

## **Nonprofit Law, Taxation & Policy**

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Credits: 3

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### **Course Description**

Nonprofits play a critical role in U.S. society, as well as across the globe. If the U.S. nonprofit sector were a country, it would have the eighth largest economy in the world. Nonprofits offer an alternative mechanism, independent of governments, to advance public goals. This course explores a range of legal and policy issues about nonprofits, focusing on their treatment under U.S. law.

What government institutions within the U.S. are responsible for regulating nonprofits? What are the goals of this regulation? How effective is it at targeting theft and other malfeasance? Or in avoiding mediocrity and promoting efficiency?

Although government regulation of nonprofits is limited, government funding can be quite significant. Nonprofits receive this support from both grants and tax subsidies. Is this funding justified? Are the subsidies structured in ways that are likely to advance the relevant goals? What key tax issues arise for nonprofits and their donors? What are the relevant rules supposed to accomplish and how successful are they in achieving these goals?

Unlike for-profit firms, nonprofits do not exist to make a profit, but to advance a cause. As a result, nonprofits cannot rely on profitability to measure their progress or allocate scarce resources. Challenges in measuring progress create a range of management and governance challenges at nonprofits. How should these challenges be addressed? What is the role of different stakeholders within nonprofits, including the board, donors, managers, and beneficiaries?

### **COURSE BOOKS**

- Fishman, Schwartz & Mayer, Nonprofit Organizations: Cases and Materials (6th edition 2021) ("Text").
- Provisions of the Internal Revenue Code available at:  
<https://www.law.cornell.edu/uscode/text/26/>  
<https://www.law.cornell.edu/uscode/text/26/>

- Schizer, How to Save the World in Six (Not So Easy) Steps: Bringing Out the Best in Nonprofits (2023) (“Schizer, How to Save the World”)
- Selected articles posted on courseworks
- Discussion Questions posted on courseworks

Classes are organized with discussion questions, which explore hypotheticals and policy issues. Students do not have to hand in these discussion questions, but they should use them to prepare for class.

### **Class 1: Introducing Key Themes**

This class surveys topics we will cover during the semester. No reading is assigned. Please have Discussion Questions #1 handy during class, since it will organize our discussion. You may want to read it in advance.

### **Class 2: Why Use Nonprofits Instead of For-Profit Firms?**

Hansmann The Role of Nonprofit Enterprise.pdf pp. 835-84, 894-96

Discussion Questions #2

### **Class 3: Why Use Nonprofits Instead of Government Agencies?**

Please read Saul Levmore, Taxes as Ballots, pp. 387-89, 404-18 (attached below).

Discussion Questions #3.

### **Class 4: State Law: Formation and Charitable Purposes**

Fishman, Schwarz & Mayer, Nonprofit Organizations: Cases & Materials (6th ed. 2021) [hereinafter “Text”]: 3, 40-44; 49-54; 56-62; 63-68, 72-74, 77-98, 100

Discussion Questions # 4.

### **Class 5: State Law: Fiduciary Duties**

Text 124-29, 135-38, 146-165, 167-170, 175-77, 184-88

Discussion Questions #5.

### **Class 6: State Law: Investment Responsibility & Enforcement**

Text 201-240

Discussion Questions #6

### **Class 7: Charitable Solicitation, Accountability & Disclosure**

Text 241-74 (chapter 4, stopping at "Solicitation over the Internet"), 281-82 (problems

Discussion Questions #7

### **Class 8: Exemption of a Nonprofit's Income: Rationale & Eligibility (Panel 1)**

Text: 287-305 (chapter 5 Part A & B), 307-321 (Part C until end of Rev. Rul. 69-545), 336-7 (special requirements for hospitals); 339-40 (problems)

Internal Revenue Code Section 501(a) & 501(c)(3)

Discussion Questions #8

### **Class 9: Exemption of a Nonprofit's Income: Eligibility (continued) & Intermediate Sanctions**

Text pp. 367-87 (public policy and *Bob Jones*), 395-96 (problems), 396-97 (educational organizations), 400-12 (*Big Mama Rag* & Rev. Proc. 86-43), 415 (problems), 415-28 (religious organizations), 432-33 (problems); 449-472 (chapter 6 A & B), 476 (penalties on managers), 480-81 (problems)

Internal Revenue Code Section 501(a) & 501(c)(3), 4960, 4958(a), (b) (c)(1) (d), (e) & (f)

Discussion Questions #9

### **Class 10: Limits on Political Activity: Policy Rationale & Lobbying**

Text 485-91 (chapter 6.C.2 and chapter 6.C.3.a)

Discussion Questions #10

### **Class 11: Limits on Political Activity: Electioneering, Constitutional Issues, and Alternative Structures**

Text 502-14 (chapter 6.C.4-- stop at "who's a candidate?"), 517-25 (chapter 6.C.5, stop at "notes & questions"), 537-42 (chapter 6.C.6, stop at "problems")

Internal Revenue Code Section 501(c)(3); Treasury Regulation 1.501(c)(3)--1(c)(3) ("action organizations").

Internal Revenue Code Section 501(c)(3) & 501(h), Treasury Regulation 1.501(c)(3)--1(c)(3) ("action organizations").

Discussion Questions #11

### **Class 12: Commercial Activities**

Text: 578-581 (chapter 7.B.1), 598-616 (chapter 7.C., 7.D until *Nat'l Collegiate Athletics*), 626-29 (Rev. Rul. 73-104 & 105), 635-40 (problems, chapter 7.E.1, 7E.2, 7.E.3), 644-53 (chapter 7.F. through "silo rule in general")

Section 511(a); Section 512(a)(1), (a)(6), (b)(1)--(5); Section 513(a), (c) & (h)(1).

Discussion Questions #12

### **Class 13: Deduction of Charitable Contributions**

Text: 825-36, 842-55, 860-69, 880-82 (you don't need to read "gifts of capital gain property and subsequent paragraphs), 884-90

Section 170(a)(1), (b)(1), (c), (d)(1), (f)(8)

Discussion Questions #13

### **Class 14: Noncash Contributions**

Text 890-916

Section 170(e)(1), (e)(3)(A) & (B), (e)(7), (f)(12), (f)(16), Section 1011(b), 170(a)(3), 170(f)(3), Section 170(h).

Discussion Questions #14

### **Class 15: Private Foundations & Donor Advised Funds**

Text 707-47

Section 170(b)(1)(A), (B), (D); Section 170(e)(1)(B)(ii); Section 170(f)(18); Section 509(a); Section 4940; Section 4941, Section 4942, Section 4943; Section 4943, Section 4944, Section 4945; Section 4958; Section 4966; Section 4967

Discussion Questions #15

### **Class 16: Avoiding Private Foundation Status**

Text 747-56, 772-74, 812-22

Section 507(d); Section 4946(a), (b), (d); 509(a)(1),(2), (d); 170(b)(1)(A); Treas. Reg. 1.170A-9(f)(2), (3), (6), (7); Treas. Reg. 1.509(a)--3(a), (b); Section 4942(j)(3); Section 4945(a), (b), (d), (g) & (h).

Discussion Questions #16

### **Class 17: Strengths & Weaknesses of Nonprofits**

Schizer, How to Save the World, Chapters 2 & 3

Discussion Questions #17

### **Class 18: Figuring Out What to Do: Plan**

David Schizer, How to Save the World, Chapter 4

Discussion Questions #18

### **Class 19: Figuring Out What to Do: Prioritize & Pivot**

David Schizer, How to Save the World, Chapters 6 & 7

Discussion Questions #19

### **Class 20: Getting Everyone On Board to Do It: Persevere & Publicize**

David Schizer, How to Save the World, Chapter 5 & 8

Discussion Questions #20

### **Class 21: Getting Everyone On Board to Do It: Raising Money**

David Schizer, How to Save the World, Chapter 5 & 8

Discussion Questions #21

### Discussion Questions #1

1. True or False: Under U.S. law, nonprofits are legally barred from making a profit.
2. True or False: Under U.S. law, nonprofits are legally barred from distributing this profit to their owners.
3. In what circumstances do you think a nonprofit has a comparative advantage over a for-profit firm?
4. You are Amy's lawyer and trusted advisor. She is a talented chef.
  - a. Amy wishes to open a catering business. Should she organize it as a nonprofit or as a for-profit firm? Why?
  - b. Amy committed to helping vulnerable populations, she also wants to open a soup kitchen. Should she organize it as a nonprofit or a for-profit firm?
  - c. Based on your answers, what general principle would you apply to determine when should a nonprofit be used, as opposed to a for-profit firm?
5. Sometimes, either a nonprofit or a government agency can take on a particular responsibility.
  - a. In what circumstances do you think a nonprofit has a comparative advantage over the federal government?
  - b. What about state and local governments?
6. Betty wants to launch a nonprofit to help vulnerable populations, and is trying to decide which of the following programs would be a good fit for a nonprofit, as opposed to the government:
  - a. Providing cash each month to families below the poverty line in order to guarantee them a minimum income.
  - b. Finding new ways to retrain workers in fading industries, who have been laid off, so they can pursue new opportunities.
  - c. Operating a community center for children from low income families.
  - d. Providing "clean" needles to drug addicts in order to reduce their risk of contracting HIV.
7. Charles is the chair of the board of a soup kitchen. He also owns a successful food distribution business.

- a. True or false: Charles is legally barred from selling food to the soup kitchen.
  - b. True or false: There are no limits on Charles's ability to sell food to the soup kitchen.
- 8. True or false: Charles is very busy at work, so he has missed all of the board meetings this year. His poor attendance is unfortunate, but it does not have any legal implications.
- 9. True or false: Dana, another board member, serves on the soup kitchen's investment committee, which invested the soup kitchen's endowment in an index fund that replicates the S&P 500. Unfortunately, the following month the market crashed, so Dana and her fellow committee members are legally obligated to make the soup kitchen whole for the losses.
- 10. True or false: The same facts as in question 9, but the investment was in a highly speculative cryptocurrency trade.
- 11. True or false: Charles, Dana, and their colleagues decided to save money by serving only five days per week, instead of seven. This choice reduces the financial pressure on the soup kitchen, but it creates hardships for the soup kitchen's clients. Is the board likely to face any liability for this decision?
- 12. In regulating charities, which step is a state attorney general more likely to take?
  - a. Questioning the relevance of the mission
  - b. Question the percentage of the budget dedicated to fundraising and administration
  - c. Questioning whether the CEO's sibling should be a major vendor to the nonprofit
- 13. Why would the government choose to subsidize something? What are the good reasons for doing so (as opposed to reasons that might be politically motivated but unwise)?
- 14. Let's say that Columbia University spends \$100X million in 2020, and takes in \$101X million in tuition, donations, and other revenue. Does Columbia have to pay tax on \$1X million?
- 15. Let's say Ellen earns \$100X in her job, and donates \$X to Columbia university. Please make the unrealistic assumption that these are the only two "tax-relevant" things she did all year. What is her taxable income?



