

The Treasury Regulations Defining “Charity”: If Only

Richard L. Schmalbeck*

Introduction – Consistency of style is not among the virtues of the Internal Revenue Code (the “Code”). Some sections are very detailed, while others are terse. Squarely in the latter category are the two sections that define the sorts of organizations that are entitled to exempt status as charities, and those organizations whose donors may deduct their contributions. Section 501(c)(3) lists eight categories of organizations that may be considered exempt. Five of these are denoted by a single adjective each: religious, charitable, scientific, literary, or educational. The remaining three are explained in only a few words: organizations that “foster national or international amateur sports competition,” prevent “cruelty to children or animals,” or engage in “testing for public safety.” Section 170(c)(2) uses essentially the same language to define the sorts of organizations to which deductible contributions can be made, but deletes reference to testing for public safety.

Further guidance with respect to the meaning of Code sections is often available in the legislative history of the acts that added those sections to the Code. But not in this case. There is hardly any legislative history at all with respect to the predecessor of section 501(c)(3); it was simply part of our first modern corporate income tax law, the Corporate Income Tax Act of 1909.¹

There is a bit more legislative history supporting the addition of the predecessor of section 170, but it offers little help in defining charity. When Congress dramatically increased tax rates in 1917 to finance the U.S. engagement in World War I, Congress was concerned that the higher tax rates might absorb too much of taxpayers’ capacity to support charitable organizations.² A contributions deduction was the solution it selected, and

¹ Corporate Income Tax Act of 1909, 36 Stat. 11.

² See 55 Cong. Rec. 6728 (1917) (“Now, when war comes and we impose these very heavy taxes on incomes, that will be the first place where the wealthy men will be tempted to economize, namely, in donations to charity.”) (semi-literate statement of Sen. Henry Hollis, Chairman, S. Comm. on Enrolled Bills).

essentially the same provision has been in the Code ever since. The legislative history explains Congress' motivation, but contains no detail on precisely the sorts of organizations it had in mind.

The absence of clarity in the statute and accompanying legislative history created a troublesome vacuum for would-be charitable organizations and their donors—the sort of vacuum into which the Treasury Department (“Treasury”) and The Internal Revenue Service (“IRS”) should have quickly poured content. But those agencies have been slow to provide the authoritative materials necessary for understanding the precise contours of these important Code concepts. Information can be gotten from a revenue ruling here, or a litigation posture there; perhaps there are internal instructional materials that have been published, or guidance offered in an IRS publication. But more than one hundred years after enactment of the first provisions exempting charities from income taxes, there is still little authoritative guidance in the form of regulations on what a charitable organization must be and do in order to win recognition as such.

Regulations are the usual and logical place in which to provide content of the sort needed, for a number of reasons, not least that they are entitled to much greater deference by courts, having the force of law so long as they are not found to contradict the Internal Revenue Code. Although modified slightly by subsequent case law, the words of Justice Stevens in *Chevron v. Natural Resources Defense Council*³ still nicely summarize the importance and authority of regulations: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁴

It is unclear what level of deference courts owe revenue rulings and other I.R.S administrative guidance. The Supreme Court has never spoken directly on the matter,

³ 467 U.S. 837 (1984).

⁴ *Id.*, at 843-44.

though in *United States v. Mead Corp.*,⁵ the Court considered what deference was owed to a “ruling letter” issued by the United States Custom Service. The ruling letter is similar to a revenue ruling in that it “represents the official position of the Customs Service” and binds Customs personnel to the policy articulated.⁶ Additionally, the ruling letter can be revoked or modified without notice and is not to be relied on as a source of law.⁷ The Court concluded that the ruling letter was not owed *Chevron* deference,⁸ but did deserve *Skidmore* deference.⁹ *Skidmore*¹⁰ articulates a range of factors for courts to consider when determining what deference is appropriate for an agency interpretation, including “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹¹

Circuit courts have responded to *Mead* in a variety of ways when considering revenue rulings. The Second, Fifth, and Sixth Circuits have all held that revenue rulings are not owed *Chevron* deference, but do receive *Skidmore* deference analysis.¹² Other circuits have left open the possibility that revenue rulings may be owed *Chevron* deference, but have refused to rule on whether *Chevron* or *Skidmore* deference is more appropriate.¹³

⁵ 533 U.S. 218 (2001).

⁶ 19 C.F.R. § 177.9 (2012).

⁷ *Id.* at § 177.9(c).

⁸ 533 U.S. at 234 (“[Ruling letters] are beyond the *Chevron* pale.”).

⁹ *Id.* at 238.

¹⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹¹ *Id.* at 140.

¹² See *In re WorldCom Inc.*, 723 F.3d 346, 358 (2d Cir. 2013) (“Although not entitled to *Chevron* deference, particular revenue rulings may be given deference to the extent that they are persuasive—in other words, we will afford them *Skidmore* deference.”); *Kornman & Associates, Inc. v. U.S.*, 527 F.3d 443, 455 (5th Cir. 2008) (“We believe that our existing jurisprudence regarding the level of deference owed to revenue rulings is fully compatible with *Skidmore*, and we apply that standard today.”); *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 137, 181 (6th Cir. 2003) (“In light of the Supreme Court’s decisions in *Christensen* and *Mead*, we conclude that Revenue Ruling 82-20 should not be accorded *Chevron* deference. Revenue rulings do, however, constitute “precedents to be used in the disposition of other cases.”) (citations omitted).

¹³ See, e.g., *USA Choice Internet Services v. United States*, 522 F.3d 1332, 1342 (Fed. Cir. 2008) (“[W]e need not address the extent of deference - if any - properly accorded to [revenue rulings].”); *Railroad Pas-*

No circuit court has held outright that revenue rulings are owed no deference. However, the Tax Court has maintained its longstanding position that revenue rulings are not accorded deference, though may be considered persuasive if they contain persuasive reasoning.¹⁴ It is not clear how this differs from the consideration owed any legal brief.

In sum, it is unsettled what deference courts should give to I.R.S. administrative guidance, including revenue rulings. Until the Supreme Court clearly articulates a rule, federal courts will likely continue to apply *Mead*'s reasoning, giving some level of deference to revenue rulings that deserve it upon consideration of the *Skidmore* factors.¹⁵

And, summarizing further, it can be said that, all things considered, it would be better to have critically important definitions of ambiguous Code concepts in regulations rather than in a hodge-podge of other materials of lesser authority.

But the regulations under the early Revenue Acts and the 1939 Code were extremely general, and quite unhelpful in drawing the lines that the charitable sector needed.¹⁶ In 1956, the Treasury embarked on a more serious effort,¹⁷ which culminated in the adoption in 1959 of Regulation §1.501(c)(3)-1(d), which offered definitions of some of the types of charitable organizations that qualified for exemption and whose donors qualified for con-

senger Corp. v. United States, 431 F.3d 374, 379 (D.C. Cir. 2006) (“[A]lthough the parties discuss whether we should defer to Revenue Ruling 79-404 pursuant to [*Chevron* or *Skidmore*], we need not resolve that question.”).

¹⁴ See *Wallace v. Comm’r*, 128 T.C. 132, 149 (2007) (“Revenue rulings are generally not accorded deference by the Court. We may, however, take a revenue ruling into account where we judge the underlying rationale to be sound.”).

¹⁵ For a more thorough analysis of this matter, see Brief of Professor Kristin E. Hickman as Amicus Curiae in Support of Neither Party, *United States v. Quality Stores*, 134 S.Ct. 1395 (2014).

¹⁶ See, e.g., Treas. Reg. 65, art. 517, T.D. 3640, 26 Treas. Dec. Int. Rev. 896 (1924) (“Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption. An association whose sole purpose is the instruction of the public, or an association whose primary purposes is to give lectures on subjects useful to the individual and beneficial to the community may be exempt as an educational corporation, even though such an association has incidental amusement features. Associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.”).

¹⁷ See Prop. Treas. Reg. § 1.501(c)(3)-1(d), 21 Fed. Reg. 460 (Dec. 9, 1955).

tributions deductions.¹⁸ With the addition two years later of another subparagraph of the regulation defining “scientific,”¹⁹ the regulations were apparently complete enough for the Treasury, since little has been offered since.

However, those regulations are in fact grossly incomplete, and inadequate in other ways as well. After a brief historical section below, this paper will offer a critique of the current regulations defining charity, and suggestions of what is needed to fix them.

The effort to produce a new set of regulations will involve many controversial judgments, and the suggestions offered in this paper made will certainly not please every reader. In fact, they will likely not please *any* reader in their entirety. They represent the author’s best guess at what the right answers may be to many thorny questions. There can be no doubt that anything that the Treasury might actually propose would decline to follow some of these suggestions. The intention, however, is not really to *answer* every question that might come up in defining charity, but rather to *pose* each major question –to provide something of a compendium of the questions that should be answered, after due reflection on the many conflicting considerations that apply to each issue, and to provide a framework within which proposed regulations might be developed.

