine kinds of altruistic organizations and a tenth, limiting-case category, mutual benefit organizations.⁸⁹ As a prescriptive matter, I have argued that the altruism embodied in each identifiable type of charity is a worthy basis for such special legal benefits as income tax exemption.⁹⁰

⁸⁸ See Atkinson, *Altruism in Nonprofit Organizations*, *supra* note 29.

⁸⁹ See *Id.* at 519-66.

⁹⁰ See *Id.* at 599-638.

Consistent with this altruism theory of charitable organizations (though not logically required by it), I have suggested that the most desirable institutional form for altruism is radically independent, self-sustaining communities.⁹¹ With an eye toward such communities, I call mine the sectarian model. In this model, charitable fiduciaries would enjoy maximum independence from all external control, from both the private side and the public. In particular, donors would have no legal right to enforce the terms of their donations, whether they take the form of endowments or contributions for ordinary operating expenses. And the state would have no say in the use of resources in the hands of charitable fiduciaries, beyond ensuring that they do not transgress the outer limits of care and loyalty. My model, in effect, would abolish the duty of obedience entirely and leave the attorney general alone with standing to enforce the remaining duties of care and loyalty.

I originally proposed this sectarian model as the universal and mandatory alternative to current law, particularly dead-hand control and its correlate, the *cy pres* doctrine.⁹² I realized then that my recommendation was wholly unrealistic, and I realize now that it may have been less than entirely wise. For both reasons, I don't mean to put the sectarian model forward here as either universal or mandatory. Rather, I want to suggest that, in particular cases, that model offers a fairly accurate description of organizations as they

⁹¹ See Atkinson, *Reforming Cy Pres Reform*, *supra* note 76, at 1142-48.

⁹² See *Id.*

were founded and are currently operating. I believe it also offers a useful default rule in these and perhaps other cases.

a. Sectarianism by Donor Choice.

A donor could quite conceivably create an explicitly sectarian organization. Instead of a classic trust in which the trustees do the donor's bidding, the donor would found a community in which the trustees themselves determine, within the broad contours of charity and with whatever deference they deem appropriate to donor's intent, what to do with the trust's corpus. This, it seems to me, is the best way to account for two of the most ancient and interesting of charities, universities and religious orders. And this is arguably the basic model of American's great private foundations, where vast sums were committed to self-perpetuating fiduciary bodies with the most general of stated charitable purposes.

Perhaps more frequently, this is what donors have in mind when they make unrestricted gifts to charities, particularly to educational institutions and religious orders. The donor, possibly a grateful alumnus or communicant, implicitly trusts the fiduciaries of the institution or order to use the donation by their own best lights, without explicit restrictions to particular purposes favored by the donor. The fiduciaries, accordingly, would be free to exercise their discretion in fitting the use of the gift to changes in what they perceive to be the needs of the charitable community over which they preside.

In cases like these, donative intent and fiduciary wishes would by definition never conflict, since the donor's intent is to have the gift used for whatever charitable purposes

the fiduciaries deem appropriate. Thus, for example, if the Saintly Sisters of Sanitation decide to sell their hospital and operate neighborhood clinics instead, the donor will have effectively assented in advance; so, too, if the faculty of the College of Chiropractic Oncology decide to come clean on some of their alma mater's more extravagant claims.

b. Sectarianism by Constitutional Mandate.

In an interesting and important class of cases, those involving core issues of religious purpose, the fiduciaries' views govern even in direct conflict with the will of donors. In contrast to the donor-elected sectarian regime I have outlined above, here current constitutional law in effect mandates a sectarian regime.

Consider a gift to a religious body, subject to strict instructions that it be applied to further the religious tenets of that body's founder. Those teachings themselves may be quite explicit; they may, indeed, be preserved in voluminous sacred texts. But it will necessarily be the religious community that interprets the founder's will and any foundational text. The process of interpretation may be highly hierarchical or deeply democratic. An ocean of institutional difference separates the curia in Rome, advising the vicar of Christ on earth, from a Quaker meeting in Brandywine, Pennsylvania, awaiting personal illumination by the Inward Light.