16. What are the two main tax benefits offered to charities that qualify under Section 501(c)(3)? Hint: See the answers to questions 11 and 12.
17. Do you know the difference between a private foundation and a public charity? Do you know which is regulated more strictly by the IRS? Why?
18. Fran establishes a private foundation and contributes \$10 million to it. She then hires her daughter, Gail, to run it. Gail is not a high-achiever, so Fran thinks this is a good way for her to take care of Gail. The Foundation pays Gail \$200,000 per year.
- Why might Fran prefer to do this, instead of simply giving Gail a generous gift each year? In addition to encouraging her work ethic, what tax advantage might Fran be seeking?
  - Could Fran replicate this result by giving a \$10 million gift to a public charity, and then relying on the charity to hire her?
19. True or false: Haley believes that seniors stay healthy longer and are happier when they live on their own. She decides to launch a “day center,” where seniors who live on their own can socialize and get social services. Her theory is that the center can help seniors live on their own longer, since they can get the support they need during the day.
- When Haley incorporates a nonprofit to pursue this mission, will the state government make a judgment about whether her theory makes sense?
  - When Haley seeks tax exempt status, will the U.S. tax authorities make a judgment about whether her theory makes sense?
  - Will anyone ever make a judgment about whether her theory makes sense?
20. What is the difference in responsibilities between the CEO of a nonprofit and the Chair of the board? Relatedly, which of the following is likely to be a responsibility of professional managers, and which is a board responsibility:
- Changing the nonprofit’s mission (e.g., from helping underprivileged children to helping underprivileged elderly)
  - Changing the menu of food served to underprivileged children
  - Deciding how large a gift to seek from a particular donor
  - Approving the budget
  - Changing the name of a nonprofit
  - Approving images and text for a new ad campaign

21. You serve on the board of an organization that has two product lines. Let's call one "Hard" (because it requires significant effort from managers to run it) and the other "Easy" (because it requires much less effort from management). At a board meeting, the CEO tells you that the firm should narrow its focus to only one business, and you are inclined to agree. She recommends shutting down "Hard."
- Assume the organization is a for-profit firm. In order to determine whether you agree, what information will you request?
  - Assume the organization is a nonprofit. In order to determine whether you agree, what information will you request? Is it easier or harder to evaluate the CEO's recommendation?
22. Ira is a successful entrepreneur, and you are his advisor. He is a CLS graduate who was the first member of his family to receive a higher education, and credits the school for changing his life. He wants to give \$1 million to the law school for financial aid, and asks you the following question: "Should I give this gift as an endowment, or as a "spendable" gift."
- What do these terms mean? In other words, what is the difference between an endowment and a spendable gift?
  - Assume that Columbia spends 5% of the value of its endowment each year. How much would the school be able to spend each year?
  - Ira's goal is to do the most good in the world. What is the tradeoff he should consider between an endowment and a spendable gift?
23. Do you agree or disagree with the following statement?: All subsidies are not created equal. It is possible to provide the same amount of money to the same person but to get very different results, depending on the way the subsidy is structured

### Discussion Questions #2

1. What is information asymmetry? What connection does Professor Hansmann suggest there is between information asymmetry and the nonprofit form?
2. Andrew wants to arrange child care for his son, Ben. He is considering “Child-Care-R-Us,” a for-profit daycare program, and “Neighborhood Childcare Services,” a nonprofit. Is there a reason why Andrew might prefer the nonprofit?
3. What is the “nondistribution constraint”? Why is it relevant to Andrew in the last problem?
4. Carl needs surgery. He has no medical training and understands only that he needs the procedure, but does not understand the details of what must be done. Is Carl likely to get this procedure at a nonprofit or a for-profit hospital?
5. Don needs to have his car repaired. He has no training as a mechanic and understands only that he needs the repair, but does not understand the details of what must be done. Is Don likely to get his car repaired at a nonprofit or a for-profit auto repair shop?
6. What is the difference between a donative nonprofit and a commercial nonprofit (using Professor Hansmann’s terminology)?
7. Elizabeth, who lives in NY, wants to buy flowers for her mother, Francis, who lives in Chicago and is celebrating a special birthday. Is Elizabeth likely to buy flowers from a nonprofit or a for-profit firm? Why?
8. Gail, who lives in NY, wants to contribute to provide emergency relief for an earthquake in Asia.
  - a. Is she likely to contribute to a nonprofit or a for-profit firm? Why?
  - b. Could advances in technology change her assessment of this issue?
9. Helen is a committed environmentalist, who is passionate about biodiversity. She knows that everyone benefits from protecting endangered species. What if the key to curing a disease someday can be found in the cells of a species that becomes extinct? She also knows that many people (herself included) derive

satisfaction from knowing that there are protected habitats for endangered species, even if they never visit them.

- a. Is species preservation a public good? Does it “cost” no more to provide the good to many persons than it does to provide it to one person”? Is there “no way to prevent others from consuming it as well”?
- b. What is an externality? Does species protection have positive externalities?

10. Helen (from the last problem) wants to donate some money to protect endangered sea turtles in Mexico. She finds an organization that funds and maintains a protected area where sea turtles live and reproduce in safety. The organization also organizes tours for tourists to observe the turtles in their natural habitat. Do you think this organization is likely to be a nonprofit or a for-profit organization? Putting aside any tax considerations, do you think Helen should care which it is? If so, why?

11. Ilene loves to run, stroll, and ride her bike in Riverside Park. She appreciates that everyone who wants to enjoy the park is allowed to do so free of charge. She knows that the park needs to be maintained, and that New York City only covers a portion of this cost, so she decides to make a donation.

- a. Is Riverside Park a public good?
- b. Given how much time she spends in the park, does Ilene still face asymmetric information in making this donation?
- c. In deciding whether to donate, does she face an issue of trust? Would she be just as likely to make this donation if Riverside Park was run by a for-profit caretaker?

12. Jack loves Columbia Law School. Since he received a generous scholarship as a student years ago, he wants to support financial aid for current students. Jack receives a draft gift agreement from the law school, asking him to commit to provide \$50,000 per year for five years (a total of \$250,000) and restricting his gift, so that it can be used only for financial aid. Since Jack is an entrepreneur, who has not reviewed a contract in a very long time, he sends it to you and asks two questions.

- a. First, how confident can Jack be that his money will be used only for financial aid, and not to pay for building maintenance or faculty salaries?
- b. Second, how confident can Jack be that the law school’s financial aid budget will increase because of his gift? What information asymmetry, if any, does Jack face in making this gift?

13. Consider the following statement: “Both commercial and donative nonprofits struggle with information asymmetry, but the nature of the information problems are different.” Do you agree or disagree? Why?
14. Kim wishes to open an opera company in Metropolis City. She knows that the rent will be expensive if she rents a high-quality theater. She also knows that she needs very elaborate sets, as well as high payroll composed of top (expensive) talent and a large chorus and orchestra. If her opera company is funded solely by ticket sales, she will have to charge \$2,000 per ticket and attract 500 people to each performance to cover its \$1 million cost. Kim’s market research tells her that she can only attract 50 people if she charges \$2,000 per ticket. To attract 500 people, she can charge only \$200 per ticket. Either way, she would bring in only \$100,000 -- which is only 1/10 of the \$1 million she needs.
- One option is to scale back her expenses dramatically. With a \$100k budget, she can hold the performances in a middle school auditorium, have very modest sets, and only one famous performer. The rest would be amateurs. She worries that this level of quality might not attract the 500 people she needs, each paying \$200.
  - What other option should she consider? How can the nonprofit form be helpful here?
  - Do Broadway theater companies use voluntary price discrimination? Are they organized as nonprofits? What about Hollywood studios?
15. Over the years, some students have expressed reservations about nonprofits in the arts world, observing that they do not engage in redistribution of wealth to vulnerable populations.
- Do you think the nonprofit form should be used only for redistribution?
  - Is there a parallel concern about universities or houses of worship?
  - Do you think there should be no public investment in museums and the arts?
16. Professor Hansmann explains the use of the nonprofit form largely as a response to contract failures. Let’s consider some other justifications (which some of you raised in reaction papers). Do you agree or disagree with the following statement? Why?
- Nonprofits are valuable as a response to a lack of competition.
  - Nonprofits are valuable as a means of promoting identity and community.
  - Nonprofits are valuable in settings where it would be immoral or unethical to earn a profit.

- d. Nonprofits are valuable in offering the providers of capital the opportunity to forgo the return they otherwise would earn and instead to give it to the nonprofit's beneficiaries.
17. To decide whether to use a nonprofit or a for-profit firm, is it sufficient to focus on the potential advantages of using nonprofits (e.g., solving contract failures, etc.)? Aside from potential advantages of nonprofits, what else must be considered?
18. Lucy, who lives in NY, wants to give money to help poor children in her hometown of Chicago. She finds out about a nonprofit called "Chicago Kids" or "CK," studies their website, and confirms that their mission is to help low-income children in Chicago. She also confirms that "CK" is a nonprofit, and that the CEO's name is Marvin, and the Board Chair's name is Natalie. Which of the following can Lucy be sure about as she considers making a donation?
- a. If CK runs a surplus, Marvin and Natalie can't take it as a dividend.
  - b. Natalie cannot be compensated as a board member of a nonprofit.
  - c. CK's rent per square foot must be below the median rent in Chicago's real estate market.
  - d. Natalie cannot be Marvin's childhood friend or his relative, since this sort of personal tie between a board chair and CEO would represent an impermissible conflict.
  - e. Marvin cannot take 8 weeks of vacation every year.
  - f. Marvin cannot receive an 8% raise three years in a row.
  - g. Marvin cannot receive a bonus equal to 5% of the surplus that CK runs each year.
  - h. Marvin cannot hire his sister, Olivia, as his chief of staff.
  - i. Marvin cannot dedicate 5% of CK's budget to pay for him to attend conferences in Europe.
  - j. If Lucy calls the office at 9am or at 4pm on any given weekday, Marvin will usually be there.
19. How reliable is the nondistribution constraint in keeping nonprofit managers and boards from skimping on quality or overcharging beneficiaries?
20. Peter is the new CEO of a for-profit hospital. Before the board hired him, the hospital's profits were an unimpressive 4% of capital invested. The board wants the hospital to earn at least 8%.
- a. How can the board motivate Peter to double the profits?
  - b. What incentive does the board itself have to press Peter for better corporate performance?

- c. Which of the following steps do you think Peter is likely to take to deliver results?
      - i. Replacing three of his five direct reports, and promising his new colleagues a bonus if earnings exceed ambitious targets.
      - ii. Analyzing the way the hospital uses space, and reducing its footprint to save on rent and maintenance.
      - iii. Automating billing systems and laying off  $\frac{1}{3}$  of the billing department.
21. Quentin is the new CEO of a nonprofit hospital. Before the board hired him, the hospital was consistently losing money. The board wants the hospital to break even.
- a. Can the board motivate Quentin in the same way that the for-profit hospital board is motivating Peter (in the last problem)? In a nonprofit, are there other reasons why professionals might be motivated to perform well, which are less likely in a for-profit firm?
  - b. How do the incentives of nonprofit boards compare with those of a for-profit board?
  - c. Do you think Quentin is as likely as Peter to take the following steps?
    - i. Replacing three of his five direct reports, and promising his new colleagues a bonus if earnings exceed ambitious targets.
    - ii. Analyzing the way the hospital uses space, and reducing its footprint to save on rent and maintenance.
    - iii. Automating billing systems and laying off  $\frac{1}{3}$  of the billing department.
22. Both Peter (as CEO of a for-profit hospital) and Quentin (as CEO of a nonprofit hospital) need capital for their hospitals. What funding sources are available to a for-profit hospital, but not a nonprofit hospital, and vice versa?
23. In Professor Hansmann's view, what are the main downsides in using the nonprofit form?
24. Although nonprofit managers and board members do not have a personal financial stake in ensuring that a nonprofit runs efficiently, why might they still be motivated to avoid waste and get the most "bang for the buck" from their budget?
25. Richard is the new CEO of a chain of for-profit restaurants in major cities across the U.S., and you are a member of his company's board. Richard's predecessor, Sally, was on the road half the time, visiting the restaurants and meeting with their managers. Sally's motto as a manager was, "there's no substitute for being

there.” She believed that her periodic visits motivated the manager of each restaurant to work harder, and that her visits allowed her to share good ideas from one restaurant with others. Sally also loved traveling, and was proud of having elite “platinum” status at a number of airlines and hotels. On each trip, when the work day ended, she made plans with one of her many friends in each of the relevant cities. Richard is going to try a different approach. He is scheduling an individual video conference with each restaurant manager every two weeks, and a group video chat for everyone every two weeks as well. He plans to travel once a month to visit a restaurant “live,” and will visit each of the 36 locations every three years (instead of every year, as Sally did). As a board member, you are trying to evaluate whether Richard is right to make this change. What information can help you to make that judgment over time?