A Brief History of the Regulations – When Congress added provisions allowing deductions of charitable contributions in 1917, it increased substantially the stakes in defining what it meant to be a charitable organization. While exempt status of the organization itself is of some significance to some organizations, it is not the main source of the federal subsidy of charitable organizations. Most of these organizations have little or no income anyway, especially if one accepts the position that any revenue generated by contributions

¹⁸ See Treas. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 5217, T.D. 6391, 1959-2 C.B. 139.

¹⁹ See Treas. Reg. § 1.501(c)(3)-1(d), 26 Fed. Reg. 189, T.D. 6525, 1961-1 C.B. 186.

should be exempt under section 102 of the Code,²⁰ which broadly excludes from income amounts received by gift or inheritance.²¹

Shortly after gifts were made deductible, Treasury issued in 1919 what appear to be the first regulations defining charity. Although the regulations reflected something of a scattered attention span, mentioning a few things in some detail, and many others not at all, they do provide an early view of what the Treasury thought deserving of subsidy. Included within the charitable realm were “an association for the relief of the families of clergymen,” or one “for furnishing the services of trained nurses to persons unable to pay for them.”²² “Also included were organizations intended to aid “the general body of litigants by improving the efficient administration of justice.”²³ Educational organizations must have been presumed to include ordinary schools and colleges, but the regulations go on to note that a school “whose sole purpose is the instruction of the public” would also qualify.²⁴ And that a “Chatauqua association whose primary purpose is to give lectures on subjects useful to the individual and beneficial to the community” could qualify.²⁵ Finally, the regulations announce that “[s]cientific corporations include an association for the scientific study of law, to the end of improvement in its administration.”²⁶

²⁰ This section exempts from income “the value of property acquired by gift, bequest, devise, or inheritance.” While the Code sometimes distinguishes between property and cash, it is clear from context and regulation that this provision is intended to exclude cash as well as property.

²¹ See Boris I. Bittker and George K. Rahdert, “The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 Yale L.J. 299,308 (1976).

²² Treas. Reg. 45, art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919).

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. Unfortunately, this sense of law as science seems to have been lost somewhere along the way, perhaps misplaced during the legal realist movement. It seems unlikely that the IRS would now rule that a legal education program was exempt on grounds of being “scientific” under Regs. §1.501(c)(3)-1(d)(5)(i), which emphasizes that “research . . . is not synonymous with scientific,” the latter category being present only if the research is, somewhat tautologously, “carried on in furtherance of a scientific purpose.” Not that it would matter, in light of the easy qualification of legal education under the “educational” part of the regulations, Regs. §1.501(c)(3)-1(d)(3).

There were a few explicit disqualifications as well, some surprising. “Societies designed to encourage the performance of first class orchestral music are not exempt,” the regulation found, because their purpose was “merely to provide a high grade of entertainment.”²⁷ Less surprising was a finding that “associations formed to disseminate controversial or partisan propaganda” could not qualify as educational²⁸—a position that Treasury has maintained since.²⁹

Subsequent regulations were less colorful. The 1924 edition, for example, contained only the barest outline of what could be described as a definition of charity. Instead, it offered some commentary on things that might be said to cast doubt on that status, pronouncing some of them exempt nonetheless, and some not.³⁰

After Congress re-codified the Internal Revenue Code in 1954, Treasury apparently thought that the time had come for an updated approach to the regulations defining charity. In 1956, it proposed regulations quite unlike earlier versions. These regulations offered an elegantly lean—but probably excessively so—account of what it meant to be “charitable,” saying only that these organizations include those whose purpose was “relief of poverty, distress, or other conditions of similar public concern.”³¹ Although the charitable category has come to be something of a residual category, as will be explained below, no sense of that emerges from these proposed regulations.

²⁷ Id.

²⁸ Id.

²⁹ This is now expressed in Regs. §1.501(c)(3)-1(d)(3), in the somewhat softer “full and fair exposition” test.

³⁰ *See, e.g.*, Treas. Reg. 65, art. 517, T.D. 3640, 26 Treas. Dec. Int. Rev. 896 (1924) (“Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption. An association whose sole purpose is the instruction of the public, or an association whose primary purposes is to give lectures on subjects useful to the individual and beneficial to the community may be exempt as an educational corporation, even though such an association has incidental amusement features. Associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.”).

³¹ *See* Prop. Treas. Reg. § 1.501(c)(3)-1(d), 21 Fed. Reg. 460 (Jan. 21, 1956).

The 1956 proposed regulations went into much greater detail as to what could qualify as an educational organization, picking up the earlier ideas to the effect that more than traditional schools could qualify, specifically bringing within the educational concept lectures and the like aimed at public education.³² But no mention is made of what might be called “cultural” organizations—museums, theater, opera, and symphony companies or similar organizations. On the contrary, some of the language of the 1956 proposed regulations seems inimical to the idea that such organizations could be educational:

To qualify as an exempt educational organization the methods employed by it must in fact be educational. Thus, not only the purpose but also the activities of such an organization must be designed to disseminate knowledge³³

Although Treasury did not comment on the nature of opposition to these proposed regulations when it withdrew them, it did indeed withdraw them in the same announcement that contained totally new proposed regulations in 1959.³⁴ Because those regulations became, with little modification, the final regulations adopted later than year,³⁵ these regulations will be described and analyzed in the next section, along with the regulations defining “scientific,” that were adopted two years later.³⁶

The Current Regulations

The Missing Regulations—The major shortcomings of the existing regulations are that they don’t say very much, and much of what they do say is wrong. The first of these is easier to demonstrate than the second. Quite simply, the regulations are hopelessly incomplete. To begin with, the regulations offer definitions of only four of the eight statutory subcategories within the charitable realm: charitable, educational, scientific, and testing for public safety. What inferences can be drawn from the silence regarding the other four categories? Are they unimportant? That cannot possibly be the case with re-

³² Id.

³³ Id.

³⁴ See Prop. Treas. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 1421 (Feb. 26, 1959).

³⁵ See Treas. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 5217, T.D. 6391, 1959-2 C.B. 139.

³⁶ See Treas. Reg. § 1.501(c)(3)-1(d), 26 Fed. Reg. 189, T.D. 6525, 1961-1 C.B. 186.

spect to religious organizations, which constitute one of the largest subcategories, and one that receives a large portion of total contributions that donors make, and mostly deduct.³⁷ The other omitted subcategories are less important, but hardly unimportant: prevention of cruelty to children and animals involves very basic human values; literary organizations could be significant vessels in the preservation of human culture; promotion of amateur sports is probably the least significant, but in a sports-loving country such as ours this is not, or at least need not be, a trivial subcategory.

Perhaps the inference from silence is that there are no controversial questions relating to organizations in the four omitted subcategories? That conjecture can be rejected immediately, for there has been some degree of controversy with respect to each of them, in part because the Treasury has failed to set forth standards that govern qualification within each of these subcategories. Is an ethical humanist congregation a religious organization?³⁸ Can a non-profit animal health clinic be considered to prevent cruelty to animals?³⁹ Can an organization created to help publish works by authors who cannot achieve the interest of commercial publishers be considered a literary organization?⁴⁰ Can promotion of a single team, or small collection of teams playing at different levels be considered “fostering amateur sports competition?”⁴¹ The answers to these questions are not self-evident, but one finds no clue in the regulations as to the appropriate resolution.

One is left concluding that the real problem is not that the subcategories are unimportant, or that there are no questions that require guidance. The real problem, it would seem, is that defining these categories is simply too difficult, either because the issues are

³⁷ GIVING USA, 2015 HIGHLIGHTS 1 (2015). Religious organizations received about \$115 billion in 2014, about 32% of total charitable giving in that year.

³⁸ See *Wash. Ethical Soc. v. Dist. of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) (holding that belief in a supernatural power is not necessary to qualify as a “religious corporation” for the purpose of D.C.’s property tax exemption; the reasoning extends to 501(c)(3)’s “religious” purpose).

³⁹ See I.R.S. Gen. Couns. Mem. 39346 (Apr. 30, 1984) (finding the provision of veterinary services for a cost-plus fee to owners able to pay for pet’s medical services does qualify as an exempt purpose).

⁴⁰ See I.R.S. Gen. Couns. Mem. 38845 (May 4, 1982) (granting 501(c)(3) status to a magazine seeking to ensure literary quality despite unprofitability).

⁴¹ See *Hutchinson Baseball Enter. v. Comm’r*, 696 F.2d 757 (finding organization that owned amateur baseball team and provided field and instructors for baseball leagues qualified for 501(c)(3) status).

too politically controversial or because the questions are too technically difficult. To which one really must say to the Treasury: Man up!; or perhaps: Buckle down!, depending on whether the primary problem is political or technical.

In fact, it is probably some mix of the two, but one imagines that political sensitivities predominate—not primarily in the partisan sense of political (though perhaps sometimes that), but more in the sense that defining charity is imbued with value judgments about what is worthwhile enough to deserve public subsidy, and individuals and interest groups will predictably disagree about judgments of that sort. But while that makes the task more difficult, it is not a reason to avoid it. It is a reason why it is all the more important that Treasury confront the difficulties and resolve them as well as it can.