But at every point along this high-church/ low-church spectrum, there is radical autonomy over against external control from both the private sector and the state on matters of core mission. No donor, no matter how large the gift or how explicit its restrictions, can invoke the state's power through the courts to challenge the fiduciaries' in

terpretation of what is "Catholic" or "Quaker." On these matters the prohibition of the Establishment Clause trumps even the clearest expression of donor intent. So, too, the attorney general can question whether a religious body is sufficiently careful with its funds, but not whether it is sufficiently Catholic or Quaker or otherwise orthodox.⁹³

c. Sectarianism by Default.

Sometimes, then, an organization's founder will give it a sectarian constitution, or a donor will create a sectarian regime for a particular gift, in each case committing the use of donated assets to the discretion of the donee organization's fiduciaries. Sometimes, in the case of religious organizations, such a regime arises by operation of law. Much more frequent than either such situation, however, is a third. In these cases donative intent could have been dispositive as a matter of law, but is not clear as a matter of fact. In such cases, where we lack both a clear expression of donor intent and a clear Constitutional mandate in favor of the fiduciaries, we need a default rule. In designing such a rule, we need to keep two potentially conflicting considerations in mind: probable donor intent and preferable public policy.

This intermediate kind of case occurs frequently in hospital conversions.⁹⁴ Typically, a charitable hospital will have received, perhaps on the basis of solicitations, dona

⁹³ Jones v. Wolf, 443 U.S. 595, 99 S.Ct. 3020 (1979); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440 (1969). For analysis of this line of cases, see Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1389 (1981); Adams and Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980).

⁹⁴ The literature on hospital conversions is large and growing. See, e.g., Robert A. Boisture, *State Attorneys General's Legal Authority to Police the Sale of Nonprofit Hospitals and HMOs*, 13 EXEMPT ORG. TAX REV. 227 (1996); M. Gregg Bloche, *Corporate Takeover of Teaching Hospitals*, 65 S. CAL. L. REV.

tions that now account for a sizable portion of its capital. The board wants to sell the hospital to a for-profit health care provider and use the net proceeds for some other charitable purpose.⁹⁵ Should the donors have standing to object?

(1) Sectarianism and Donor Intent.

We have already seen how to honor several kinds of donor claims without derailing the deal. Donors whose gifts have already been spent for the hospital's operating purposes have no further interest; even on the extremely donor-friendly proprietary model, they have gotten what they paid for. Wards-and-wings donors, whether individuals or mass contributors to capital campaigns, are a different matter. As we have seen, under the proprietary model they could be given restitution, in effect a refund of their contributions.

We are now, however, in a position to see that such a remedy might not be appropriate. Even if we assume that donor intent should be dispositive, it may not be clear that the donors originally intended permanent constraints on fiduciaries' discretion. Rather than implicitly conditioning their gifts on their continued use in a charitable hospital, subject to refund if the charity's use changed, donors may well have been happy to have their gifts used to operate a hospital for as long as the board found that use appropriate, then to have that use changed to what the board believed best for the communities' health or overall well-being. Donors, like hospital fiduciaries themselves, may not have foreseen the

1035 (1992). See also Theresa McMahon, *Fair Value? The Conversion of Nonprofit HMOs*, 30 U.S.F. L. Rev. 355 (1996); Thomas Silk, *Conversions of Tax-Exempt Nonprofit Organizations: Federal Tax Law and State Charitable Law Issues*, 13 EXEMPT ORG. TAX REV. 745 (1996).

⁹⁵ See Evelyn Brody, *The Limits of Charity Fiduciary Law* at 62-69 (April 28, 1997 Draft); Bloche, *Corporate Takeover*, *supra* note 94, at 1138-50.

dramatic rise of for-profits in the hospital industry, and may, had they thought of it, have been willing to leave hospital fiduciaries in a position to respond as they deem appropriate.