26. Tina is the new CEO of a network of welfare centers and soup kitchens across the U.S., and you are a member of his nonprofit’s board. Tina’s predecessor, Ursula, was on the road half the time, visiting the welfare centers and meeting with their managers. Like Sally, Ursula’s motto as a manager was, “there’s no substitute for being there.” She believed that her periodic visits motivated the manager of each welfare center to work harder, and that her visits allowed her to share good ideas from one center with others. Like Sally, Ursula also loved traveling, accumulating frequent flier miles, and seeing friends in every city. Like Richard, Tina is going to try a different approach, relying more on video conferences and less on “live” visits. As a board member, you are trying to evaluate whether Tina is right to make this change. What information can help you to make that judgment over time? Is your job evaluating Tina’s judgment harder or easier or no different than the job of evaluating whether Richard is right in the last problem?
27. Professor Hansmann focuses on the issue of when to use nonprofits instead of *for-profit firms*. Does he also discuss the issue of when to use nonprofits instead of *government agencies*?



### Discussion Questions # 3

*Please keep in mind that the answers to a number of these questions are not in the reading.*

1. What does Hansmann consider the defining feature of nonprofits? Do governments have the same feature?
2. The following are the main justifications that Hansmann offered for using nonprofits instead of for-profit firms. Which (if any) would also serve as justifications for relying on government agencies, instead of for-profit firms?
  - a. Consumers / beneficiaries cannot judge quality, so they won't trust a for-profit firm to supply them with the relevant goods and services
  - b. Donors cannot verify that goods and services purchased for third parties actually were delivered, and are of a sufficient quality so, again, they won't trust a for-profit firm to supply the relevant goods and services
  - c. Donors know that an organization is pursuing a goal they care about, but they can't tell whether the organization needs (or is actually using) their money to do this work. In other words, they can't tell the marginal impact of their contribution.
  - d. Public goods are undersupplied by the market because of free-riding.
  - e. Which, of any, of these rationales for using a nonprofit also could justify a government subsidy?
3. Experimentation: In principle, many goals could be pursued either by government agencies or by nonprofits (or, indeed, by both). Let's consider the comparative advantages and disadvantages of pursuing them through one or the other.
  - a. Please pick a cause that matters to you. In the U.S., if you want the government to do something about it, whom must you persuade? What if you want a nonprofit to do something? Which of these steps seems easier?
  - b. Assume that the cause you care about is controversial. Do you think it is easier to persuade a government agency to pursue your agenda or to persuade a nonprofit? Why?
  - c. Assume that your cause is a popular one, but you have thought of a new (and controversial) way to pursue it. Do you think it is easier to persuade a government agency or a nonprofit to try your idea? Why?

- d. Assume you are unable to persuade a particular nonprofit to pursue your agenda. Assuming you want to pursue this goal through nonprofits (not government agencies), what else can you do?
  - e. True or false: Nonprofits add more value in societies where citizens have diverse preferences about public goods.
- 4. Freedom: Continuing with the question of whether to pursue goals through government agencies or nonprofits, are there goals that you think are important, but you think it would be inappropriate for the government to pursue them? Can you offer an example of one?
- 5. Analog to Federalism: The U.S. has different levels of government: federal, state, and local.
  - a. Which is most attuned to the interests, needs, and preferences of a particular geographical community? Is that an advantage? If so, can nonprofits offer a similar advantage?
  - b. For a cause that you care about, do you think it is an advantage or a disadvantage for more than one organization (whether it's a government agency or a nonprofit) to try to advance it? Why? Does the existence of the nonprofit sector make it more or less likely that multiple organizations will try to address an issue?
- 6. Double Utility: In analyzing whether government agencies or nonprofits should pursue a goal, we should consider their ability not just to do the relevant work, but also to get the necessary resources.
  - a. How do governments raise money? Putting aside any government subsidies for the moment, how do charities raise money? Which has an easier time getting the money it needs?
  - b. When a donor contributes voluntarily to an organization, assume that the organization's beneficiaries derive a benefit. Do you think the donor also gets satisfaction from the donation?
  - c. Do you think taxpayers derive the same satisfaction in paying taxes?
  - d. Do you think the double benefit described here can justify a government subsidy to charities?
  - e. True or false: A subsidy for charity can persuade some people to volunteer funds for initiatives that the government otherwise would have to fund, and thus saves the taxpayer money.
- 7. Inefficiency: Let's also consider possible downsides of relying on nonprofits instead of the government. Hansmann offered a theory about why nonprofits tend to operate inefficiently. What was it? Does it apply also to government agencies?

8. Economies of scale:
  - a. What are economies of scale?
  - b. Do you think it is more likely that government agencies or nonprofits can take advantage of them? Why?
  - c. An earlier question asked about knowledge of local conditions. Is there a tradeoff between economies of scale, on one hand, and knowledge of local conditions, on the other?
9. Deliberation and Accountability:
  - a. Levmore observes that government officials could be motivated either by rational deliberation or by lobbying and interest group pressure. How might the assumption we make about the quality of government decision making affect our assessment of the value of nonprofits?
  - b. Levmore says that it is “possible that with regard to the wisdom of certain contributions there is reason to have greater faith in the information and expertise available to centralized decision makers.” Why might that be the case?
  - c. When a donor considers whether to contribute to charity, should she care whether the government is already pursuing the same goal? To make a fully informed decision, would she want to know what the government already is doing?
  - d. Continuing with the last question, would she also want to know what other donors are supporting? What does Levmore say about this?
  - e. To whom are for-profit firms accountable? Who is watching them to make sure they do their jobs well?
  - f. To whom are government agencies accountable? Who is watching them to make sure they do their jobs well?
  - g. To whom are nonprofits accountable? Who is watching them to make sure they do their jobs well?
10. Three types of government support for nonprofits
  - a. What is a grant? Do governments ever provide grants to nonprofits?
  - b. What does it mean that nonprofits are exempt from tax?
  - c. Contributions to charity generally are deductible. What does this mean? What is a tax deduction?
11. Alexandra earns \$100,000 in her job. To keep the numbers simple, assume that she must be a 10% tax on all of her income.
  - a. How much tax must she pay if she is taxed on the full \$100,000?

- b. Assume that Alexandra is allowed to deduct charitable contributions from her income, and she contributes \$10,000 to charity. How much tax must she pay?
  - c. Levmore observes that “The charitable deduction makes the government a partner in every gift-giving venture.” Please use the above example to explain Levmore’s point.
  - d. Levmore emphasizes that in the charitable deduction, the government puts up money only if a donor also was willing to put up her own money. What advantage, if any, do you see in this “matching” approach?
12. Levmore characterizes the subsidy for charitable contributions as a form of voting.
- a. Can all Americans “vote” in the way that Levmore describes? In other words, can they all get a government match by giving to charity? What does it mean to itemize deductions? If we wanted to ensure that all Americans who pay taxes receive a charitable subsidy, regardless of whether they itemize, could we do that?
  - b. Assume that every American gives the same amount to charity (\$100) and that they all can deduct this amount. Do they all get the same “matching grant” from the government through the charitable deduction? (Hint: What does it mean for a tax system to be “progressive”? If taxpayers do not get a uniform match under current law, what change can Congress make to ensure that the “match” is uniform?)
  - c. Assume that on a per-dollar basis, the government “match” is the same for all taxpayers. Is there still a reason why high-income taxpayers are likely to claim a larger match than low-income taxpayers?
13. Levmore observes that high-income taxpayers give more to charity, and are likely to claim a larger tax deduction for charitable contributions.
- a. Is there any reason to think that high-income and middle-income and low-income taxpayers might support different charities? To use Levmore’s phrase, do you think they are likely to “vote” differently?
  - b. Assuming they support the same charities (so that there is no systematic difference), do you consider it a positive or a negative if high-income taxpayers are giving more to charity and thus claiming a larger government match?
  - c. If you support redistribution of wealth, would you consider supporting a charitable subsidy, targeted at wealthy people, as a way to induce voluntary redistribution? What advantages, if any, does voluntary redistribution have over mandatory redistribution through progressive tax rates?

- d. To induce voluntary distribution, how important do you think it is to let donors choose what they want to support (or “vote,” as Levmore puts it)? Do you think they would give as much without that?
- e. When you decide the distributional impact of the charitable subsidy here, does it matter whether the public good being funded is a soup kitchen or the opera?
- f. Assume that you are concerned about the influence that wealthy people have over charities and the government “match.” How different is this from the influence of wealthy people in the private sector? In politics?

### Discussion Questions #4

#### 1. Types of Nonprofits

- a. Nonprofits vary widely in their missions. What is the one characteristic that all have in common? In other words, what makes an organization a nonprofit?
- b. Are labor unions, lobbying organizations, and country clubs usually nonprofits?
- c. What tax advantage to both 501(c)(3) (or “charitable”) organizations and other nonprofits have in common?
- d. What tax advantage is available only to 501(c)(3) organizations?
- e. There are two types of 501(c)(3) organizations. What are they? Why is this distinction important?
- f. What are the three types of nonprofit forms that are eligible for tax exempt status under 501(c)(3)?
- g. What is involved in forming an unincorporated association? What are some advantages of using this form? What are some disadvantages?
- h. What is involved in forming a charitable trust? What are the advantages and disadvantages of using trust form?

#### 2. Nonprofit Corporations

- a. What is involved in forming a nonprofit corporation?
- b. Compared with unincorporated associations and trusts, that are the advantages and disadvantages of using the corporate form?
- c. Can nonprofit corporations rely on legal precedents about for-profit corporations? Why is this important?
- d. Can nonprofit corporations issue stock?
- e. Are there different types (e.g., some for religious organizations, some for hospitals, etc.)?

#### 3. Angela and a group of her friends do not enjoy attending religious services at their local synagogue, so they decide to form a new congregation.

- a. Are they likely to form a public benefit corporation or a mutual benefit corporation?
- b. What is the difference between using a membership structure or a self-perpetuating board of directors? Which is more common?
- c. If they use a membership structure, can members sell their memberships to others?

4. Angela owns a small business in an “up and coming” neighborhood. Her home town does not provide as many services as she would like. She reaches out to other small businesses, and they decide to form an association that will supplement the services provided by the town, and also will publicize their business district, hold periodic festivals, and the like.
  - a. Is Angela likely to form this as a public benefit corporation or as a mutual benefit corporation?
  - b. If she moves her business to another location, would she be allowed to sell her membership?
5. Bob is a drug dealer. To nurture a market for one of his best selling products, cocaine, he wants to launch a nonprofit, “Coke R Us,” that will introduce children to the joys of cocaine. Will a state approve his corporate charter? What doctrine is relevant?
6. Carl is a white nationalist. He wants to open a nonprofit museum.
  - a. Assume that Carl’s museum urges violence against anyone who isn’t white. Will a state approve his corporate charter? What doctrine is relevant?
  - b. Instead, Carl’s museum advocates stripping anyone who isn’t white of their U.S. citizenship and expelling them from the U.S. Will a state approve his corporate charter? What doctrine is relevant?
7. Review of Charitable Purpose
  - a. Who decides whether a purpose qualifies as “charitable”? How rigorous is this review today? Has the level of rigor changed over time?
  - b. In footnote 46 on p. 64, the textbook mentions a case about an immigrant Jewish group. What was the issue and what did the court decide?
  - c. On p. 65, the text discusses an Ohio case, *State ex rel. Grant v. Brown*. What was the issue in the case and what did the court decide?
  - d. Let’s return to Carl, the “white nationalist” in problem 6. Assume that Carl’s museum celebrates “white power” by telling the story of some of his personal heroes, including confederate generals, politicians who defended segregation, German leaders in the 1930sm etc. If you are asked to predict what the state will do—not what you think the state *should* do—do you think his charter would be approved?
  - e. Now let’s turn to the normative question. In your opinion, should Carl’s charter be approved? What standard do you think should be applied? More generally, How much control do you think the government should exert over what counts as charitable?
8. Commercial Activities
  - a. What are the facts in *Sinai Temple*? What was the issue?
  - b. How did the court come out? Did you agree with the court?