The Regulations That Aren't Missing – But at least Treasury has provided guidance as to four of the subcategories of charity: charitable, educational, testing for public safety, and scientific. How do they stack up? Not too well. They are in fact full of gaps, and terribly lacking in specific detail. And by now, many of them are out-of-date as well. Consider them one-by-one.

The Charitable Subset – Regs. §1.501(c)(3)-1(d)(2) offers a definition of this important category. The degree of difficulty in defining “charity” is multiplied by the fact that the word is used in so many different ways in the tax-exempt world. It is, first of all, sometimes used to describe *all* the things that might be within sections 170(c)(2) and 501(c)(3). For example, the first of these sections allows deductions for “any charitable contribution,”⁴² certainly including religious and educational organizations, among others. The same section goes on to list the categories of organizations that might receive charitable contributions, the listing of which includes the word “charitable,” making the word in effect a subset of itself.⁴³

⁴² IRC §170(a)(1).

⁴³ Confusion over these two senses of the word “charitable” even reached the Supreme Court in at least one important case. Justice Rehnquist’s dissent in *Bob Jones University v. United States* disputed the majority position that “charitable” organizations needed to be conducted in furtherance of public policy. Rehnquist argued that this particular organization did not need to be consonant with public policy, because it was “educational,” rather than “charitable.” 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting).

But even as a subset, the word is used in two distinct ways: in the narrower sense, it may mean only relief of poverty and distress—the sort of work that a soup kitchen or the Red Cross might do. This is sometimes referred to as the “ordinary and popular” meaning.⁴⁴ But the word can be used instead as a residual category—slouching a bit back toward the notion that all things covered by §501(c)(3) are within the realm of “charity.” In this broader sense, it operates to bring in all things traditionally considered charitable, whether or not specifically mentioned in the Code. This broader sense is sometimes referred to as the “legal” sense of the word—a characterization that is less than perspicuous. Presumably this broader sense came to be referred to as the “legal” sense because it has been embodied in laws dating back to at least the Statute of Charitable Uses of 1601,⁴⁵ from which time it has become embedded in charitable trust law.⁴⁶

In a famous formulation of the idea of “charitable” in its broader sense, Lord McNaughten wrote that the legal sense of “charity” comprised “four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”⁴⁷ The last of these, of course, explicitly embraces the notion of “charitable” as including an essential residual category of things—albeit a somewhat elusive, ill-defined one—that a society would want to encourage, and perhaps subsidize, but which did not fall into any of the other, more explicit categories. It is essential, it seems, in part because it can allow the law of charity to expand to include activities that might have emerged as important public desiderata in the years since the Statute of Charitable Uses in 1601, or the Corporate Income Tax Act of 1909, or even the 1959 Treasury Regulations.

⁴⁴ Staff of the Joint Committee on Taxation, “Historical Development and Present Law of the Federal Tax Exemption for Charitable and Other Tax-Exempt Organizations,” JCX-29-05, at 61 (2005).

⁴⁵ An Act to Redress the Mis-employment off Lands, Goods, and Stocks of Money Heretofore Given to Certain Charitable Uses, 1601, 43 Eliz. 1, ch. 4 (Eng.)

⁴⁶ Austin Wakeman Scott, William Franklin Fratcher, and Mark L. Ascher, *Scott and Ascher on Trusts*, 5th Ed., Vol. 5, at 2376 (2008).

⁴⁷ *Comm’r v. Pemsel*, 1891 A.C. 531, 583 (1891).

A simple example will make the point: Although the law of nuisance has long recognized that certain localized insults to air or water quality were imaginable, and sometimes actionable, it is only more recently that systemic threats to the environment—ones that come from every factory, automobile, and flatulent cow on earth--have been recognized as appropriate targets for redress by charitable organizations. A flexible residual category of “charitable” allows the law to expand (or contract) as dictated by the circumstances from time-to-time.

How do the current regulations navigate these several senses of the word charitable? They certainly incline toward the last, broadest sense of the word, but let them speak for themselves:

The term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes; or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

One hears in these words strains of multiple sources, from the Statute of Charitable Uses to the opinion of Lord McNaughten. Let us consider these one-by-one.

First, the reference to the “generally accepted legal sense” of charity seems unhelpful to most readers. To say that a word in a statute is to be construed in its legal sense is almost circular. The phrase is saved from complete nonsense only by the fact that it is lifted from the famous Pemsel case—but one uses “famous” guardedly, since it is not as though that case is referred to with any frequency by journalists, nonprofit executives, or the general public. It is true that those groups do not routinely read regulations, either, but judges do, as do attorneys and accountants who may not be familiar with either Pemsel or the standard treatises on trusts.

The elaboration to the effect that this is not to be construed as limited by the enumeration of other purposes seems self-evident, which in this case makes it puzzling: why would one think that “charitable” would limit or be limited by the other enumerated categories? They are listed in a sequence, and presumably apply independently. Does this language anticipate the confusion referenced above in the Bob Jones case, in which Justice Rehnquist thought that overarching charitable principles did not apply to educational organizations? It wouldn’t seem so; this regulation, after all, purports to explain “charitable” as that term is used in the sequence of terms defining organizations exempt from tax under IRC §501(c)(3). It is speaking about the “subset” usage, not the usage that applies to the entire charitable sector.

After the general language just discussed, the regulations defining the “charitable subset” of section 501(c)(3) organizations can be divided into several more specific categories. Consider how the well or poorly the regulations do in providing clarity within each of these categories:

Relief of the Poor, etc. The first category—referring to “relief of the poor and distressed, or of the underprivileged” is the essential core of the “subset” sense of charitable. One is relieved to see it in the regulations, but a few questions nag. First, why are the words “poor” and “distressed” connected conjunctively rather than disjunctively? Surely there are distressed people who are not poor, and poor people who are not distressed. The Red Cross can presumably give a blanket and a cot in the local armory to a person who is not poor, but has just lost her home to a hurricane. Similarly, an organization can provide assistance to the clearly impoverished Porgy, even while he sings, without apparent distress: “I’ve got plenty o’ nuttin’, and nuttin’s plenty for me.”⁴⁸ This simply must be read disjunctively; but then it might as well be written that way.

Further, what does the regulation mean to add by countenancing relief of the “underprivileged?” If this is the same as the group of the poor, then it is unnecessary. If it means something different, it is not clear what. In various rulings and other pronounce-

⁴⁸ George Gershwin, Ira Gershwin & DuBose Heyward, *I Got Plenty o’ Nuttin’*, PORGY & BESS (1934).

ments, the IRS has employed standard definitions of poverty status used by the Census Bureau and the Department of Health and Human Services to assist in deciding whether a charitable organization could be said to be providing relief to the poor.⁴⁹ There does not seem to be a comparably specific sense of what criteria would be used to determine if a particular individual was “underprivileged.” The term is generally defined as having a below average standard of living; but that is undesirably imprecise.

Advancement of Other Things. The next phrases in the regulation, referring to the advancement of religion, education, or science, seem totally superfluous in light of the fact that the statute separately references each of these purposes in other categories within section 501(c)(3). Again, this part of the regulations is supposed to be defining the charitable subset of section 501(c)(3) organizations, not the entirety of that section. The language appears to be directly lifted (with the addition of “science”) from the Pemsel opinion, but it is unnecessary in this part of the regulations.⁵⁰

Public Buildings, etc. Following endorsement of advancing things that are already advanced elsewhere, the regulation mentions that “erection or maintenance of public buildings, monuments, or works” can fall within the charitable subset. This strikes the modern reader as a bit odd, since there doesn’t seem to be much of this sort of activity today. Andrew Carnegie devoted significant sums to the erection of libraries, some of which either became, or were *ab initio*, public buildings, so this has happened, and is certainly laudable.⁵¹ But it doesn’t happen much anymore, in part because the process of erecting public buildings, and maintaining them, is now too complicated a process to be delegated outside of public bodies. If a charity were to decide to erect a public school or courthouse, would it be subject to the various laws regarding public contracting? Would it need to obtain authorization of the county or municipality that was to use the public building? How

⁴⁹ See, e.g., Rev. Proc. 96-32, 1996-1 C.B. 717, which inferentially defines the poor as those having less than 80% of the area’s median income.

⁵⁰ *Comm’r v. Pemsel*, 1891 A.C. 531, 583 (1891).

⁵¹ See Susan Stamberg, *How Andrew Carnegie Turned His Fortune Into a Library Legacy*, NPR.ORG (Aug. 1, 2013, 3:00 AM), <http://www.npr.org/2013/08/01/207272849/how-andrew-carnegie-turned-his-fortune-into-a-library-legacy>

would it establish its design criteria? Every bit of the process of adding public buildings, from zoning, to design standards, to contracting, to labor laws, to financing, has been brought within the public sphere. It is not much of an exaggeration to say that most public bodies wouldn't even welcome a contribution of a building *per se*, though they might welcome contributions of funds to be devoted to that purpose. Which raises another point: since contributions to governments are deductible under section 170(c)(1), and since this can include gifts in kind as well as gifts in cash, what purpose does it serve to separately mention public buildings in the context of the charitable subset of section 170(c)(2) organizations?