Faced with these uncertainties, contemporary courts take one of two basic approaches, neither of which is particularly appealing, as a matter of either doctrine or policy. The first approach is to assume that the donors, even of unrestricted gifts, implicitly impose a condition that the donated assets be used for the stated purpose of the donee organization at the time of the donation.⁹⁶ In the case of the typical charitable hospital, this means that the unrestricted gifts are treated as if restricted by donors to hospital purposes. Donors themselves are not granted standing to enforce this implicit restriction (or, for that matter, even express restrictions unless a reversionary interest is quite explicit).⁹⁷ But the implicit restriction can be enforced by the attorney general, and, if the attorney general objects to a proposed change, that change must meet the fairly narrow restrictions of the cy pres doctrine. In its traditional and still widely followed form, that doctrine may not cover the typical election to sell a viable charitable hospital to a for-profit health care provider and use the sales proceeds for non-hospital purposes.⁹⁸

⁹⁶ See, e.g., *Queen of Angels Hospital v. Younger*, 66 Cal. App. 3d 359 (1977); *Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932 (Cal. 1964); *Attorney General v. Hahnemann Hospital*, 494 N.E. 2d 1011 (Mass. 1986); Chisolm, *supra* note 12, at 146; Brody, *Limits of Charity Fiduciary Law*, *supra* note 95, at 64-65.

⁹⁷ See *Fremont-Smith*, *supra* note 5, at 207; Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 607.

⁹⁸ See *Queen of Angels Hospital v. Younger*, 66 Cal.App.3d 359 (1977).

The second approach is more permissive of change, but only through the invocation of a doctrinal distinction unlikely to have any real relation to donors' intent. The critical, and highly artificial, distinction in this approach is between charitable trusts and charitable corporations. Gifts to charitable trusts are deemed, here as in the first approach, to be subject to the terms of the trust at the time of the donation, and thus to require cy pres relief in order to be used for different purposes. Unrestricted gifts to charitable corporations, on the other hand, are deemed under this approach to be changeable by the fiduciaries, if the fiduciaries have the power to amend the articles of incorporation.⁹⁹

Although this is a coherent distinction as a matter of doctrine, it makes little sense as a likely construction of donor intent. Donors probably pay little heed to whether they are giving to a corporation or trust, and probably do not expect the former to be any more changeable in its purposes than the latter.¹⁰⁰ As a doctrinal matter, it is quite easy to argue that donations to a charitable corporation are implicitly impressed with a trust according

⁹⁹ See Rev. Model Nonprofit Corp. Act, Sections 10.02 and 10.30; Brody, *Limits of Charity Fiduciary Law*, *supra* note 95, at 14, 64; Brody, *Institutional Dissonance*, *supra* note 76, at 492. Other courts adopt a position somewhere between those outlined in the text. While holding that donations to a charitable corporation are impressed with a trust and thus not freely re-deployable by charter amendment, these courts apply a somewhat more liberal, "quasi-cy pres" standard to proposed changes. See *Alco Gravure, Inc. v. Knapp Foundation*, 479 N.E.2d 752, 757 (N.Y. 1985); Brody, *Limits of Charity Fiduciary Law*, *supra* note 95, at 58-59.

¹⁰⁰ See Model Nonprofit Corp. Act Section 2.02, official comment 3(a) at 60 ("By irrevocably dedicating assets when such dedication is not required, the incorporators may inadvertently impress the assets of a corporation with unintended restrictions and obligations."); Brody, *Limits of Charity Fiduciary Law*, *supra* note 95, at 14 ("In practice, it must be admitted, rarely does the founder of a charity consider the legal differences and make a choice based on the advantages of institutional form"). *But see* *Oberly v. Kirby*, 592 A.2d 445, 466-67 (Del. 1991) (maintaining distinction between trust and corporate form, with attendant differences as to changes of purpose, as a matter of founders' intent).

to the terms of the corporation's charter at the time of the gift. That, in fact, is precisely the reasoning of the first, less flexible approach, which treats gifts to corporations and trusts alike as locked into the purposes of the organization at the time of the gift.