- c. Are nonprofits allowed to earn a profit?
- d. Are nonprofits allowed to distribute a profit?
- e. Are they allowed to give discounts to members or would this qualify as a distribution of profits?

9. Evolving Definition of Charity

- a. Setting aside the archaic language, how effective do you think the old English “statute of charitable uses” was in laying out what you think of as “charity”?
- b. Can you think of anything the statute leaves out that you consider charitable? For instance, do you think it covers impact litigation to promote women’s rights or gay rights? What about a think tank focusing on basic scientific research? What about athletic programs for disadvantaged youth? Does the statute have a catch-all category?
- c. Please compare the English statute with the definition in *Jackson v. Phillips* on p. 77? How similar are these definitions of charity? Which is broader? Would the definition in *Jackson v. Phillips* cover the causes in “b”?
- d. Please compare the English statute and *Jackson v. Phillips* with the restatement of Charitable Nonprofit Organizations, Sec. 1.01, which lists six categories: relief of poverty, advancement of knowledge or education, advancement of religion, promotion of health, governmental or municipal purposes and other purposes beneficial to the community.” How similar are they? Which is the broadest? Would this definition cover the causes in “b”?
- e. How do the three formulations considered above compare with I.R.C. Section 501(c)(3)? It lists the following charitable purposes: “religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition. . . , or for the prevention of cruelty to children or animals.” Doesn’t “charitable” include “religious” in the other definitions? Does 501(c)(3) include a catch-all category?
- f. Please read problem “a” on p. 81 of the Text and offer a response. Does it matter that there is no stated requirement that they should be poor?
- g. Please read problem “b” on p. 81 of the Text and offer a response. What if purpose was: “show that Charles Dickens travelled back in time to write Shakespeare’s plays?”
- h. Please read problem “c” on p. 81 of the Text and offer a response.

10. Corcoran Gallery

- a. What problems did the gallery face?



- b. What solution did the trustees propose?
- c. What is the relevant doctrine? What legal standard was the court supposed to apply?
- d. Assume that you are a member of the Corcoran family and you are trying to oppose the trustees petition. What argument would you make?
- e. Do you agree with the court's decision?

11. *Jackson v. Phillips*

- a. What was the problem with the gift? What doctrine did the courts use to address it? Do you agree with the court's approach?

12. What were the facts in *Buck Trust*? What was the issue and what did the Court decide?

13. What is the difference between *cy pres* and deviation?

14. What were the facts in *Barnes*? What was the issue and what did the Court decide? Do you agree with the court's decision?

15. What were the facts in *L.L. Nunn Trust*? What was the issue and what did the Court decide? Do you agree with the court's decision?

16. Applying *cy pres* and Deviation

- a. Years ago, Dan left a bequest to Law School, creating a prize for the graduating student of "White Anglosaxon Protestant heritage" with the highest grades. Dan's daughter, Edith, is still alive. Law School wants to delete the "White Anglosaxon Protestant heritage" restriction. What should they try to do first? If this fails, what doctrine should they invoke? Do you think a court will agree?
- b. Same question, except that Dan's restriction was to create a prize for the woman graduating with the highest grades. What doctrine should they invoke? Do you think a court will agree?
- c. Please read problem "1" on p. 100 of the Text and offer a response.
- d. Please read problem "2" on p. 100 of the Text and offer a response.
- e. Please read problem "3" on p. 100 of the Text and offer a response.
- f. Please read problem "4" on p. 100 of the Text and offer a response.
- g. Please read problem "5" on p. 100 of the Text and offer a response.

### Discussion Questions #5

1. In general, what is the division of labor between a nonprofit's professional managers, on one hand, and the board, on the other?
2. Aside from state corporate law, what other source of law determines how a nonprofit is governed?
3. Under state law, what are the two main legal obligations of a director of a nonprofit corporation?
4. *Lucy Webb*
  - a. What are the facts of Lucy Webb? What was the issue?
  - b. How did the court come out? Did you agree?
5. Please read problem "a" on p. 160 of the text and offer a response.
6. Angela is on the board of a disaster relief organization. She reads in the newspaper that employees of another disaster relief organization have been stealing supplies, which are intended for victims of an earthquake in Bangladesh, and have been selling them on the Internet. She calls Bob, the CEO of her charity, refers to the scandal at the other charity and asks, "do I have anything to worry about? Is anything like this happening at our charity," and Bob says, "no, you have nothing to worry about."
  - a. Which of Angela's legal obligations is relevant?
  - b. Has she discharged her obligation?
  - c. Is there anything else you think she should do?
7. Carla serves on the board of a charity that provides humanitarian relief in Eastern Europe and the former Soviet Union. The charity raises money in dollars (from Americans) and spends money in the local currency. Doug, the CEO, worries that the dollar will become weaker, relative to the Ruble and other local currencies, so he recommends converting a large sum into Rubles in order to avoid losing purchasing power in the local currency. Doug raises this issue at a board meeting and invites Ellen to join the meeting by phone. Ellen is a currency expert at the financial institution that works closely with the charity. After Doug lays out his proposal, Ellen weighs in to say that nothing is certain, but that she thinks there is a reasonable probability that the dollar will weaken in the next year. After discussing the issue with Doug and Ellen, Carla and the rest of the board approve Doug's proposal. Unfortunately, Doug's prediction turns out to be incorrect. The dollar strengthens by 10% against the ruble, so Doug's currency transaction ends up costing the charity approximately \$1 million in lost purchasing power. Has Carla breached any of her fiduciary duties in approving this transaction?

8. Please read problem “b” on p.160 and offer a response.
9. Please read problem “c” on p.161 and offer a response.
10. Do you think charities should be immune from tort liability? What about their officers and directors? What are the competing considerations here?
11. Do you think directors and officers of charities should be indemnified for the costs of a litigation where they prevail? What if they lose? Why?
12. Let’s look at the second excerpt from *Lucy Webb*, which is on p.175. What was the issue and how did the court come out?
13. How can directors rely on process-based approaches to ensure that they comply with the duty of loyalty? If the process-based response is unsuccessful -- for instance, because the process is not considered adequate -- does that mean that they have breached the duty of loyalty?
14. Please read the planning problem in the text on p.187 and offer a response.
15. Fran is the director of a nonprofit art museum, and also is a private collector of art.
  - a. The museum has a large collection of 17th century Dutch masters, and no Impressionists. The director of the museum wants to sell a Rembrandt and use the proceeds to purchase a Monet. Fran has always wanted a Rembrandt. As a director, can she buy this painting from the museum?
  - b. At a board meeting, she learns that the museum is in discussions to buy a Monet from her friend, Georgia. After the meeting, Fran calls you (her lawyer) to find out whether she can approach Georgia and offer to buy the painting.
16. Based on the material we have reviewed, how important do you think fear of liability is in motivating officers and directors to do their best work?
17. What other motivations encourage nonprofit professionals and directors to do their best?

### Discussion Questions#6

1. Investment Responsibility
  - a. Under what circumstances, must nonprofits invest money?
  - b. Who has the ultimate responsibility for these investments? Can they delegate this responsibility? If so, to whom?
  - c. What was the issue in Harvard College v. Amory? How did the court come out?
2. A Few Basic Points About Investing (some of which are not in the reading)
  - a. Assume that you buy an Apple Macbook Pro and you think it's a really good product. Does it follow that you should buy Apple stock? Why or why not?
  - b. What is the "efficient market hypothesis"?
  - c. True or false: Individuals who do not have special knowledge of the market usually should invest in index funds, while leaving "stock picking" to professionals.
  - d. True or false: Most mutual funds underperform general stock indices, especially once their management and trading costs are taken into account.
  - e. In general, investors are compensated for taking more risk. What does "risk" mean in the context of investments? Is a U.S. Treasury bond riskier or less risky than an investment in the S&P 500 Stock Index?
  - f. Some portfolio theorists distinguish between "asystematic" or "company specific" risk, on one hand, and "systematic" or "market-wide" risk, on the other. Which of these can be eliminated through diversification? Why does this matter? (By the way, what does "diversification" mean in the context of investing?)
  - g. Al is 24-years old and he is setting aside money for retirement, as is his mother, Betty, who is 64-years old.
    - i. Should Al have the same risk-tolerance as his mother? someone who is 64-years old? Why or why not? What is the key factor?
    - ii. Assume that one of them invests 100% in the S&P 500 and the other invests 90% in Treasury bonds and 10% in the S&P 500. Which do you think is investing in each of these portfolios?
  - h. Should a nonprofit invest more like Al or his mother? Does it depend on particular characteristics of the nonprofit? Which do you think are relevant?

- i. David Swensen, who has managed Yale University's endowment very successfully for decades, pioneered a new approach to investing a nonprofit's endowment. Instead of picking only among publicly traded U.S. stocks and bonds, he has added other asset classes, including non-U.S. equities, private equity, venture capital, commodities, and timber. Why do you think he (and others who have followed his example) have taken this approach?
3. Carla donates \$1 million to the Do-Good Fund (DG), an umbrella charity that makes grants. In her gift agreement, she provides that DG can "spend only income, while preserving the principal."
  - a. What is an endowment? Has Carla created one?
  - b. Assume that DG invests Carla's funds in a diversified portfolio of stocks and bonds, which generates \$50,000 of dividends and income. At the same time, the stocks and bonds decline in value by \$60,000, so at the end of the year the portfolio is worth \$990,000. Under the traditional "historic dollar value" rule, can DG spend any money?
  - c. Same facts as "b," but the relevant jurisdiction has enacted the UPMIFA. Can DG spend any money? If so, is it limited to the \$50,000?
  - d. Same facts as c. If the board wishes to spend \$500,000 on an urgent need, can they do so?
  - e. Assume that DG invests the entire gift in a single stock. You are counsel to the charity. Do you have any advice for the board?
4. Ellen is chair of the board of nonprofit. You are her lawyer. She calls up to ask you the following questions.
  - a. Under current law, is it true that nonprofits can invest only in a designated list of securities in most jurisdictions? Does this rule make sense?
  - b. Under current law in most jurisdictions, in deciding whether investments are prudent, are nonprofits supposed to evaluate each investment separately, or to consider how each fits into the nonprofit's entire portfolio? Does the current rule make sense?
  - c. Can I delegate investment decisions to professional managers? If so, what responsibilities (if any) do I and my colleagues on the board still have?
5. Fran and George are co-chairs of the board of Hospital. Hospital is a nonprofit with a \$500 million endowment, which funds the care it provides to low income patients, as well as medical research to combat diseases. George calls Fran to say that he wants Hospital to change its investment strategy.
  - a. "We should invest only in medical research and pharmaceutical companies, so that we can pursue our mission through our investments, as well as through the work of our professionals." Fran calls to ask for your advice. Do you agree with George? What are the competing considerations?