Monuments raise different issues. If there is broad public consensus that a monument is appropriate, much of what is said in the previous paragraph applies: it should probably be sited, designed, and executed by a government, perhaps with whatever private funds can be obtained, but with the support of a section 170(c)(1) deduction rather than a (c)(2). If, in contrast, one group of citizens wants to erect yet another monument to General James Longstreet, the "Old War Horse" who was Robert E. Lee's principal subordinate, while another wants to erect a monument to H. "Rap" Brown, a somewhat incendiary civil rights leader, it isn't clear that either should execute their respective preferences with the assistance of governmental subsidies provided by contributions deductions.

Burdens of Government. Relief of the burdens of government is another venerable charitable purpose that the regulations explicitly mention, and this purpose seems antiquated for some of the same reasons just mentioned. There may have been a time when the basic needs of government could not be met due to primitive revenue systems; but the advent of the income tax has made it possible for governments generally to afford what they want to provide. And governments have become increasingly particular about the *manner* in which governmental goods and services are provided, with elaborate rules about how employees are to be hired, compensated, and protected; how materials and infrastructure are to be contracted for, and so on.

The most obvious space in modern society for services that might be said to relieve the burdens of government seem to be in the social services area. One could certainly say

that a soup kitchen, or a meals-on-wheels program, provides services that might otherwise be done by a government. But there is a bit of a chicken-and-egg problem in evaluating this argument: are they not actually being done by a government because they are already being done by private philanthropic enterprises? Or is it more accurate to say that the government itself does not regard soup kitchens or home delivery of meals as one of its burdens, allowing private philanthropy to fill the gaps?

In fact, there is a more-or-less continuing controversy over how elaborate the social safety net ought to be, which is what leaves room for private charitable work to operate. But the concept of relieving the burdens of government is problematic in a situation where there is no clear, widely shared agreement about how far those burdens go. But it is also unnecessary to resolve this question in the social services area, because the relief provided in that area can ordinarily also be described as relief of poverty or distress, making the relief-of-the-burdens-of-government rationale redundant.

Similarly, private schools and colleges could be said to relieve the burdens of government in providing education; but it is unnecessary to cast educational operations in those terms when educational organizations are recognized as exempt simply because they are educational.

In most areas outside of the social services and educational fields, it is doubtful that attempts by private charitable entities to discharge governmental obligations would be welcome. Should charities contribute to national defense? Should they exercise police power? Should they operate court or correctional systems? Should they license drivers to operate vehicles? Should they inspect buildings to assure compliance with building codes? The answers would seem to be a string of “no, thank you” responses that are as long as the list of questions.

But there are a few exceptions to this – interstitial spaces in which the government might acknowledge a burden, but could accept the services of a nonprofit organization in discharging that burden. For example, operation of a youth sports or other recreational program might contribute to the welfare of a community, but might not fall under any ob-

vious category of charitable activity, as expressed in section 501(c)(3) or the regulations thereunder. And there may be a need for governmental services in communities that are too small to justify governmental provision of those services. An example would be a volunteer fire department for a community small enough that a full-time force of firefighters is unnecessary (and too expensive for the community's local government). A useful term to describe these exceptions might refer to organizations that promote social welfare.

Promotion of Social Welfare. Which is, of course, the next clause in the regulations. It seems in one sense to be out-of-place, with language that quotes verbatim the language of Code section 501(c)(4). What constitutes “promotion of social welfare” is itself far from self-evident (and the regulations under section 501(c)(4) are not particularly more helpful than their section 501(c)(3) counterparts).⁵² But it is generally understood that (c)(4) organizations are different from (c)(3) organizations, if only because it wouldn't make sense to have separate provisions if Congress didn't have some distinction(s) in mind. In recent years, the difference has seemed to be in large part a question of whether the organization does substantial lobbying—something that is forbidden for section 501(c)(3) organizations, but not for (c)(4)s.

However, the distinction between the two types of organizations pre-dates the addition of the lobbying restrictions to the text of section 501(c)(3). The Revenue Act of 1918, which first introduced the charitable contributions deduction, allowed, in section 214(11), such deductions for contributions to organizations that were organized for “religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals”⁵³ Section 231(6) of the same act exempts organizations with those purposes, while section 231(8) exempts organizations organized to “promote social welfare.”⁵⁴ The latter category of organizations, however, is not embraced by the deductions provision. None of the provisions of this act explicitly restricted lobbying efforts by

⁵² Regs. §1.501(c)(4)-1(a)(2) simply says that such organizations are “primarily engaged in promoting in some way the common good and welfare of the people of the community.”

⁵³ Revenue Act of 1918, §214(a)(11), 40 Stat. 1068. This section also allowed deductions for contributions to certain vocational rehabilitation organizations.

⁵⁴ *Id.*, at 1076.

either type of organization, a limitation that was first discovered by Judge Learned Hand in the famous 1930 case of *Slee v. Commissioner*,⁵⁵ and subsequently added to the Code in 1934, but only in the case of charitable organizations, not social welfare organizations.⁵⁶

So prior to that time, and for several years, Congress chose to distinguish—on grounds other than lobbying--charitable organizations from social welfare organizations, allowing deductions for contributions to the former but not the latter. Does the clause in the section 501(c)(3) regulations invite disregard of that distinction?⁵⁷

Maybe. The wording of this provision says that the term “charitable” includes promotion of social welfare, but modifies that by adding “by organizations designed to accomplish any of the above purposes”⁵⁸ Promoting social welfare thus seems to count as a charitable purpose, but only for organizations intended for some other charitable purpose. It would seem not to be an independent ground for exemption under section 501(c)(3) by itself. But this provision is a bit mysterious. Could an organization that was created to maintain public monuments, and also promote social welfare, qualify as a section 501(c)(3) organization under this provision? It would seem so, but it also seems odd that such an organization could, by having monument preservation among its purposes, pull activities not otherwise blessed with the bounty of a contributions deduction into that promised land by virtue of being housed in the same organization that maintains monuments.

While the statutory authority for allowing promotion of social welfare into section 501(c)(3) status through the back door seems weak, it might be justified by taking a broad view of the idea of lessening the burdens of government. Government also ideally seeks to promote social welfare, so a charitable organization that does the same relieves govern-

⁵⁵ 42 F. 2d 184 (2d Cir. 1930).

⁵⁶ Revenue Act of 1934, § 101(6), 48 Stat. 700 (exempting charitable organizations “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation”).

⁵⁷ The distinction is similarly blurred in the (c)(4) regulations. Regs. §1.504(c)(4)-1(a)(2) says: “A social welfare organization will qualify for exemption as a charitable organization if it falls within the definition of charitable set forth in paragraph (d)(2) of §1.501(c)(3)-1.”

⁵⁸ Regs. §1.501(c)(3)-1(d)(2).

mental burdens to that extent. But if this is the intention (and it seems not a bad one), the regulations could certainly be clearer on this point, and flatly state that, as of some date certain, the distinction between social welfare organizations under section 501(c)(4) and charitable organizations qualifying under section 501(c)(3) is no more and no less the question of whether the organization engages in more than insubstantial lobbying.

The Afterthoughts—The regulations defining the charitable subset concludes with something of a laundry list of functions that Treasury had not included in the first version of the 1959 proposed regulations (issued in February),⁵⁹ but added when those regulations were finalized (in June).⁶⁰ They seem to be afterthoughts in syntax as well as in fact: the list of charitable sub-types already had what appeared to be a terminal “and” connection between the last idea and the next-to-last idea. The new language simply tacked on another conjunction, along with its several miscellaneous thoughts about “neighborhood tensions,” “prejudice and discrimination,” “community deterioration,” and the like.

This paper is not an exploration of American politics and sociology of the 1950s, but it would be a mistake to ignore completely what was going on when the current regulations were written. There was, first of all, a demographic tidal wave flowing over the large industrial cities of the North. As table 1 below shows, the black population, which until World War II had resided largely in the rural South, was urbanizing, and moving north, during the decade of the 1940s. Detroit’s black population more than doubled over the course of that decade. Cleveland and Chicago saw their black populations increase by 75% and 77%, respectively. Over the course of the 1950s, the rate of increase slowed somewhat, but the absolute numbers of new black residents continued to swell—the net increase in Black population in Chicago over the decade of the fifties was over 300,000; Detroit, which was only half as populous as Chicago, saw a net increase of nearly 200,000, while Cleveland, smaller still, saw a net increase of more than 100,000. It does not require a degree in sociology, or even very much imagination, to appreciate the destabilizing effect

⁵⁹ See Prop. Treas. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 1421 (Feb. 26, 1959).

⁶⁰ See Treas. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 5217, T.D. 6391, 1959-2 C.B. 139.

that these population increases likely had on the largely segregated residential neighborhoods of these and other large cities of the North.