Where donor intent to make a restricted gift is clear, it makes little sense to let that intent be frustrated by the accident of making the gift to a corporation rather than to a trust. On the other hand, where the intent to make a restricted gift is not clear, it makes little sense to infer such a restriction as a matter of honoring donor intent. As we have seen, there is another, equally plausible possibility: the donor meant to make an unrestricted gift. Courts may well overlook this possibility because they do not see that fiduciary discretion may be a matter of donor choice.

(2) Sectarianism and Public Policy.

Even when giving fiduciaries discretion to change charitable purposes is not a likely donor choice, it may nevertheless be a desirable default rule for a different reason. Under the sectarian model, fiduciary discretion is a virtue, not a vice. In the spirit of that model, it would be appropriate to have a presumption in favor of fiduciary discretion, rebuttable only by a very explicit reservation by the donor to the contrary. Charitable fiduciaries could then freely decide how to use their organization's assets within the broad parameters of charitable purposes, without interference either from donors or the attorney general.

This presumption is hardly more at odds with donor intent than an important aspect of current law. Many donors are doubtlessly surprised to learn that, unless they have

been quite specific in their reservations, they lack standing to sue to enforce the terms of restrictions they place on their gifts. The virtual, if not quite explicit, presumption against such donor reservations of standing pretty clearly rests not on inferences about donor intent, but on fears that charities will be unduly encumbered by donor suits.¹⁰¹ Nor is it likely that donors, if asked, would name the attorney general as sole surrogate enforcer of their charitable intentions; again, that aspect of the law is based on policy considerations independent of, and perhaps counter to, predictable donor intent. If anything, the sectarian model simply moves a bit further in the same direction, freeing charitable fiduciaries of interference by the attorney general as well as the typical donor. A presumption in favor of fiduciary discretion would not have to operate with equal strength throughout the entirety of charity. More conservatively, it could be applied to particular kinds of charity; gifts to religious orders and educational institutions would seem appropriate candidates. Even more conservatively, the presumption could be applied with greatest force only to those individual institutions whose donors have a history of deference to fiduciaries. This would seem generally truer of hierarchical than congregational churches, for example, although raising that inference to the level of a legal presumption may risk running afoul of Establishment Clause constraints.

¹⁰¹ As Hansmann rightly observes, "A reason sometimes given for this [denial of donor standing] is that the gift to charity is absolute, and leaves no remaining right in the hands of the donor. Another common justification is that standing for donors would lead to excessive litigation." Penn at 607 (citations omitted.) But the first reason is pretty thin for, as Hansmann points out, "To characterize a contribution to a nonprofit as a mere gift in which the donor no longer maintains an interest is simply to define away ... important elements of the transaction." Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 609.

Perhaps most importantly, the presumption could be made stronger in inverse relation to the radicalness of the fiduciaries' proposed change. At the margin, in cases of extreme and perverse changes, the presumption could disappear entirely. This would cover an unlikely but much-mooted case: "Those who give to a home for abandoned animals do not anticipate a future board[s] amending the charity's purpose to become research vivisectists."¹⁰² On the other hand, the presumption could be quite strong in the less bizarre -- and certainly much more typical -- conversion of a charity from a hospital into a chain of neighborhood health clinics or a foundation making grants for medical research and education. In all cases, likely donor intent would be balanced against changing public needs as interpreted by the charity's fiduciaries. In effect, then, a flexible presumption of donor intent would function much like a liberalized cy pres rule, particularly those versions that give great weight to fiduciaries' judgments about the need and direction of charitable change.¹⁰³

2. Sectarianism and Policing Charitable Fiduciaries.

At the center of the sectarian model lies a distinct distaste for the duty of obedience, at least as enforced through the courts. That distaste itself is born of a positive commitment to the independence of charity from external control. But we must be careful here, lest sectarianism work its own undoing. Without enforcement of the duties of care

¹⁰² Attorney General v. Hahnemann Hospital, 494 N.E.2d 1011, 1021 n.18 (Mass. 1986). Quoted in Brody, *Limits of Charity Fiduciary Law*, *supra* note 95, at 58; Elizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 NO. KY. L. REV. 251, 264 n.69 (1988); Kurtz, *supra* note 12, at 150 n.109.