- b. Alternatively, assume that George calls and says the following. “We should stop investing in companies that make cigarettes, alcohol, guns, and fatty foods, since these products all undermine health.” Again, Fran calls for your opinion. What do you think?
- 6. If you want information about a nonprofit, what information can you get through state governments? What about through the federal government?
- 7. What is the theory behind looking to the state attorney general to police misconduct at charities?
- 8. What of the following issues are most likely to attract the attention of the AG?
  - a. Transactions between officers or directors, on one hand, and charities, on the other
  - b. Misappropriation by officers or directors
  - c. Outdated missions
  - d. Misleading fundraising appeals
  - e. Wasteful programs
- 9. What constraints limit the AG’s review of nonprofit activity?
- 10. In 1961, Helen and Irving Jackson gave \$35 million to Tiger University to train graduate students in its school of Public and International Affairs to serve in the federal government, particularly in foreign relations. This endowment has grown to \$650 million. Instead of funding the purpose intended by the Jacksons, this endowment has been used to support the general expenses of the public affairs school. Helen and Irving’s daughter (Kate) and son (Lawrence) have sued the university, demanding that Tiger should add the income spent on other purposes back to this endowment (approximately \$200 million) and that Tiger should use this endowment solely for its intended purpose.
  - a. If Kate and Lawrence want to find out the details of how Tiger spent this money, can they rely on state filings or on Form 990?
  - b. If Tiger is a membership organization and Kate and Lawrence are members, could they get this information? (Note that universities generally are not membership organizations.)
  - c. What is the best way for them to get this information, if the university refuses to provide it voluntarily?
  - d. If Kate and Lawrence try to bring a lawsuit arguing that the officers and directors of Tiger breached their fiduciary duties, do they have standing to do so? What if Helen and Irving (the donors, rather than their children) brought this action? What is the rationale for current law? Do you agree?
  - e. Mary is a graduate student who wants to work for the government after graduation, and wants more resources devoted to students like her. Does she have standing to bring an action arguing that the officers and directors have breached their fiduciary duties? What is the rationale for current law? Do you agree?

- f. Does the attorney general have standing to bring a lawsuit alleging a breach of fiduciary duties?
  - g. If Kate and Lawrence bring a lawsuit -- not alleging breach of fiduciary duties, but to enforce the terms of their gifts -- the university will try to argue that Kate and Lawrence lack standing to bring this lawsuit. What arguments will they make? How do you expect Kate and Lawrence to respond?
  - h. Why might Tiger settle this lawsuit and come to an understanding with Kate and Lawrence, even if Tiger believes it can win on standing grounds?
  - i. What is the most reliable way for donors to ensure that they have standing? What is the tax problem with this approach? Is there a solution to this problem?
11. In 2012, Nathan gives a \$5 million gift to Law School and in return Law School agrees to name the gym for him. But a year later, Nathan is convicted of insider trading. Law School asks to renegotiate the naming rights, but Nathan refuses. Law School removes his name anyway. Nathan brings a lawsuit, demanding that Law School should either put his name back on the auditorium or return the gift.
- a. Who do you think has the better argument in this lawsuit?
  - b. To head off this issue in future gifts, what clause should Law School seek to include in its gift agreements?
  - c. Would it surprise you to learn that six years later, Nathan gives \$10 million and, in return, Law School puts his name back on the gym and also names a number of professorships for him, focusing on social justice?
12. Please read problem 1 on p.240 and offer a response.
13. Please read problem 2 on p.240 and offer a response.
14. Please read problem 3 on p.240 and offer a response.
15. Please read problem 4 on p.240 and offer a response.
16. Please read problem 5 on p.240 and offer a response.
17. As a practical matter, who monitors nonprofit managers? Who monitors these monitors?

### Discussion Questions #7

1. Alan has launched Charity, a new nonprofit. Alan does not have the staff or time to do all of his own fundraising. The organization's annual budget is \$300,000.
  - a. Betty is the owner and manager of "Fundraiser Corp," a for-profit firm that specializes in mail and phone appeals for nonprofits. Betty proposes to launch a campaign for Alan and will take 50% of the first \$200,000 they raise and 25% of everything thereafter. Does this kind of arrangement raise questions among state AGs?
  - b. As we have seen, state AGs focus on stopping theft and other forms of malfeasance when regulating nonprofits. They do not generally consider whether a nonprofit's programs are having the desired impact or whether a nonprofit operates cost-effectively. Given this "big picture," do you agree or disagree with the effort of states to regulate fundraising?
2. *United Cancer Council*
  - a. What were the facts of the case? Was it based on state or federal law? What was the government's argument? What did Judge Posner conclude? Did you agree with him?
  - b. What other theory did Judge Posner leave open as a possible path for regulators?
3. *Schaumburg*
  - a. What were the facts? What was the issue in the case? How did the court come out?
  - b. The court summarizes other precedents. One is *Schneider*. What was the key factor that caused the court to strike down the relevant rule?
  - c. Can a state have a general limit on door-to-door commercial advertising and solicitation?
  - d. If a religious organization is handing out bibles and leaflets about their religious philosophy and practices, and in the course of distributing this material they ask for money, does this activity count as "commercial advertising" that can be disallowed?
  - e. What if the organization in "d" is a labor union. Can the state prevent it from handing out literature and soliciting members?
4. Daniel is a minister who is looking to make religion more relevant to people in his community, many of whom no longer want to go to a weekly church service. As founder of the Church of Daniel, he trains a team of "religious associates" to go



door to door. They ring the bell, provide free literature, and also offer to stay and provide spiritual counseling. Elena works for the state AG. She's been asked to consider what, if anything, the AG should do about Daniel's door-to-door activities.

- a. Assume for now that Daniel's associates don't ask for money. Even so, Elena worries that Daniel and his associates are taking advantage of lonely and unsophisticated people. She is considering a new regime in which charities must receive a state permit in order to go door to door. In general, only religious organizations will be permitted to do so. But to be eligible, a religious organization must be "well established" ( a term that Elena is not planning to define). Elena asks you for legal advice about his proposal. What answer do you give her?
- b. Assume that the regime would allow any religious organization to go door to door, but not any other charity. What legal advice do you give?
- c. Assume that Elena decides to narrow the restriction. Charities are free to go door to door to talk about their mission and to provide information, but they cannot solicit funds. What legal advice do you give?
- d. Assume that Elena decides to require all charities that seek to solicit door to door to register with the AG, but the AG does not use discretion to make merits based judgments about which charities to approve. What is your legal advice?
- e. Assume that Elena's proposal will allow registered charities to solicit funds, but they must hand the potential donor a piece of paper explaining what percentage of the budget actually goes to the mission, as opposed to fundraising and administration. What legal advice do you give?
- f. The same as in "e," but the fundraiser does not have to hand this document to a potential donor. Instead, the charity must keep this document on file with the state AG, and the AG makes it available on a public website.

5. *Riley*

- a. What was the rule at issue in the case? What was North Carolina trying to accomplish through this rule? Do you agree with the goal?
- b. Judge Posner mentions the same issue in *United Cancer*. Was he sympathetic to the goal? What concern did he raise about it? (Hint: he thought it put new or less popular charities at a disadvantage. Why?)
- c. In analyzing the rule, does the court apply rational basis scrutiny or strict scrutiny? Why?
- d. What are the state's two arguments to distinguish this case from others? What is Justice Brennan's response to these arguments?

- e. North Carolina also required solicitors to give potential donors information about fundraising ratios during the solicitation, What does the court say about this?
  - f. Justice Brennan identifies two alternatives that states could constitutionally pursue. What are they?
6. Felice runs a nonprofit that engages in impact litigation to promote animal rights. She and her litigation director and their small team handle some cases on their own. These in-house litigators are collectively paid a total of \$1 million each year. Felice also spends \$500,000 on fundraising, and raises the organization's \$1.5 annual budget.
- a. Based on the above numbers, what is the fundraising ratio?
  - b. Why do you think some donors are interested in fundraising ratios? What advantage do they have as a measure of nonprofit quality?
  - c. Assume that the nonprofit also relies on law firm volunteers to take on animal rights cases on a *pro bono* basis. In total, law firms contribute 2,000 hours of time which on average are worth \$500 per hour. How can Felice use this additional fact to recompute this ratio?
  - d. Assume that Felice wants to recalculate again based on an additional insight: part of the mission is to make the case to the public, not just in court. Assume that fundraisers circulate information about litigation successes to potential donors and traditional media, and that they also post information through social media. All the relevant materials and all fundraising conversations include discussion of legal issues and of the organization's litigation track record. How can Felice use this additional fact to recompute this ratio?
  - e. How do you think organizations that raise millions of dollars each year sometimes take the position that they spend nothing on fundraising? Does this fact affect your confidence in these ratios?
7. Casebook problems on p. 281-82: Let's discuss 1 a & b; 2a, b & c,
8. Underlying policy issues
- a. Stepping back from the details of the regime for regulating charitable solicitation, what concerns justify this regulation? How significant do you think these concerns are?
  - b. To what extent does complete and accurate disclosure address these concerns? Do you think donors will read it carefully? Does this matter?
  - c. How persuaded are you that fundraising is a form of speech, which should be protected?
  - d. The ACLU's advocacy for others is protected speech, but is the effort to raise money for itself also protected speech? Or is it more like advertising? If they advertise by talking about how important their work is, can the two be disentangled? What if they advertise by asking a celebrity to do a commercial saying "it's cool to protect our freedom"?

- e. Same question for a church. The church's religious mission obviously is protected, but does it follow that its fundraising efforts should be as well? Or is the issue that the two can't be disentangled?
- f. Is a hospital's work protected by the First Amendment? Or a community center that has a pool, gym, and nursery school? If not, should fundraising for it be protected by the First Amendment in the same way as fundraising for the ACLU or for a church?

### Discussion Questions #8

1. Basic Introduction to the U.S. Income Tax
  - a. Andrew, a recent law school graduate, starts his own law practice representing people who are buying homes. He charges each client \$3,000 and has 60 clients in his first year, bringing in a total of \$180,000. The tax law has a concept called “gross income,” which includes all the amounts that are potentially taxable. Should Andrew include \$180,000 in his gross income?
  - b. Barbara, who is Andrew’s oldest friend, gave him a \$100 Amazon gift card for his birthday. Should Andrew include this \$100 in his gross income?
  - c. Andrew hires Carl to serve as his secretary, paying him \$50,000. How, if at all, does this amount affect Andrew’s tax bill?
  - d. Andrew pays \$30,000 of rent for his office. How, if at all, does this amount affect his tax bill?
  - e. Andrew invested some of the money he earned last year in stocks and corporate bonds. He has received \$1,000 of interest and dividends this year. Is that taxable?
  - f. Andrew’s law practice is doing really well. Charlie, his landlord, asks him if he wants to buy his office, instead of renting it. Andrew pays \$200,000 and receives title to the office. What effect, if any, does this expenditure have on Andrew’s tax bill?
2. Tax expenditures
  - a. What does the phrase “tax expenditure” mean?
  - b. How does a tax expenditure differ from a “structural feature” of the tax system?
  - c. How is a tax expenditure different from a direct expenditure?
  - d. Do Bittker and Rahdert think the exemption of charities from the income tax is a tax expenditure?
3. Boris Bittker and George Rahdert argued that even without a special exemption, tax exempt organizations generally would *not* be taxed on their income. To evaluate their claim, please consider the following:
  - a. When Barbara gave Andrew a birthday present (above), did Andrew have to pay tax on this gift? Applying the same rule, if a graduate makes a donation to CLS, would the law school have taxable income (assuming there was no special rule for tax exempts). In other words, is the exemption of donations from a nonprofit’s income a “subsidy” as Bittker defines the term?