Table 1

| City | 1940 | 1950 | 1960 | 2000 | 2010 |
|----------------------------|-----------|-----------|-----------|-----------|-----------|
| Chicago Total Population | 3,396,808 | 3,620,962 | 3,550,404 | 2,896,016 | 2,695,598 |
| Chicago Black Population | 277,731 | 492,265 | 812,637 | 1,065,009 | 887,608 |
| Cleveland Total Population | 878,336 | 914,808 | 876,050 | 478,403 | 396,815 |
| Cleveland Black Population | 84,504 | 147,847 | 250,818 | 249,192 | 211,672 |
| Detroit Total Population | 1,623,452 | 1,849,568 | 1,670,144 | 951,270 | 713,777 |
| Detroit Black Population | 149,119 | 300,506 | 482,223 | 775,772 | 590,226 |

The fifties also witnessed the dawn of the civil rights era. Black athletes were integrating professional sports teams. The Supreme Court declared *de jure* school segregation unconstitutional.⁶¹ These were the social concerns, and the urban problems, of the times.

This is not to say that the United States has solved those problems—clearly, it has not. But the problems now have a different shape. As the table also shows, the population data from the censuses of 2000 and 2010 reveal that the Black population of the featured cities has not only stopped growing; it has begun to recede. And while drug abuse (and “juvenile delinquency”) was once thought to be primarily a problem of the inner city, it is now an equal-opportunity social problem, afflicting white populations in small towns and rural areas with similar or even greater intensity.

If new regulations were promulgated today, would it be desirable to include language resembling the “afterthoughts” that seemed appropriate in 1959? Probably not. In 2015, one could say that the primary racial problems relate to employment, relations with the police, and affordable housing. Rather than worrying about “block busting” of white

⁶¹ Brown v. Board of Education, 347 U.S. 483 (1954).

ethnic neighborhoods, city planners are now worried about minority residents being displaced by “gentrification.” But there is little need for regulations to describe those problems with particularity, and then pronounce organizations that address those problems to be charitable. The idea that an organization could be within the charitable subset if its primary purpose is to promote social welfare is probably now best expressed in precisely those general terms.

The Omissions. As should be clear by now, much of the content of the regulations that defines the charitable subset of section 501(c)(3) organizations is redundant or otherwise unnecessary or unwise. But an even greater problem than what the regulations say is what they don’t say. Like the regulations overall, this part—section 501(c)(3)-1(d)(2)—seems oblivious to the existence of organizations other than the ones that it directly refers to. It is simply remarkable that the regulations go to the trouble of pronouncing that organizations that erect or maintain public monuments are “charitable,” and yet say nothing whatever about the largest single category of charitable organization, as measured by annual revenue and total assets, namely, hospitals. Hospitals generated in 2011 approximately \$691 billion, or 42%, of the charitable sector’s total revenue of \$1.6 trillion, and held assets totaling approximately \$852 billion, or 28%, of the charitable sector’s total of just over \$3 trillion.⁶² But the word “hospital” is completely absent from the regulations.

Because hospitals treat primarily patients who are either injured or ill, “relief of distress” seems a reasonably apt description of the functions performed. However, undue reliance on that language may create problems for hospitals that provide “wellness” programs, annual physical check-ups, vaccinations, and similar services for essentially healthy patients. Other organizations, such as out-patient clinics, also provide health care, and are similarly unnoticed by the regulations. And organizations that have as their primary pur-

⁶² Estimates computed by the author, based on statistics in Paul Arnsberger, “Nonprofit Charitable Organizations, 2011,” IRS Statistics of Income Bulletin, Spring, 2014, at 1-3. Arnsberger’s data are based on Form 990 submissions, and thus omit most churches, and organizations that regularly have less than \$25,000 of revenue. Hospitals were identified by the presence of Schedule H, a schedule that hospitals are required to file with the Form 990.

pose not the direct provision of health care, but rather the arrangements for financing the provision of health care are left out altogether as well.

Hospitals were very different in the 1950s than they are now. They had traditionally served in some sense as dormitories for the ill, including the chronically ill, and those who were simply too infirm, and too poor, to provide for their own maintenance in any other way. Today, they house only the most acutely ill or seriously injured patients, and for as short a period as practicable. But in the 1950s as now, hospitals were an important part of the charitable sector, and their omission from Treasury's description of charitable organizations is almost shocking.

The same could be said, to a lesser degree, of other elements of the health care system. But whatever the explanation may be for these omissions, some effort to distill in the regulations what parts of health services can qualify for charitable status would surely be welcome.

Other important categories of organizations that are widely acknowledged to be within the general understanding of charity are similarly missing from the regulations. There is no explicit mention of legal aid clinics, environmental groups, low-income housing programs, soup kitchens or other nutritional assistance programs. This may not be troublesome, as most of these organizations would be comfortably within either the "relief of the poor or distressed" or the "social welfare" functions that are mentioned in the regulations. And, as noted above, some of these organizational types might not have existed when the regulations were written. And if new regulations were written today, it is certainly conceivable that such regulations wouldn't appear to cover subsequently emerging categories of organizations that may arise to meet future needs. So general language might not only suffice, but have advantages over efforts to achieve greater specificity. Still, it would improve clarity if the examples that we know of now could be enumerated, along with language expressing general principles.

The Educational Subset

The Core. Section 1.501(c)(3)-1(d)(3)(i) elaborates on what an "educational"

organization is. As with the “charitable” subset described above, the core text of this part of the regulation is brief, and can be quoted in full without undue tedium:

The term educational, as used in section 501(c)(3), relates to:

- (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
- (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

To paraphrase, education is instruction that either improves skills or imparts useful information. So far, so good. This would seem to encompass all sorts of schools, ranging from pre-school instruction—in the alphabet, colors, use of (blunt-nosed!) scissors, cleaning up your workspace, and other useful pre-K skills,⁶³—to higher education, professional schools, and so-called “vocational” schools that might teach their students how to repair appliances or drive large trucks.

One might offer a few quibbles over the particular language chosen. The emphasis on “useful” knowledge seems like an invitation to question whether studying Latin, or art history, is truly useful, or merely interesting. And what is the point of requiring that instruction not only be useful to the student, but beneficial to the community? Was Treasury anticipating the “Fagin’s School for Pickpockets” argument that would surface later in the Bob Jones case?⁶⁴ If so, then this phrase might mean nothing more than that the in-

⁶³ It would seem to me to be within the language regarding instruction, but the IRS has sometimes questioned whether preschools were “educational” or merely “custodial.” *See, e.g.,* Mich. Early Childhood Ctr. v. Comm’r, 37 T.C.M. (CCH) 808 (1978) (overturning IRS decision to deny 501(c)(3) status to preschool because “the record shows that the necessary custodial care was made an educational experience for the infants and small children.”); San Francisco Infant School, Inc. v. Comm’r, 69 T.C. 957 (1978) (overturning IRS decision to deny 501(c)(3) status to preschool because “providing substantial custodial care was merely a vehicle for or incidental to achieving petitioner’s only substantial purpose, education of the children, and is not ground for disqualification from exemption.”). Perhaps the IRS had a point when these cases were litigated, but it is now difficult to imagine a preschool that would not engage in significant activity that would be described as instruction to improve a child’s capabilities.

⁶⁴ Bob Jones University v. United States, 461 U.S. 574 (1983). The argument, featured primarily in Justice Rehnquist’s dissenting opinion, was whether common-law notions of charity, with their embedded notion of public benefit, applied to educational organizations; and, if they didn’t, then what would foreclose exempt status to a school that benefitted its students primarily by teaching them to perform illegal acts skillfully?

struction must not be harmful to the broader society. In that view, the benefit to society from instruction useful to the student would generally be presumed, and the organization disqualified only if there is substantial evidence to the contrary.

That probably *is* what it means, but the “beneficial to the community” language raises unfortunate questions. Does it create an obligation to demonstrate practicality? Treasury does not mean to say, surely, that instruction in number theory can be educational only if its practical benefit to the community can be demonstrated.⁶⁵ One doubts that, but it’s not completely clear; and for that reason, one is left thinking that the regulation could do without the “beneficial to the community” language, especially after Bob Jones has declared that no organization can be considered charitable if its operations are contrary to public policy.

Following that quite brief statement of general principles, the regulation proceeds to assure readers that advocacy of positions or viewpoints will not *disqualify* an organization from educational status, “so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.” This language has the dubious distinction of having been declared flatly unconstitutional by the second highest court in the land, in the case of *Big Mama Rag v. United States*.⁶⁶ Notwithstanding that rebuke, this language remains in the regulations without amendment, and has been used by the government in support of adverse determinations as to eligibility for exempt status.⁶⁷ The sentiment that Treasury apparently meant to convey is simply that presentation of opinion unsupported by facts isn’t education, and

⁶⁵ It turns out, of course, that number theory has produced a good deal of social benefit. (But please don’t ask me how.) But often the particulars of that are not apparent for years, as is the case with much basic research. If community benefit needs to be proven at the time of an exemption application, satisfaction of that requirement would often be difficult.