¹⁰³ See John Simon, *American Philanthropy and the Buck Trust*, 20 U.S.F. L. REV. 641 (1987).

and loyalty, charity itself becomes a sham. Unless charitable fiduciaries are required to exercise at least some degree of care in their use of charitable assets and, more significantly, unless they are forbidden to convert those assets to their own personal use, charity is a mere cloak for fiduciary sloth or self-indulgence.

It bears emphasizing, therefore, that the sectarian model is entirely consistent with rigorous enforcement of the duties of care and loyalty by the attorney general and other state officials acting in similar capacities. It may well be objected, of course, that such enforcement is not likely to be forthcoming. We have dealt with that objection in a general way already. We are now in a position to see that the sectarian model offers within itself an alternative: the alternative to enforcement by expanded individual standing and by attorneys general is to rely on charitable organizations themselves.

Expanded individual standing is usually offered as a supplement or corrective to policing by attorneys general. The latter are said to provide either too little supervision, or supervision that is skewed by the self-interest of an elected official. On both these scores, however, individual standing suffers precisely the flaws it is supposed to correct.

As the more careful supporters of expanded standing acknowledge, private suits to enforce charitable fiduciary duties are not likely to be forthcoming in sufficiently large numbers to operate as a serious supplement to public policing.¹⁰⁴ The reason lies in a classic problem of collective action. To the extent that private parties are truly acting in the

¹⁰⁴ See Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 610 ("the real problem appears to lie in creating sufficient incentives to lead individuals to bring suit rather than in creating roadblocks to hold them back").

public interest, trying to keep charitable fiduciaries within the legal bounds of benefiting the public, they are providing a typical public good. Such goods include external benefits, benefits that the citizen suing pays for but that others enjoy for free. Any particular citizen has an incentive to free-ride on the good offices of others. Thus law enforcement, like public goods generally, is likely to be supplied by private actors only at sub-optimal levels.

Sometimes, of course, private parties will have very strong individual economic incentives to sue charities. Those incentives may overcome the free-ride problem only to create another. In the typical case of donor standing, private enforcers get to keep the allegedly misused charitable assets if they win the case. If the substantive conditions of the gift are proved to have been violated, the gift reverts under its own terms to private parties for their entirely private use. Since these use restrictions are of potentially infinite duration, their enforcers will typically be not the original donor, but the donor's successors in interest. These successors may not have the donor's charitable inclinations at heart; they may, indeed, prefer to see the gift fail than to see it re-tailored in a way that the donor would have preferred. The price of this kind of enforcement is a paradox: in order to prevent fiduciaries from moving charitable assets from one charitable use to another, the assets are given to private parties and thus lost to charity altogether.¹⁰⁵

There is also an element of skewing self-interest in beneficiary standing, especially when the duty of obedience is at issue. As we saw in the Edes Home case, current benefi

¹⁰⁵ See Fremont-Smith, *supra* note 5, at 207 ("In such a case these individuals will be attempting to enforce rights adverse to the trust, not seeking to enforce it.") Recognizing this problem, Karst conditions his call for expanded donor standing on a prohibition of the donor's "receiving any private gain from his action." Karst, *supra* note 21, at 448.

ciaries are fighting to retain their favored status as recipients of charitable largesse. Thus when either donors or beneficiaries sue under the duty of obedience, the interests of the private enforcer may well cut against the general interest of charity. In the case of default takers, the assets are entirely lost to charity; in the case of current beneficiaries, charitable assets are locked into uses that may not do the greatest good to either the greatest number or the most needy.

With respect to the enforcement of charitable fiduciary duties, we seem to have a double case of governmental and market failure. Quantitatively, the attorney general provides less public enforcement than citizens with supra-median demand would prefer; owing to collective action problems, optimal levels of private enforcement are unlikely. Qualitatively, the enforcement by the attorney general may be skewed by political motives, even as private enforcement is skewed by economic self-interest. As is often the case in other contexts of government and market failure, charity offers an appealing alternative, a kind of *via media* that combines the some of the advantages of public and individual action while reducing the problems of each.