- b. When CLS earns endowment income, would CLS have to pay tax on it (assuming no special rule for tax exempts)? In other words, is the exemption of investment income a subsidy?
  - c. If you pay a personal trainer at the gym, is your payment taxable income to her? Similarly, if you pay tuition to CLS, would CLS have taxable income (again, assuming there was no special rule for tax exempts)? When a nonprofit does not report the fees that it receives from beneficiaries, is this a subsidy?
  - d. When CLS pays a professor to teach a class, would CLS be able to deduct this expense (assuming there was no special rule for tax exempts)? Assuming CLS uses all of its fee income to pay employees' salaries, is the exclusion of the fee income from income a subsidy?
  - e. If CLS uses some fee income to build a new dormitory or classroom building, would CLS be able to deduct this expense (assuming no special rule for tax exempts)? Is the exclusion of this fee income a subsidy?
  - f. To sum up, how (if at all) is tax exempt status more beneficial to CLS than the regular tax regime would be?
4. The casebook refers to the public benefit subsidy theory as one rationale for exempting a charity's income. What is the basic idea?
5. Henry Hansmann offers a different rationale for exempting a nonprofit's income from tax.
- a. What special problem do tax exempts face?
  - b. How does the exemption mitigate this problem?
  - c. Why is the exemption an imperfect remedy?
6. Section 501(c)(3) describes which organizations are eligible both to be tax exempt and to receive tax-deductible contributions:
- "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."*
- a. What is the so-called "organizational" test? What must a nonprofit do to satisfy it?

- b. Can a trust satisfy the organizational test? What about an unincorporated association?
  - c. A nonprofit's corporate charter provides the following: "The organization is formed to improve human welfare, including through charitable and educational purposes within the meaning of Section 501(c)(3) of the code." What is the relevant test which this language must satisfy? Does it pass this test? If not, how would you change the language?
  - d. If a nonprofit is a corporation, can the language requiring it to pursue only exempt purposes be inserted only in its bylaws, or does this language also need to be in its charter?
  - e. To analyze whether a nonprofit satisfies the organizational test, can you just look at its charter or other organizational documents? Or do you need to know the details of its work?
  - f. What is the so-called "operational" test? What must a nonprofit do to satisfy it?
  - g. The statute says the organization must be organized and operated "exclusively" for one of the listed purposes. If a museum that otherwise would be tax-exempt opens up a for-profit museum shop, does it lose its tax exemption?
7. Abigail's house sits on a three acre plot of land. She creates a nonprofit and contributes two of these acres to it to create a park. She and her husband, Bob, and her sister, Candice, are the nonprofit's board of directors. The nonprofit builds a fence around the property, does not publicize that the land has become a public park, and opens the gate only between 5pm and 10pm one evening every week. Abigail deducts the value of the land, and makes a charitable deduction to fund landscaping and other maintenance for the property. What regulatory test is relevant here? Do you think this nonprofit passes the test?
  8. Ben incorporates a nonprofit and includes the right language in its charter. His intention is to use it to open a soup kitchen, but he gets busy. Years go by and the nonprofit corporation is dormant. Is it eligible for the exemption? Why?
  9. Is it enough for a nonprofit to satisfy the terms of Section 501(c)(3)? Is there another step an organization should take in order for donors to deduct contributions? What is involved? What kind of nonprofit is exempt from taking this step?
  10. To qualify under Section 501(c)(3), an organization's purpose must be one of those listed. The most general is "charitable," so this is an important "catch-all."
    - a. What was the traditional definition of "charitable" and how has the definition changed over time?
    - b. Assume that an organization brings lawsuits to defend the legal rights of women who work on Wall Street. Under the traditional definition of

- “charitable,” would this work qualify as charitable? What about under the current definition?
- c. Assume that an organization brings law suits to protect the environment. Under the traditional definition of “charitable,” would this work qualify as charitable? What about under the current definition?
11. Assume that an organization is dedicated to helping poor people by providing them with free heroin for recreational use. Would this organization qualify under Section 501(c)(3)? What is the relevant criterion that must be considered?
  12. What an organization provides free vodka (a legal product) to recovering alcoholics with low incomes? Would this organization qualify under Section 501(c)(3)? What is the relevant criterion that must be considered?
  13. Health care: Revenue Ruling 69-545
    - a. Is providing health care a charitable purpose?
    - b. Does the IRS believe that all hospitals are eligible to be nonprofits?
    - c. What is a revenue ruling? Is it a decision of a court? (This is not answered in the reading.)
    - d. Under the revenue ruling, what requirements (if any) are specified for the hospital’s finances and bottom line? Can it run a surplus? If so, can it distribute this surplus? Can it fund rent or other services for the benefit of the founders?
    - e. Under the revenue ruling, what requirements (if any) are specified for the kinds of care a hospital provides?
    - f. Under the revenue ruling, what requirements (if any) are specified for the hospital’s governance?
  1. In 2010, Congress imposed additional requirements for hospitals to qualify as nonprofits:
    - a. What process and disclosure requirements were introduced?
    - b. What substantive requirements were introduced?
  14. Let’s discuss problems a through d on page 339-40 of the text.

### Discussion Questions #9

1. *Bob Jones*

- a. What are the facts in *Bob Jones*? What legal doctrine is the government trying to invoke to revoke the university's exemption?
- b. Which language in section 501(c)(3) is the court interpreting? Recall that Section 501(c)(3) provides as follows:

*Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*

- c. What is the first amendment issue here? How did the court come out?
  - d. Is Justice Powell in his concurrence or Justice Rehnquist in his dissent defending the merits of university's discriminatory policy?
  - e. On what issue does Justice Powell agree with the rest of the majority?
  - f. What is Justice Powell's concern about the court's opinion? Do you agree with him or the majority?
  - g. What is the basis for Justice Rehnquist's disagreement with the majority?
  - h. Does Justice Rehnquist believe that the Treasury department could use regulations to achieve the objective the government is seeking in the case?
  - i. If you were on the court, would you join the opinion of the majority, Powell, or Rehnquist?
2. On page 395, please answer problems a through g.
3. Organizations can be tax-exempt if they pursue an "educational purpose."
- a. In *Big Mama Rag* on p.400, the district court agreed with the IRS that the publication did not qualify as having an "educational purpose." Why not?



- b. The DC Circuit reversed. What was Judge Mikva's reason for reversing the district court?
  - c. After *Big Mama Rag*, the DC Circuit had to decide whether the IRS was correct in concluding that a white supremacist organization, The National Alliance, which published a magazine, *Attack!*, was not formed for an "educational purpose." To defend this decision, the IRS developed a new argument, the "methodology test," which the court accepted. The argument also appears in Rev. Proc. 86-43 on p. 408. What is the argument?
  - d. Please answer problems a through c on page 415.
- 4. Organizations also can qualify as tax exempt for pursuing a "religious purpose."
  - a. Some commentators argue that providing a tax exemption to religious organizations should be unconstitutional, while others argue that not providing this exemption would be unconstitutional. What do you think?
  - b. What was the issue in *Holy Spirit Association*? Did you agree with the court's analysis?
  - c. What was the issue in GCM 36693? Did you agree with the analysis?
  - d. What question is the IRS supposed to ask in deciding whether a religious organization qualifies under Section 501(c)(3)? What question is it not allowed to ask?
  - e. Must an organization be a house of worship in order to qualify as organized for a religious purpose?
  - f. Please answer problems a, b, and c on p. 432-33.
- 5. *Church of Scientology*
  - a. What doctrine is the court applying? Under that rule, what are charities not permitted to do? If they violate this rule, what is the consequence?
  - b. What is the government arguing about the founder of the church? How does the Church respond?
  - c. Did you agree with the court's conclusion? What facts do you think were most significant to the court?
  - d. Do you agree that compliance with these doctrines should be preconditions for qualifying under Section 501(c)(3)? Why or why not?
  - e. What is the difference between "inurement" and "private benefit"? Which is the broader limit?
- 6. Compensation
  - a. Dorothy is the new president of Community Center ("CC"), which has been running deficits. Ed is chair of CC's board. CC has been running deficits for years, burning through its shrinking endowment. Ed and others on CC's compensation committee decide that they need to motivate Dorothy to deal with the deficit, even if this involves painful choices, including cutting programs and firing long-serving colleagues. They offer Dorothy a

bonus, which is equal to 10% of any surplus CC runs in the first two years of her service as president. Before formalizing this arrangement, Ed calls you, since you are the nonprofit's lawyer. Do you see any issues here? If so, are there ways that Ed can pursue the same goal in a way that does not create a legal issue?

- b. Dorothy does a terrific job. In her third year, Ed and the committee want to give her a pay package worth \$1.1 million. What tax consequence, if any, is triggered under Section 4960?
  - c. Fran is president of University. She earns \$3 million per year in salary. Her university has a leading medical school, which has a number of world class surgeons on staff. Ten of them earn \$5 million per year or more for the life-saving surgeries they perform. Are any of these surgeons covered by Section 4960? What about Fran?
  - d. Why do you think nonprofits need to disclose the compensation of their officers and directors on form 990? What tax issues are being policed?
  - e. Should there be salary caps for professionals at nonprofits?
  - f. Do you think it is problematic for nonprofit board members to be paid?
7. Andrea inherited a great deal of money from her mother, Betty. Andrea loves to hike in nature and moves with her four children to an estate in a rural area. The closest school is 50 miles away, and Andrea is concerned about the quality of the education there. She decides to establish a school and incorporates a nonprofit in order to do so. She contributes \$10 million and recruits a respected educator, Catherine, to run it, and Andrea, Betty, and her friend Dan, serve as the board of directors. The school, called the Excellence Academy, buys a plot of land adjacent to Andrea's estate.
- a. Assume that Andrea's four children are the only students enrolled in the school. Is the school eligible under Section 501(c)(3)?
  - b. What if Catherine makes a concerted effort to recruit other children, and advertises that Andrea's generous gift means that the school does not have to charge any tuition. Even so, the area is sufficiently isolated that the pool of potential applicants is very limited. As a result, only 10 children enroll (i.e., Andrea's four children and six others). Is the school eligible under Section 501(c)(3)?
  - c. What if the school has 20 children in each of its four grades, which means that each of Andrea's children has 19 classmates. Assume also that the school charges tuition -- and like other parents, Andrea pays it for her children -- but Andrea's generous \$10 million gift enables this tuition to be below market. Is the school eligible under Section 501(c)(3)?
  - d. Doesn't a university benefit its students and graduates more than it benefits the public at large? Do you think the law is wrong to classify universities as qualifying under Section 501(c)(3)?

8. In the 1990's, Congress added "intermediate sanctions" under Section 4958 to the tax law governing nonprofits.
- a. What was Congress's goal in enacting them? Why are they called "intermediate"?
  - b. Which types of nonprofits are governed by these rules?
  - c. In general, these rules cover "excess benefit" transactions involving "disqualified persons" or "DQPs." Who counts as a "DQP"? What is an excess benefit transaction?
  - d. When these sanctions are imposed, who is required to pay them?
  - e. Assume that a university pays its Provost \$5 million, and that the pay range for this position at comparable universities is between \$500,000 and \$1 million. The university president has signed off on this compensation. In principle, the I.R.S. can seek to revoke the university's exemption. Instead, it seeks to impose intermediate sanctions. On whom will these sanctions be invoked? Please estimate the amount of the sanctions. Is there a risk of a second round of sanctions? How can this second round be avoided?
  - f. Same as in "e," except that the \$5 million salary is paid to a Jane, a prominent computer science professor who is responsible for research and teaching, and has no administrative responsibilities. Can intermediate sanctions apply?
  - g. A community center is sued because one of its nursery school teachers was abusing children. It pays \$2 million to a Janet, a leading lawyer, to defend all 40 cases that have been filed. Janet has no other relationships to the community center, and she is billing at her usual (high) rate, which other institutions have regularly paid her. Could intermediate sanctions be imposed on the community center?
  - h. Please answer problems 1 a, b & c on pp. 480-81.