⁶⁶ 631 F.2d 1030 (D.C. Cir., 1980). Actually, the dubious distinction may be not so much that it has been declared unconstitutional, but that it has survived that declaration unscathed. Treasury has never modified the language, nor announced that it would not be applied in future cases. Indeed, it expressly announced that it would continue to apply these provisions in Rev. Proc. 86-43, 1986-2 Cum. Bull. 729, albeit in a manner which it believed would remedy the constitutional defects, (though one doubts that Judge Mikva, the author of the *Big Mama Rag* opinion, would have agreed). And it has applied these provisions in its arguments in litigated disputes over eligibility for exemption, as explained in the text.

⁶⁷ See *National Alliance v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1983).

the regulation might be preferable if it were stated in that way. However, it's not entirely clear that that would successfully disqualify organizations that present opinion unsupported by fact, in light of the presence of "literary" among the permissible purposes of section 501(c)(3) organizations. Couldn't one say that many essays consist of opinions unsupported by facts? And that essays are a literary form? If the work in question is about aesthetic judgments, one wonders what it even means to say that support of "facts" is necessary. Beauty may be truth to John Keats, but judgments about beauty are nonetheless matters of taste, not fact.

That doesn't necessarily mean that the IRS would lack grounds on which to disqualify a neo-Nazi group or the Ku Klux Klan from exempt status. There remains the public policy requirement of Bob Jones, which could be mobilized to prevent such an outcome. Groups of this sort exist to incite actions that can easily be found deleterious to social welfare, which should be enough.

The Examples—The language that follows the advocacy provisions offers several "examples of educational organizations."⁶⁸ These include:

—A school, of nearly any sort, as long as it meets certain criteria such as having a "regular" curriculum and "regular" faculty.⁶⁹

—An organization that presents lectures, panel discussions, etc., apparently on any subject matter.⁷⁰

—A correspondence school that uses television or radio.⁷¹

⁶⁸ Regs. §1.501(c)(3)-1(d)(3)(ii). There are four numbered examples, but in fact each example has multiple parts, comprising perhaps a dozen or so distinct instances of organizations that the regulations deem educational.

⁶⁹ Id., example 1. It is not clear from the context what "regular" adds to the curriculum and faculty requirements.

⁷⁰ Id., example 2.

⁷¹ Id., example 3. One hopes and assumes that the IRS applies this as if on-line correspondence instruction also qualifies.

–“Museums, zoos, planetariums, symphony orchestras, and other similar organizations.”⁷²

Examples can be very helpful in describing the sorts of things that Treasury thinks are within (or without) some core concept; indeed, this is perhaps the chief advantage in intelligibility that regulations have over more formal Code and statutory materials, which do not generally contain examples, *per se*.⁷³ However, a concern in this case is that the fourth (and by far the most important⁷⁴) example does not seem to exemplify anything. Instead, it has nothing to do with the core language of the definition of “educational” offered in the preceding clause.

An example of a good example might be this: Suppose a public school rule required schools to provide “a healthy lunch” to all students. Regulations might define that as a lunch that includes a “hot and nutritious main course,” and offers lasagna and beef stew as examples. Both of the dishes mentioned are served hot, and contain some reasonably nutritious ingredients. They thus illustrate what is meant by a “hot and nutritious main course.”

The argument here is not that there is anything wrong with the content of example 4, which may be a reasonable understanding of what “educational” organizations can be permitted to do, while qualifying as being in pursuit of exempt educational purposes. The argument is that this example is more free-standing than it needs to be. It would be much improved if it provided instances of some more generally stated rule. Instead, the example *becomes* the rule. It allows a wide variety of cultural organizations to qualify as educa-

⁷² Id., example 4.

⁷³ It could be argued that statutory provisions such as IRC §165(c)(3), which allows deduction of casualty losses incurred due to “fire, shipwreck, or other casualty” are using “fire” and “shipwreck” as examples of things that might produce deductible casualty losses. However, these are more like categories than examples. An “example” as that term is used here refers to a more complete and detailed set of facts, providing a specific instance of a category.

⁷⁴ Obviously, example 1, which refers to schools, describes an important part of the educational subset. However, schools so clearly fit within the general concept of providing instruction that this example isn’t terribly illuminating.

tional, even though they may have little to do with the core definition of educational as involving instruction.

Perhaps this complaint is exaggerated. It is certainly possible to imagine a museum that provides something that can be called “instruction” without straying far from the usual meaning of that word. A well-curated art exhibition, for example, will come with a lot of words—words describing the historical times and circumstances of the artist, the movements that he grew up with, the departures from the preexisting paradigms that his art took him in, and so on. For those who read the notes, or listen to the audio guides that are routinely available, instruction is certainly happening. This might be distinguished from a museum that simply displayed works of art for the enjoyment of the viewers—rather more like a gallery does.⁷⁵

However, some of the other organizations that could reasonably infer that they qualify for exemption under example 4 are a bit more problematic. In particular, those organizations whose primary activity is the production of performances would not seem to fit easily within the core idea of education as “instruction or training.” Symphony orchestras are mentioned specifically, but the reference at the end to “similar organizations” suggests that opera, dance, and theater companies would also easily qualify, as long as they meet the other requirements of section 501(c)(3). All of these groups are primarily providing entertainment. They may provide the occasional children’s concert, or the like, but they mostly perform before paid audiences of adults, and the only instructional element present may be the program introducing the works to be performed—and those programs are not conspicuously more instructional than any that one would get upon admission to a Broadway musical, simply giving notes about the cast, a brief synopsis of the story line (if any), and a reminder to turn off your cell phones.

⁷⁵ The author is not aware of art museums that are this bare bones, or of museums whose applications for exemption have been denied because they were indifferent to the instructional aims that educational institutions are supposed to have. However, it is possible that part of the IRS antipathy to the organization in *Goldsboro Art League v. Comm’r*, 75 T.C. 337 (1980) sprang from a sense that instructional elements of the League’s programs were insufficiently well-developed.

At the “high art” end of the performance spectrum, it would seem as though no distinctions are ever made among performances to decide whether education or entertainment predominates. For example, pieces by Schoenberg, which are usually unpleasant to listen to, but which allegedly have innovative qualities that make them important in the history of serious music, might be said to be educational, if not downright painful. Similarly, “Young Person’s Guide to the Orchestra” virtually screams its educational content. On the other hand, the 1812 Overture, or anything by John Phillip Sousa, leans more toward the pure entertainment pole. But it doesn’t matter; if it’s performed by a symphony orchestra—even one with the word “pops” in its title, the performance, and the orchestra, will easily qualify as educational.

Interestingly, it hasn’t always been that way. As noted earlier, in one of the earliest regulations defining charity (in 1919), Article 517 of the Treasury Regulations stated: “Societies designed to encourage the performance of first class orchestral music are not exempt, the purpose being merely to provide a high grade of entertainment.”⁷⁶ But that’s not the rule now. Orchestras, opera, theater and dance companies get a free pass, regardless of the balance between entertainment and instruction.

But is there any limit to this, and, if there is, what are the standards? Can a community theater that performs mostly plays by Neil Simon qualify? What about rock concerts? Fortunately, commercially successful performance organizations, like the Rolling Stones, or, to update the reference into something closer to the current century, the Dave Matthews Band, are unlikely to seek exempt status, for the obvious reason that arranging their affairs as a nonprofit organization would leave a lot of money on the table. But one wonders if a less successful group, or perhaps a band in its “pre-successful” stage, could establish a nonprofit organization, and enjoy a modicum of (deductible) support from a few patrons, and maybe a win a grant or two? If it turns out to be wildly successful, the

⁷⁶ Treas. Reg. 45, art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919). This early regulation seems to have been concerned with the question of where to draw the line between education and amusement. The same section also opined that educational organizations could include “an association to promote acquaintance with the Spanish language and literature, although it has incidental amusement features.” I can’t help thinking of Ricky Ricardo, but that would be anachronistic; he didn’t begin appearing on “I Love Lucy” until thirty years later.

organization would be free to pay its artists whatever the fair market value of their services might be—which, if they are indeed successful, might be quite a substantial sum, since the top end of the performance profession is exceedingly well-paid. And it is worth noting that highly successful performers in more classical modes—Placido Domingo, Itzhak Perlman, and the like—do indeed earn huge sums performing with companies that are invariably organized as section 501(c)(3) entities. And even the rank and file members of well-known orchestras enjoy six-figure compensation packages.

The IRS would probably deny the rock band’s exemption application, but the regulations would certainly be of little help in justifying that denial. The IRS would probably base the denial on the similarity of the business plan to that of a commercial rock band, and note that the expectation appears to involve substantial private benefit to the musicians in the band. But if the IRS allows the Juilliard String Quartet exempt status, but denies it to a rock band at a similar stage in its development, when both groups have about the same success selling tickets, it may be difficult for the IRS to sustain that position in court.

The difficulty of drawing a line between high art and ordinary entertainment suggests that perhaps the regulations should take a different tack altogether. Perhaps, drawing on the analogy of the “community benefit” doctrine in the health-care field, the regulations could allow organizations that are primarily in the business of staging performances to qualify as “educational,” but only if they provide some service to the community that more convincingly involves instruction. This would be satisfied if, in addition to performances before paying customers, the groups perform from time-to-time in schools, or benefit concerts, in which a significant part of the performance is devoted to explanations of the musical history and/or artistry involved in the performance.