Some private individuals who want more charitable oversight than the government provides may be willing to confer uncompensated benefits on others. Charitable monitoring organizations offer them a way of pooling their resources to achieve economies of scale almost certainly unavailable to any of them acting alone. This is also true of charitable organizations, which may want a means of joint oversight. General-purpose charitable

watch-dog groups already exist.¹⁰⁶ Specialized charitable monitoring bodies are perhaps strongest and most institutionally accepted in one of the principal areas of sectarian charity, higher education, in the form of private, nonprofit accrediting bodies.¹⁰⁷ Such bodies are also prominent in health care, an area in which concern about oversight is intense.¹⁰⁸

The incentives of charitable monitoring groups would seem less likely to be skewed by the political interests of elected officials or the avarice of private default takers. These advantages of charitable monitors, it should be emphasized, come without any expansion of traditional standing rules. Rather, charitable monitors may make traditional private enforcement mechanisms more viable, in several related ways. This is especially true if the role of charitable monitors themselves is derived from the sectarian model.

a. The Ancient Office of Visitor.

Charities offer a way to revitalize an ancient form of monitoring charity, visitation, that now lies in legal desuetude¹⁰⁹ and academic disfavor.¹¹⁰ At common law, founders and endowers of charitable corporations had a power of visitation to supervise their

¹⁰⁶ See Brody, *Institutional Dissonance*, *supra* note 76, at 485 n.267 and 503 n. 338.

¹⁰⁷ See *Marjorie Webster Junior College, Inc., v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 658-59 (1970).

¹⁰⁸ See Bloche, *Corporate Takeover of Teaching Hospitals*, *supra* note , at 1122, n.381.

¹⁰⁹ Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 21, at 607; Fremont-Smith, *supra* note 5, at 206-07.

¹¹⁰ See Karst, *supra* note 21, at 446 ("The doctrine of visitation should be given a swift statutory burial."); GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* 63, Section 416 (revised 2d ed. 1991) (describing visitation as "a relic of earlier times" that has not proved itself "extremely practical or desirable under present conditions.").

gifts.¹¹¹ This power offset, at least to some extent, the law's traditional disfavor of donor enforcement suits.¹¹²

In its traditional form, however, the office of visitorship posed several problems. For one thing, the rather indefinite and expansive scope of visitatorial powers raised questions of whether the visitors or the charitable fiduciaries had final say on important issues of charitable management, thus threatening to make charity management a muddle.¹¹³ For another, courts deemed the reservation of visitatorial powers automatic, inherent in the endowing of a corporate charity.¹¹⁴ Inferring such a reservation, however, might actually contravene a donor's implicit wish, as we have seen, to repose full trust in the charity's fiduciaries. Moreover, the visitation power was hereditary and passed to the donor's heirs unless the donor provided otherwise.¹¹⁵ Although this obviously allowed for continued supervision of perpetual gifts, it posed several related problems. Individual heirs might die out, or they might become burdensomely numerous.¹¹⁶ And they might lose interest in

¹¹¹ BOGERT AND BOGERT Section 416 at 57, 60; Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369 (1936).

¹¹² See BOGERT AND BOGERT, *supra* note 110, at Section 416 at 57.

¹¹³ See Karst, *supra* note 21, at 446.

¹¹⁴ See BOGERT AND BOGERT, *supra* note 110, at 57-59, Section 416.

¹¹⁵ See *id.* at 60.