### Discussion Questions# 10

1. Political Activity as a Means of Advancing a Nonprofit's Mission (Please note that the answers to this question aren't in the reading).
  - a. If the goal of subsidizing charity is to advance the charity's mission (e.g., of providing care to vulnerable populations, educating future leaders, engaging in medical research, etc.) by *empowering private individuals* to experiment with new approaches -- free of government control -- would it make sense to subsidize lobbying and electioneering by nonprofits?
  - b. Does the answer change if the goal is to advance the charity's mission *by any available means*?
2. Market Failure (Please note that the answer to this question isn't in the reading).
  - a. Charitable subsidies are needed when the market does not produce enough of something that is socially valuable. Do you think this problem arises with lobbying? For example, are you concerned that vulnerable populations within society are less effective at lobbying than wealthy groups? If so, is that an argument for allowing a charitable deduction for lobbying expenses?
  - b. Who do you think is more likely to take full advantage of a deduction to fund lobbying--vulnerable populations or wealthy people?
3. Economies of Scope & Scale (Please note that the answer to this question isn't in the reading).
  - a. "Economies of scope" arise when it is more efficient to pursue two different activities within one organization. Can you give an example of this sort of economy of scope for political activity at nonprofits? (Hint: expertise).
  - b. Could there be economies of scale in fundraising for both lobbying and related charitable activities. Why?
  - c. When managers are given two different jobs to do, does that increase or reduce their discretion about how to spend their time? How might nonprofit managers and board members derive personal advantages from their nonprofits' political activity? Do you think the risk is the same for involvement in legislation, on one hand, and in campaigns, on the other?
  - d. Do you think nonprofits that lobby or endorse candidates would become less independent from government, and thus less free to test novel and even controversial ideas?
  - e. Campaigns and legislative battles can become heated. What risks do charities face in becoming involved in these contests?
4. Consequences for a Nonprofit of Lobbying

- a. What is the consequence if a 501(c)(3) organization engages in substantial lobbying? How do you think the IRS determines whether lobbying is substantial?
  - b. What excise taxes might apply?
5. Alan works for an environmental advocacy group, which receives tax deductible contributions as a 501(c)(3) organization. The organization brings lawsuits against polluters. Litigation strategies must be based on current law, and Alan regrets the constraint this imposes. He believes current law is not adequate to address risks of toxic chemicals and other pollution, as well as greenhouse gas emissions, and to protect habitats and endangered species. He approaches his boss, Betty, and urges her to allow him to launch a new “public policy” department for the organization. Alan reports that he has a funder who would cover his salary, along with the salary of staff members, to launch this effort. You are Betty’s friend, and she calls to ask you the following questions.
  - a. Alan plans to reach out to legislators about pending legislation to curb the use of pesticides, to express support for this legislation, to discuss a visit he made to a farmer who used pesticides and then became sick, and to emphasize that the organization’s loyal donors expect legislators to keep them safe. Is there any legal issue with this?
  - b. Alan plans to reach out to legislators with policy papers that include detailed facts and analysis of the costs and benefits of using pesticides, along with competing options for addressing these issues. Alan’s reports offer a sufficiently full and fair exposition of the pertinent facts to enable the reader to form an independent opinion or conclusion. In addition, Alan does not single out one of the options he discusses as the one he recommends; rather, he does not make a recommendation. Is there any legal issue with this?
  - c. The same as in “b,” but Alan does recommend one option, which is the one in legislation pending before the relevant legislative body (i.e., banning use of the relevant pesticides). Is there any legal issue with this?
  - d. Instead of the “direct” efforts to educate or influence legislators, Alan plans to focus on grassroots initiatives, which will educate or influence voters. Alan plans to send a brief mass mailing and email which gives notice that the legislature is considering a ban on pesticides, includes the anecdote about the farmer he visited (mentioned above), and urges people to reach out to their legislator to express support. Alan does not want to clutter the email -- he worries people won’t read something long -- so he won’t include any policy analysis in it. Is there any legal issue with this?
  - e. The same as “d” but instead of urging people to contact their legislator, the mailing gives the name and address of legislators who are viewed as

swing votes, but does not ask people to contact them. Is there any legal issue with this?

- f. Alan intends to publish a bi-monthly newsletter to collect and report all published materials, ongoing research, and new developments with regard to the use of pesticides in raising crops. The newsletter also will include notices of proposed pesticide legislation with impartial summaries of the provisions and debates on such legislation. The newsletter will not encourage recipients to take action with respect to such legislation, and will present information on both sides of the legislative controversy and will present such information fully and fairly. Is there any legal issue with this?
- g. Alan is satisfied that Charles, a member of the faculty of University, is qualified to do a comprehensive study of the effects of certain pesticides on health. Alan wants to make a grant to Charles to underwrite the cost of this study and will not control the content of Charles' output. Charles will produce a book which will conclude that the relevant pesticides should be banned. Charles' book will contain a sufficiently full and fair exposition of the pertinent facts, including advantages of the use of pesticides, to enable a reader to form an independent opinion as to whether pesticides should be banned as provided in the pending bills. Is there any legal issue about this?
- h. Alan wants to air a two-program television series relating to the pesticide issue. The first program will contain information, arguments, and conclusions favoring legislation to restrict the use of pesticides. The second program will contain information, arguments, and conclusions opposing legislation to restrict the use of pesticides. The programs will be broadcast within 6 months of each other during commensurate periods of prime time. Is there any legal issue about this? What if the second program will be broadcast at 7am on Sunday morning?
- i. Alan intends to produce an in-house study on pesticide X. A bill is pending in the U.S. Senate to ban the use of pesticide X. Alan's study will lead to the conclusion that pesticide X is extremely harmful and that the bill pending in the U.S. Senate is an appropriate and much needed remedy. The study contains a sufficiently full and fair exposition of the pertinent facts, including advantages of the use of pesticide X, to enable a reader to form an independent opinion as to whether pesticides should be banned as provided in the pending bills. In its analysis of the pending bill, the study names certain undecided Senators on the Senate committee considering the bill, but the study will not directly encourage readers to contact those legislators. Is there any legal issue about this?

- j. The same as in “i” except that, after stating support for the pending bill, the study will conclude: “You should write to the undecided committee members to support this crucial bill.” Is there any legal issue about this?
  - k. Alan will urge congressional committees to hold hearings on specific issues that are important to the organization’s mission. Is there any legal issue with this?
  - l. Alan will issue an annual report describing how various members of congress voted on specific legislation, but without characterizing votes as good or bad. Is there any legal issue with this?
  - m. Alan will go to legislator’s town halls and ask questions about environmental issues. Is there any legal issue with this?
  - n. Alan plans to engage in a robust social media and advertising campaign, reaching the largest possible audience, informing them that legislation is pending and urging them to contact their legislators to support it. He expects to devote approximately 30% of the organization’s annual budget to this effort. Is this a problem?
  - o. The same as “n,” but Alan intends to devote only 2% of the organization’s budget to this effort. The rest of the budget will be devoted to even-handed research. Is there any legal issue about this?
  - p. Alan intends to send an email only to the organization’s members -- not to the general public -- telling them that legislation that is relevant to the organization’s mission is pending, and expressing a view on this legislation. Alan will not ask members to do anything in the email, but will merely alert them that legislation is pending. Is there any legal issue about this?
  - q. The same as in “p,” but the email asks members to contact their legislators and to tell others to do so. Is there any legal issue about this?
  - r. Assume that Congress is holding a hearing on a bill that would deny 501(c)(3) status to environmental organizations. Alan is invited to testify in opposition to this bill. If he accepts this invitation, will this testimony (which relates to specific legislation) be treated as the sort of lobbying that can jeopardize the organization’s 501(c)(3) status or trigger other penalties?
6. Why might a nonprofit elect to be tested under the “expenditure test election” instead of the “no substantial part” test? (Note that we are not covering the details of this election).

### Discussion Questions# 11

1. Consequences of Electioneering
  - a. 501(c)(3) organizations can engage in some lobbying, as long as it is not “substantial.” Does Congress take the same approach with electioneering?
  - b. Can electioneering cause 501(c)(3) organization to lose its 501(c)(3) status?
  - c. What other penalties could apply?
2. Electioneering
  - a. Let’s return to Alan and Betty. Alan recognizes that a lot rides on the outcomes of various elections. Alan sets up a voter registration station at the nonprofit’s office. All are welcome to register there and there are no materials or signs favoring one candidate over another. Is there any legal issue with this?
  - b. The week before an election, Alan’s team sets up a phone bank, calling registered voters. They ask about the voter’s views of environmental issues. If the voter’s views are aligned, they end the call by encouraging them to vote. They do not include this language if the voter’s views are inconsistent with the organization’s views. Is there any legal issue with this?
  - c. Alan plans to meet with candidates for congress and state legislatures, describe the organization’s key policy priorities, and seek commitments from them to support these priorities. If a specific candidate agrees, he will email the organization’s email distribution list, reporting the candidate’s commitment to the organization’s priorities, and urging the reader to vote for this candidate. Is there any legal issue with this?
  - d. Alan plans to distribute on the organization’s email list a chart summarizing the environmental positions of all the candidates in the election. He will not include any “bottom line” about which candidate to support. Is there any legal issue with this?
  - e. There are two candidates in the relevant election. Alan plans to invite each of them to speak at separate events. Alan plans to invite Candidate X (whose positions align well with the organization’s) to give introductory remarks at the organization’s annual fundraising auction, which is quite well attended. He plans to invite Candidate Y to speak at a 7am breakfast the next morning. Attendance at these breakfasts usually is sparse. Is there any legal issue with this?



- f. In the local congressional election, Candidate A supports a carbon tax, while Candidate B opposes a carbon tax. Alan and the organization are staunch supporters of a carbon tax. They publish a report on the importance of a carbon tax and distribute it widely in the weeks before the election. The report does not mention Candidate A & B or the election. Is there any legal issue with this?
  - g. Same facts as “g.” At the organization’s annual dinner, which is two weeks before the election, Alan holds up the report during his remarks and says, “A carbon tax is critical to our future. You all know that. We have an election coming up. I can’t tell you who to vote for, but I urge you to think carefully about your vote.” Is there a legal problem with this?
  - h. Can Alan endorse a candidate in his personal capacity?
  - i. Alan posts a weekly blog on the nonprofit’s website, which usually includes a discussion of some aspect of the nonprofit’s work. In the week before an election, Alan devotes his blog post to a discussion of the candidates and concludes the post by saying, “In light of this analysis, it is clear that Candidate X is better aligned with our mission.” Is there any legal issue with this?
  - j. Can Alan share the organization’s email distribution list with the pro-green candidate in an election? He is not going to share it with the other candidate.
  - k. Alan wants to contribute the nonprofit’s funds to political campaigns. Is that permissible?
3. *Regan v. TWR*
- a. What was the mission of the nonprofit in *Regan v. TWR*? What were the facts? What was the issue in the case? Was the debate about the relevant statute or about the constitution?
  - b. How did the Court come out? What was the rationale? Did you agree?
4. In *Citizens United* (which was not assigned in the reading), the Court held that limiting independent political spending from corporations and other groups violates the first amendment right to free speech.
- a. To defend the constitutionality of the limits on political spending by corporations, the government claimed that *Citizens United* was not burdened by campaign expenditure limits, because it could mitigate those limits by establishing a separate PAC. Do you see a parallel to the reasoning in *TWR*? What is it?
  - b. In *Citizens United*, the Court waived aside the PAC alternative as too burdensome—and therefore not an effective answer to the concern that limits on corporate campaign contributions violated the first amendment scrutiny. How does the Court’s rationale in *Citizens United* compare with its rationale in *TWR*?