The Testing-for-Public-Safety Subset – The next subparagraph of the regulations—section 1.501(c)(3)-1(d)(4)—deals with the exemption for testing for public safety. It provides, in its entirety, that: “The term testing for public safety, as used in section 501(c)(3), includes the testing of consumer products, such as electrical products, to determine whether they are safe for use by the general public.”

This seems almost to be a joke. It adds hardly anything to the language of the Code itself. And in view of the fact that Treasury did not seem unduly troubled by the absence of regulations as to several important charitable subsets—organizations whose purposes are religious, literary, or the prevention of cruelty to animals and children⁷⁷—one cannot explain this regulation as simply reflecting a perceived need to produce regulations that were, at least superficially, comprehensive.

There is a reference to “consumer” products, but one would hardly have thought that the objects of public-safety testing would be ballistic missiles or nuclear reactors. And the regulation does provide a single example: electrical products. This is no doubt a reference to the case that appears to have provoked Congress to add the testing subset to the Code in 1954, *Underwriters Laboratories Inc. v. Commissioner*.⁷⁸ The Circuit Court in that case held that the testing served the function of promoting the sale of the appliances whose safety Underwriters Laboratories had certified, and was therefore not “science for the sake of science,” but rather “science for the sake of business.”⁷⁹

What the regulation doesn’t clarify, but could have, is the status of organizations that seek to provide general consumer information, including but not limited to product safety. What about the Consumers Union, for example, which does test products for safety, and duly reports its findings in that area, but also provides, in its monthly magazine, information about product quality and design? In fact, this organization, which publishes *Consumer Reports*, is exempt as a 501(c)(3) organization,⁸⁰ but that outcome would have been clearer, more certain, with a more complete regulation.

The Scientific Subset – The last of the charitable subsets covered by the section 501(c)(3) regulations are organizations whose purposes are scientific. This portion of the

⁷⁷ There is also no regulation relating to promotion of amateur sports competition, but that provision was added to the Code in 1976, well after these regulations were promulgated.

⁷⁸ 135 F.2d 371 (7th Cir. 1943).

⁷⁹ *Id.*, at 373.

⁸⁰ It’s most recent Form 990 can be found at: <http://www.guidestar.org/FinDocuments/2014/131/776/2014-131776434-0b5b13a6-9.pdf>

regulations has its own peculiar history. No attempt to define “scientific” was included in the 1956 proposed regulations,⁸¹ nor in the 1959 proposed regulations.⁸² However, when the 1959 proposed regulations were finalized later in that year, the preamble to the Treasury decision went out of its way to note that “consideration is being given to such a definition [of “scientific”] by the Internal Revenue Service, and regulations with respect thereto will be published in a subsequent notice of proposed rule making.”⁸³ Presumably, comments were received to the general effect of “why no definition of ‘scientific’?” and Treasury wanted to assure the public that they were in the works. Those regulations were duly issued in proposed form in November of 1960,⁸⁴ and adopted without much substantive change—except for a provision making the new regulations applicable only to taxable years beginning after 1960.⁸⁵

The quality of the scientific subset regulations seems somewhat higher than those of the other three areas that have received the attention of the Treasury in the form of regulation promulgation. In general, the regulations in this area make some efforts to define a core idea of scientific research, and then offer both positive and negative examples of organizations whose purposes will or will not qualify under this category of exempt purpose.

Specifically, subdivision (i) defines “scientific,” making it clear that not all types of “research” are scientific. There is some circularity at the bottom of this definition, however, in that this subdivision ultimately cannot come up with any synonyms that would provide illumination on what the word “scientific” actually means. Instead, the subdivision simply says that: “For research to be “scientific,” within the meaning of section 501(c)(3), it must be carried on in furtherance of a “scientific” purpose. There’s not much light shed

⁸¹ 21 Fed. Reg. 460 et seq. (1956).

⁸² 24 Fed. Reg. 1421 et seq. (1959).

⁸³ 24 Fed. Reg. 5217 (9159).

⁸⁴ 25 Fed. Reg. 10850 et seq. (1960).

⁸⁵ 26 Fed. Reg. 189 et seq. (1961). Because the final adoption was on January 11, 1961, the effect of this provision was to make the regulations effective retroactively for only the first eleven days of 1961.

by that language, but the subdivision does note that scientific research can be either basic or applied, which answers at least one question that could imaginably come up.

Subdivision (ii) provides a negative example: research that is “carried on as an incident to commercial or industrial operations” is not within the definition of “scientific” for these purposes. Of course, research that is intended to advance a commercial or industrial purpose would ordinarily be deductible under section 174—a provision that was in the Internal Revenue Code at the time that these regulations were being considered and adopted (and still is). But there are some exceptions to the rules allowing deductibility, and of course the sounder accounting treatment of research costs would probably be to capitalize such costs, so the distinction between commercial research and the sort that could qualify as an exempt purpose could become more salient if changes are made in the business tax provisions relating to research at some time in the future.

Subdivision (iii) is the most helpful, explaining that scientific research will be considered as “carried on in the public interest” for purposes of subdivision (i) if the results are made available to the public, the research is performed for a governmental unit, or if the research is “directed toward benefiting the public.” This latter term is further elaborated upon as research directed at the development of educational materials, research that is to be published in a treatise or other form available to the public, research that is devoted to finding a cure for disease, or research that is intended to aid a community in attracting or retaining industry.

Subdivision (iv) provides further negative examples, saying that scientific research will not qualify as an exempt purpose if the organization performs research exclusively for its nonexempt creators, or if the organization retains ownership of “more than an insubstantial portion” of the patents, copyrights, etc. that are produced.

Subdivision (v) provides that research that does not qualify under this subparagraph of the regulations will not disqualify an otherwise qualified organization. The suggestion is that the nonqualified research may simply be treated as unrelated business activity. And,

finally, subdivision (vi) provides an effective date that is, as discussed above, essentially prospective.

It appears that organizations have generally viewed the regulations of this subset as raising compliance issues. As a consequence, some may have chosen to describe their purposes in ways that seem designed to qualify the organization as educational rather than scientific. It is mildly ironic that organizations might choose to be governed by “bad” regulations rather than the relatively “good” regulations in section 1.501(c)(3)-1(d)(5), but hardly surprising. Regulations that offer only loose, ambiguous guidance can offer at least colorable shelter to organizations that may have doubts about their status. This is simply another reason why Treasury needs to tighten its regulations in those other areas.

The Ideal Regulations – In general, ideal regulations would include a concise, accurate statement of the principles underlying the statutory rules. These might be called the core concepts of the rules being promulgated. These can be, and probably should be, expressed in language that is general enough that changing historical conditions can be accommodated without the need for too frequent amendment of the regulations.

These core concepts would then ideally be illustrated by specific examples of both qualifying situations, and nonqualifying situations. Treasury should not rely exclusively, in selecting these examples, on cases that illustrate the polar situations within the realms of qualifying and nonqualifying organizations. Many revenue rulings, and some regulations examples, are of what might be called the Holy Mary/Devil Incarnate type: Situation 1 consists of Mary, Holy Mother of God, who possesses all five desirable characteristics of whatever is under examination. Situation 2 consists of the Devil Incarnate, who possesses none of those desirable characteristics, and perhaps even has a few characteristics that smell of sulfur. After dutifully analyzing the law, and applying it to the facts, the IRS concludes that the organization in situation 1 qualifies, while the organization in situation 2 does not.⁸⁶

⁸⁶ There are many examples that could be cited, but each of the items that might illustrate these points has real author(s), many still living, and this paper already contains enough disparagement of the IRS that it is

That's a relief, of course; but it would be more illuminating if Treasury would choose examples that are close to the line that it is trying to draw, with examples on both sides of that line. These would be helpful in answering questions like: if there are five desirable characteristics, will an organization that possesses three of them be just barely all right, or must it have four or even all five of the described characteristics? Are the sulfurous characteristics fatal to qualification, or are they simply factors to be weighed along with others? From examples close to, and on either side of, the line, readers of the regulations can more easily form judgments about precisely where the Treasury locates the line being drawn.

Some specific suggestions for the eight categories of charitable organizations can also be made, as follows:

Charitable— This category would begin with the obvious and traditional: relief of poor or distressed persons. Clarity could be improved by noting that distress is typically a temporary condition, and that charitable purposes would not be served by continuing aid to formerly distressed persons once the distress has been relieved. Positive examples of relief of poverty might include homeless shelters and soup kitchens. While means testing of beneficiaries is not always practical, and should not be insisted upon, there should be a general understanding that all or most beneficiaries of the programs of organizations in this category would be below the official definitions of poverty used by other federal agencies. Positive examples of relief of distress would be provision of food, shelter, and clothing for disaster victims. A negative example could be developed based on some of the facts of the post-9/11 efforts, which apparently provided relief to reasonably wealthy families for periods long after the initial tragedy.