¹¹⁶ In England, primogeniture took care of the latter problem, see BOGERT AND BOGERT, *supra* note 110, at 62, and, at least in theory, escheate removed the former by making the crown in effect everyone's ultimate heir. See *id.* at 57 n. 3 (citing *The King v. Masters and Fellows of Catherine's Hall*, 4 T.R. 233, for rule that "in default of heirs of the founder, power of visitation goes to the King."). Escheate, of course, would create an odd redundancy, giving visitation powers to the one party who, through his or her agents, has inherent power to supervise all charitable trusts as *parens patriae*.

charity supervision or, more ominously, "be openly hostile to the institution which had deprived them of part or all of the fortune of their relative."¹¹⁷

Donors to charitable corporations were traditionally free to appoint charitable organizations as visitors,¹¹⁸ and settlors of charitable trusts could create equivalent powers under current law.¹¹⁹ Such appointments would alleviate the problems with individual visitors. If courts were to honor only specific appointments, the risk of external intermeddling unintended by the donor would disappear.¹²⁰ Charitable institutions are of potentially infinite duration, and it is axiomatic that charitable trusts do not fail for want of a trustee. Unlike either heirs or charitable institutions that are made default takers upon the failure of a charitable gift, charitable visitors have no self-interest in opposition to the institutions they monitor. Charities with purposes other than monitoring might tend to let their visitorial powers lapse. But the office of visitation lies near the core purpose of watch-dog and accreditation groups, and the powers it confers would surely enhance the performance of their oversight mission.

¹¹⁷ BOGERT AND BOGERT, *supra* note 110, at 62.

¹¹⁸ See BOGERT AND BOGERT, *supra* note 110, at 60 (noting donor's power to vest visitation power in "another person, group, or body").

¹¹⁹ See *id.* at 63.

¹²⁰ This seems the preferred approach of American courts, perhaps for that reason. See Fremont-Smith, *supra* note 5, at 206 ("The visitorial power did not extend to heirs unless expressly reserved, and in most cases such reservations were narrowly construed, the attitude of the court being that the interests of the heirs were usually inimical to that of the charity.").

b. The Modern Trend Toward Disclosure.

One of the principal powers of visitors is access to information about the internal operation of the charity subject to visitation. As we have seen, the remedies available to those who have standing to sue charities include accountings and other kinds of disclosure. Proponents of increased supervision of charitable fiduciaries frequently call for expanding their obligations to disclose, to make more information available to more constituencies. Especially in the area of nonprofit hospital conversions, these proposals occasionally take statutory form.¹²¹

From the perspective of the sectarian model, increasing charity's disclosure obligations is a mixed blessing. On the one hand, it enhances the kind of informal, extra-legal controls over charitable fiduciaries that the sectarian model favors over more coercive measures. Increased scrutiny by the press, the public, and other charities may well improve the deliberations of charitable fiduciaries, particularly when the ultimate decision is left in the fiduciaries' hands. On the other hand, increased scrutiny may have a chilling effect on charitable activity, a worry that assumes constitutional dimensions in the protection of membership lists.¹²² Thus, in assessing any call for expanded disclosure, the sectarian model counsels careful weighing of the benefits of enhanced accountability against the costs of increased intrusion.¹²³

¹²¹ See Brody, *Limits of Charity Fiduciary Law*, *supra* note 95.

¹²² See *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹²³ See Chisolm, *Accountability*, *supra* note 12, at 154.

3. From Charitable Independence to Charitable Imperialism.

Maintenance of charity's sectoral independence, an article of the sectarian faith, requires caution in increasing of required disclosure. But if information is to be the new currency of all three sectors, charity has at least as much to gain as to lose. The flip-side of disclosure by charity is disclosure to charity; charity can monitor as well as be monitored. We have seen how charities might well monitor each other; I am suggesting here that they might also monitor their sectoral siblings on the public and for-profit sides. Consistent with the sectarian view of charity, their role could be less to do what government and the market do badly than to ensure that the other two sectors do their own work well.

A particularly apt example of such extra-sectoral charitable jurisdiction is health care, especially hospital care. In an industry where charitable providers seem most at risk from for-profit competitors, charity may be in an ideal position to turn the tables, very much to the public benefit (which is, after all, charity's ultimate purpose under any model). Sales of charitable hospitals typically produce an embarrassment of riches, a fund of sales proceeds in search of an appropriate purpose. Some have suggested, under the contract failure theory, that these monies be deployed to monitor for-profit provision of health care.¹²⁴ Under that theory, for-profits may be more efficient operators of hospitals, even though they pose a greater risk than charities of exploiting information asymmetries to the detriment of patients.