Promotion of social welfare by nonprofit organizations should be included in more or less those terms, and it should be clarified that the distinction between section 501(c)(3) and (c)(4) organizations is only that the latter are not subject to the limitations on lobbying that apply to the former. Positive examples could include environmental groups, legal aid

not necessary to inject more by a random selection of examples. Every teacher and practitioner in the tax field is familiar with this type of ruling or regulation.

clinics, and public-access recreational facilities, such as a YMCA. It would be wise to add public affairs journalism to the list of examples, since nonprofit organizations in that field produce clear public benefits, and have increasing difficulties in finding sufficient resources to perform their functions optimally. It should also be mentioned specifically that this is intended to be a residual category under which organizations that clearly offer broad public benefits can qualify for exemption, even if they don't fit neatly within any more specific category.

Negative examples might include so-called “public interest” law firms. Whether on the right or on the left, these have mostly served to advance a relatively narrow view of the public interest, advancing instead the viewpoints of their founders and supporters. In addition, litigation of this sort is similar in many ways to lobbying: both functions represent attempts to influence public officials—in the public-interest law firm case, judges—to adopt positions consistent with the proponents' viewpoints. Advancing partisan viewpoints is constitutionally protected speech, but just as the current law declines to subsidize lobbying, it should also decline to subsidize efforts to achieve public policy outcomes through the courts, for the same reason: political speech should be, and generally is, an after-tax activity.

Hospitals, clinics, and other health care facilities should be rebuttably presumed to be tax-exempt. Though they could fall within the general promotion of social welfare category, their size and importance in the charitable sector suggests that specific rules would be useful. The rules in this area will be among the most difficult to draft, but, in general, emphasis should be placed on arrangements that seem designed to serve broad public interests rather than the interests of for-profit providers of services. Thus, aspects like the openness of access to the facilities, and public governance of the organizations, in which independent directors control the organization, should be emphasized. Negative examples could illustrate that facilities like nonprofit surgical centers that are controlled by the doctors who use them, where the doctors may enjoy below-market access to their facilities, enabling them to earn higher net profits than they would otherwise, will not qualify for exemption.

Attention might well be given in this regulation to refinement of the scope of public welfare. It is generally recognized that activities and organizations can have such narrow scope that they should not qualify as exempt under sections 501 and 170. Examples include an organization intended to benefit families living on a single block, or owners of property abutting a small lake. Factors to be analyzed include both the absolute number of people who may benefit from the activity in question, and the relative size of the beneficiary class after adjustment for the population of the community served. Emphasis should also be placed on the breadth and openness of the group of beneficiaries, which should not generally discriminate on the basis of religion (though those may qualify as religious organizations), ethnic group, alumni of a particular college, etc. Discrimination on the basis of race would of course be proscribed, but it would probably be wise to countenance discrimination on the basis of age in appropriate cases (e.g., a little league program for children under the age of 12), or gender (e.g., a shelter for women who are victims of family violence.)

Educational – To avoid ambiguity about whether the subject matter needs to be practical, the core rule in this area might be best structured in terms of organizations whose purpose is to impart knowledge or skills. Benefit to society would not be required, but it might be noted that no organization that sought to impart knowledge or skills that were detrimental to society could be approved, because they would violate the public policy principles of the Bob Jones case. Positive examples are many, and can be easily imagined. Negative examples might include one that did indeed violate public policy by offering instruction in, say, how to build a meth lab. An example could also be used to make the point that organizations that exist simply to advocate public policy positions are not exempt as educational organizations.

The most difficult part of the regulations in this area may be those that are designed to cover cultural institutions whose functions are discharged primarily by performance of works before paying audiences. As much as one might wish the Code had included “cultural” among the adjectives that describe exempt purposes, the fact is that it does not. The best approach may be to impose at least minimal public educational responsibilities on or-

ganizations whose primary activity consists of performing. These could consist of performances for elementary-school students, or benefit performances that include more instructional elements than the usual musical or theatrical performance ordinarily does. This could resemble the “community benefit” standard currently applied to nonprofit hospitals: the benefit can sometimes represent only a modest portion of the organization’s activities (such as maintenance of an open emergency room, in the case of hospitals), but that portion must be present, and not negligible, for the organization to merit exemption. Examples could be offered of organizations that do, or do not, offer sufficient elements of this public education.

Religious – The regulations for this category might begin by separating it into two parts, the most important of which might be churches. A more inclusive term might be “congregations.” This would be a place to offer a definition of this term, which could borrow from existing case law and IRS materials used to determine when an organization is free from obligations to file annual returns, and the like. Examples on either side can be readily drawn from case law and rulings.

The second part could describe any organization whose purpose is to facilitate religious worship or other activities. These could include synodical superstructures, publishers of liturgical materials, religious music, or theological works, and organizations providing religious education (which might not qualify as educational if that term is defined, as suggested, in terms of imparting knowledge).

As to both parts, the regulations should emphasize the broad inclusiveness of the “religious” concept, so that it is clear that organizations that provide or facilitate spiritual, ethical, or philosophical exercises that resemble religious services, and occupy the same space in the lives of their adherents as conventional churches do, could qualify as religious for purposes of exemption and contributions treatment.

Prevention of Cruelty – Again, one wishes for a more broadly-worded Code provision, since children and animals are not the only targets of cruelty. The elderly, the mentally ill, and members of violent families may all be in need of protection, and the charita-

ble sector provides much of what relief is available. But because of the narrow wording of the Code language on this charitable purpose, the regulations in this area might well begin with a cross-reference indicating that organizations whose purpose is to protect individuals from cruelty, including ones not primarily targeting children and animals, can readily achieve exempt status under the “charitable” category.

As to children and animals, the important role that the regulations could fulfill would be to make clear that any organization that serves primarily to protect animal welfare could qualify, whether or not it literally prevents “cruelty,” *per se*. Positive examples could include animal shelters, and services providing spaying and neutering of animals. However, a line needs to be drawn between animal welfare and some of the more recreational interactions with animals. Thus, dog-breeding and dog shows are primarily consumption activities, not charitable ones, and exempt status could be withheld by an example or two to that effect. Similarly, organizations that merely provide custodial services for pets whose owners are traveling or otherwise temporarily unable to care for the pets should not be eligible for exempt status. And animal services that primarily serve agricultural purposes are ordinarily too commercial to deserve charitable status.

Scientific – Of the existing regulations, the ones in this area seem the most thoughtful and accurate. However, in their efforts to limit qualification under this category to true “science,” (whatever that is), the regulations may take too narrow a view. It would seem better, especially if the educational regulations emphasize imparting knowledge, to include within this category any serious research aimed at expansion of knowledge, whether it is immediately to be imparted to students or not. Thus, social science research should be specifically mentioned, and even research into legal questions might be sanctioned with exempt status in this category, as indeed the very first regulations defining charity explicitly did.

Testing for Public Safety – The regulations in this area should at least make clear that any efforts to test products for the purpose of providing information to consumers could qualify as charitable, as long as the testing includes significant attention to safety features, and is truly independent of the commercial interests of manufacturers and retailers.

Presence of a governance structure that is independent of commercial interests is probably the best path to providing assurance on the latter point.

Literary – This is a neglected category, probably due to the fact that it is largely redundant. A literacy program might be described here, but it would also surely qualify as educational. A “Friends of the Library” group would qualify, but it would also qualify under the social welfare function of the charitable category. Nonetheless, these organizational types could also be considered literary, and so could be included in both the core definition and examples portions of regulations on “literary.” This category could also include book clubs, writers’ workshops, and possibly even nonprofit publishers. To prevent abuse, however, it would probably be wise to require nonprofit publishers to be independent of the authors whose works they publish, to avoid allowing a nonprofit vanity press to flourish on the basis of (deductible) contributions from authors who can find no one else to publish their works.

Promotion of National and International Sports – This was never a well-populated part of the charitable sector, and it seems to be diminishing in relevance as amateur sports themselves disappear from the sports world (except in the context of schools and colleges, which would normally be exempt as educational institutions). It was created for the benefit of Olympic committees, which have sought public contributions in order to support training of athletes for Olympic competition. Those presumably still qualify, though one wonders if they should, in light of the explicit abandonment of the last pretense that Olympic competitors must be amateurs.

Presumably there are still some amateur sports organizations of this general type, especially for athletes who are at or below college age, and for whom preservation of their status as amateurs is important because the NCAA says it is. Organizations like the Amateur Athletics Union would continue to qualify, and could be cited as examples within this category. It is also true, however, that most organizations that would qualify under this heading would also probably qualify under the “charitable” heading, so some cross-reference to that category might be appropriate.

Conclusion – The current regulations defining charity for purposes of exempt status and eligibility to receive deductible contributions are shamefully inadequate. They should provide authoritative guidance with respect to a substantially comprehensive list of issues that may predictably arise, but they are instead incomplete, out-of-date, and in many cases nearly unintelligible. The defects have been described in some particularity in the main body of this paper, and suggestions have been offered as an outline for promulgation of a new set of regulations that would be clearer, more complete, and more consistent with existing practice (in most cases), and more consistent with the statutory language (in other cases, where the practice has perhaps departed excessively from the explicit language of the Code). It remains only for the Treasury to undertake a project along the lines suggested.