¹²⁴ See Joseph A. Grundfest, *Comment on Hansmann's Changing Roles*, in *INDIVIDUAL AND SOCIAL RESPONSIBILITY* 270 at 274 (1996).

Sales of charitable hospitals could conceivably be structured in a way that promotes the best of both worlds. The new for-profit hospital owner would provide basic managerial services, presumably prodded toward cost efficiency by the profit motive. Part of the sales proceeds could be used to fund a charitable ombudsman organization, the principal function of which would be to prevent the for-profit hospital's exploitation of information asymmetries. On the analogy of visitorship powers, the old charitable hospital could reserve monitoring powers to the new charitable monitoring body as a condition of the transfer of assets to the for-profit purchaser.

In the classic visitorship, private donors typically reserve to themselves or other private parties the power to watch over charitable fiduciaries' use of long-term donations. I have suggested advantages in donors' reserving the power of visitation to other charities, particularly those that specialize in monitoring charitable fiduciaries. Here I suggest that charitable fiduciaries condition the sale of their operating assets to for-profit competitors on the reservation of the power to police the use of those assets.

That arrangement, like the sectarian model it epitomizes, raises, at least in principle, a final question: Who will watch the charitable watchers? The answer is, perhaps, the ultimate imperialistic move: academic centers on philanthropy, through conferences such as this; in a word, we.

IV. Conclusion.

We have considered the question of who should have standing to enforce the duties of charitable fiduciaries mindful of Mencken's warning: "For every complex problem, there is a solution that is simple, elegant -- and wrong."¹²⁵ Each of the models we have examined -- the proprietary model, the various citizenship models, and the sectarian model -- is flawed by its elegant ignoring of countervailing considerations. Perhaps from their different, partial perspectives a truly comprehensive answer to our original question could be fashioned.

But that would sorely test the Atkinson hypothesis, a corollary, perhaps even a corrective, of Mencken's maxim. According to my hypothesis, a solution to a complex problem that is more complex than the problem will not be saved by its elegance or even its workability; for practical purposes, it will be worse than an overly simple solution, which, if elegant enough, will have at least the advantage of being read, however obviously it is wrong. (The neatest thing about my hypothesis is that its statement is virtually self-proving.)

By contrast, Mencken's own maxim is at war with itself. It is simply too simple and elegant for its own good. It would be very odd -- and contrary to Mencken's maxim -- if the complex problem of assessing the adequacy of answers to complex problems could be resolved in a single sentence. That is the strength and the weakness of aphorisms; in an

¹²⁵ Hall and Colombo, *supra* note 6, at 330 n.76.

odd way, Mencken's aphorism is an aphorism against aphorism, and thus a paradox: If Mencken is right, he must be wrong.

But there is another, and deeper problem with Mencken's aphorism. Like much of Mencken's work, it plays to our prejudices, reinforcing them rather than exposing them for careful scrutiny. Mencken's maxim encourages us to think that complex social problems have solutions that are either right or wrong. That's wrong. Competing solutions to such problems -- and now I have in mind the various models I have critiqued and proffered -- are, in the last analysis, neither right nor wrong answers. They are, rather, alternative visions.

The question of who should have standing to sue charitable fiduciaries ultimately comes round to what kind of charity we want to have, what we think charity is and what we want it to be. The proprietary model implies a donor and purchaser dominated charity; the various citizenship models seek a kind of grass-roots democratization of charity; my sectarian model idealizes self-sustaining fiduciary communities. But as one who believes that diversity is near the core of charity, I want a law of charity that permits the creation and growth of charities on each of these models. What Laura Brown Chisolm has argued about charity regulation in general applies with particular force to the law of standing:

Any attempt to structure the rules to make each organization responsive to everyone would diminish the diversity of the sector and sacrifice innovation for standardization. Both diversity and accountability are better served by structuring legal

rules so as to allow and encourage formation and development of a variety of institutions, such that individuals can form or find organizations that respond to their diverse preferences and priorities.¹²⁶

Amen.

¹²⁶ Chisolm, *supra* note 12, at 152.