5. Alternative structures

- a. Returning to Alan and Betty, assume that Alan wants the organization to endorse candidates and to support specific legislation. What structure can they adopt to allow him to do so? What is the downside of this structure?
- b. What are the costs and benefits of using a “527” instead of a 501(c)(4)?

### Discussion Questions# 12

1. In deciding whether revenue was tax exempt, the Supreme Court offered what came to be known as the “destination test.”
  - a. What did this test provide?
  - b. Under the Unrelated Business Income Tax, is the focus still on the “destination” of income or on another factor?
2. Eligibility Under Section 501(c)(3)
  - a. Does the UBIT regime affect whether a nonprofit is eligible for Section 501(c)(3)?
  - b. Can a nonprofit that engages in profit-generating activities unrelated to its mission still be exempt on its other income--that is, the income that actually is related to its mission? What is the test?
  - c. As a tax advisor, how would you operationalize this test? How would you decide if a nonprofit has crossed the line?
  - d. Would it help to put unrelated business activity in a corporate subsidiary?
3. Felice is a loyal graduate of Great Law School. After practicing law for a few years, she starts a business, Heat & Light, a high-end chain of fitness centers and an associated line of exercise equipment and apparel. The business earns millions of dollars in profits every year. Felice credits Great Law School for her success, and donates the business to Great Law School. GLS uses this revenue to fund financial aid for students and to increase the size of the faculty. By the way, Felice held the business in a “single member limited liability company,” an entity that is disregarded for tax purposes. This means that she -- and then Great Law School, the new owner of this LLC -- are regarded for tax purposes as directly owning these assets.
  - a. If the destination test was still the governing rule, would GLS pay tax on profits from the business?
  - b. Under current law, what would be the tax treatment of this income?
  - c. Assume that “Heat and Light” generates 1/2 of GLS’s net income. Does owning this business create a tax issue for GLS? If it does, what can GLS do to avert this tax issue?
  - d. Instead of “Heat and Light,” assume that Felice’s business is a database of legal news and information (which, as a shorthand, she calls “Like Bloomberg, but for lawyers”). Would GLS have to worry about losing its tax exemption?
4. Tax rules are sometimes enacted to address inequity, and sometimes to address inefficiency. (Inefficiency in this context means that a tax rule changes behavior,

causing taxpayers to take steps they would not otherwise take.) Obviously, tax reforms are sometimes meant to address both.

- a. What is the equity or fairness rationale that is commonly invoked for the UBIT regime? Who arguably is treated unfairly when tax exempts compete with for-profit firms?
  - b. What is the efficiency rationale for taxing the unrelated business income of nonprofits?
  - c. Under the destination test, does GLS have an incentive to invest its endowment in active businesses (such as “Heat & Light”), as opposed to passive investments (such as bonds or commercial or residential real estate)?
5. Under Section 513(a), what are the three conditions that must be satisfied in order for a nonprofit’s activities to be subject to UBTI?
6. *American College of Physicians*
  - a. What were the facts? What was the issue in the case?
  - b. Is there any dispute about whether selling advertising is a trade or business? Or whether the publication carried on this activity regularly?
  - c. What was the taxpayer’s argument about the relationship between the advertising and its mission? What was the government’s argument?
  - d. How did the Court come out? Did you agree?
  - e. Why did the Court analyze the sale of advertising as a separate trade or business? Why wasn’t this activity just a subset of the broader trade or business of publishing a medical journal?
7. College Athletics & Gift Shops
  - a. Rev. Rule 80-296
    - i. What is the issue? What answer does the government give? Do you agree or would you have come out differently?
    - ii. By the way, what is a revenue ruling? How authoritative is it? What is the difference between a “published” and a “private” ruling?
  - b. Rev. Rul. 73-104
    - i. What is the issue? What answer does the government give? Do you agree or would you have come out differently?
  - c. Rev. Rul. 73-105
    - i. What is the issue? What answer does the government give?
    - ii. Do you agree with the distinction between selling prints and selling science books and materials about the city?
8. Let’s discuss pp. 635-36: problems 1(a), (b), (c), (d), (f) & (g); 2(a), (b), (c) & (e).
9. University is considering three different uses of its endowment. You are their tax advisor.

- a. Under option 1, University would spend \$5 million to buy a factory that manufactures noodles. (The University would own the factory directly and would not hold it through a subsidiary). Is the revenue UBTI?
  - b. Under option 2, University would spend \$5 million to buy stock in Food Conglomerate, one of the world's largest publicly-traded food producers. University would receive periodic dividends and would hope also to sell its stock at a gain. Are the dividends taxable as UBTI? What about the capital gains? See Section 512(b)(1).
10. Museum owns a building to display its collection, as well as an office building next door to house its administrative staff. Dalia, who is Museum's Director, realizes that some administrative functions can be conducted miles away from the museum, where space is cheaper.
  - a. Dalia leases offices in Museum's office building to Law Firm for \$300,000 per year. Is this rental payment UBTI? See Section 512(b)(3).
  - b. Same as "a," but Dalia also includes desks, chairs, tables, a microwave, and a coffee machine. Must any of the rental payment be taxed, assuming this personal property is of only modest value? See Section 512(b)(3).
  - c. Dalia leases space to a tech startup, and Museum receives 10% of the startup's revenue in return for the space. Is this rent taxable? See Section 512(b)(3).
11. *Rensselaer Polytechnic Institute ("RPI")*
  - a. What are the facts of the case? What was the issue?
  - b. What was the taxpayer's position? What was the government's position?
  - c. How did the court come out? Do you agree?
12. University has a stadium that is used by its athletic teams for both practices and for games, and also is rented out for concerts and other events. To keep the numbers round, assume there are 360 days in a year, instead of 365. Students use the stadium for 180 days in a year. The stadium is rented out for events (unrelated to University's mission) for 90 days a year, and the stadium is not used at all on the other 90 days in the year. Assume that University has \$1 million of fixed costs operating the stadium each year, including depreciation expenses and personnel).
  - a. Using the government's methodology in RPI, how much of the expenses can University deduct?
  - b. Using the University's methodology, how much can they deduct?
13. If a tax exempt loses money in one of its unrelated businesses, can it use those losses to avoid tax on another unrelated business? See Section 512(a)(6).

### Discussion Questions #13

1. Distribution and the Charitable Deduction
  - a. During the Coronavirus pandemic, Congress authorized a charitable deduction for non itemizers for cash donations of up to \$300. Congress had considered this idea before. Why?
  - c. Why do some commentators argue that the charitable deduction is an “upside down” subsidy?
  - d. Does this same critique apply to the charitable deduction in the estate and gift tax?
  - e. Why might charities oppose the repeal of the estate tax? Why might they hesitate to state this position publicly?
  - f. If we want to administer a matching program through the tax system, but without this “upside down” effect, what change could we make?
  - g. Is it possible to apply a different tax rate to income, on one hand, and to deductions, on the other?
  - h. Economists argue that the marginal subsidy for an activity should equal the marginal benefit from the subsidized activity. For example, if technology that reduces air pollution creates a public benefit that is worth \$1 million -- but no individual has the incentive to pay for it -- this technology should get a \$1 million subsidy. So this means that a subsidy should be calibrated to the benefit it is producing.
    - i. Can this be done through the tax system? Can it be done in a system that awards funding without making a judgment about the merits of what is being funded?
    - ii. Is a deduction -- which depends on the donor’s tax rate -- likely to approximate this benefit?
2. Subsidizing Charitable Giving by High Income Taxpayers: Potential Rationales
  - a. Subsidies are supposed to influence behavior (e.g., by persuading someone to do something valuable that they would not otherwise do).
    - i. Do you know what the term “elasticity” means?
    - ii. As a taxpayer, how do you feel about subsidizing something that someone would do anyway? Do you prefer to subsidize behavior that is elastic or inelastic?
    - iii. Compared with someone who has a low income, do you think it is easier or harder for someone with a high-income to give away more money in absolute terms? What about as a percentage of income?

In other words, do you think charitable giving is more or less elastic for wealthy donors?

- b. Assume that our goal is to channel resources where they do the most good, and that Charity X would use money in a socially valuable way. In a (very) stylized example, assume that \$1 generates 10 units of welfare if given to Charity X.
    - i. If a donor gives a dollar to Charity X, the net social gain is actually less than 10 units of welfare. Why? (Please note the word “net”).
    - ii. Why might the net social benefit vary with the donor?
    - iii. Is there a reason to think that the net social benefit is likely to be greater if a donation comes from high-income donors instead of from low-income donors? For purposes of this question, please assume that the donation is going to the same charity (“Charity X”), regardless of which donor is donating. In other words, this question is NOT about the charitable choices a donor would make.
  - c. There is a concern that high marginal tax rates discourage high-income taxpayers from working and investing. If this is the case, how might the charitable deduction mitigate this source of inefficiency? In this case, does the subsidy have to be “upside down”?
3. Bill Andrews argued that the charitable deduction is not a subsidy. To be a subsidy, a rule must provide different treatment than the tax system otherwise would. Andrews argued that money contributed to charity is not properly considered income under general income tax principles, at least as they are properly understood.
- a. What definition of income does Andrews use in order to exclude charity? He invokes “2,000 years of religious, philosophical, and ethical views”? Do you find this argument persuasive?
  - b. One of his arguments focuses on soup kitchens and other initiatives targeting low income groups. What is his argument? Do you find it persuasive?
  - c. Andrews acknowledges that some charity is directed at education, the arts, and other causes that are not necessarily focused on vulnerable populations. What is his argument for this sort of charity? Do you find it persuasive?
  - d. Andrews draws an analogy between charity, on the one hand, and overpaying employees, undercharging clients, or volunteering services, on the other. What is his argument? Do you find it persuasive?
  - e. Andrews acknowledges two counter-arguments, which relate to 1) the control a donor exerts over charitable contributions; and 2) the satisfaction she derives. What are these arguments? Do you find them persuasive?

4. Rev. Rul 63-253

- a. Under Section 170(c)(2)(A), can taxpayers deduct a charitable deduction to a charity organized overseas?
  - b. If a U.S. taxpayer wants to support an overseas cause, how can she do it? What must they avoid doing?
5. Since 2017, the state where Jason lives has been awarding a 70% state tax credit for charitable contributions to “The State Improvement Fund,” a charity organized by the state which funds key services offered by the state government.
  - a. In general, are contributions to the federal government, as well as to state and local governments, deductible charitable contributions?
  - b. What change in the federal tax law motivated the state to create this fund and offer this 70% credit?
  - c. The federal government has indicated that it will disallow the deduction for 70% of Jason’s contribution. Why?
6. Return Benefits
  - a. If a taxpayer receives a benefit in return for a charitable contribution, is the entire deduction disallowed?
  - b. For example, if Kate contributes \$10,000 and receives a dinner worth \$200 in return, is the entire \$10,000 deduction disallowed? What is the rule?
  - c. What if Kate does not want to go to the dinner? What can she do to maximize her tax deduction?
7. Larry earned \$1 million in 2020, and contributed the entire amount to his private foundation.
  - a. Does he owe any tax in 2020?
  - b. Does the answer change if he gives this money to Columbia Law School?
  - c. Assume that Larry gives \$350,000 to Columbia Law School and \$200,000 to his private foundation. How much can he deduct? See Section 170(b)(1)(B).
  - d. Do you think it’s harder for Larry to give away his first dollar of earnings in a year or his last dollar?
8. Assume that the median household gives 1% of their income to charity.
  - a. If the purpose of the charitable subsidy is to motivate people to give gifts they would not otherwise give, does it make sense to subsidize gifts of less than 1% of someone’s gross income?
  - b. Do you agree or disagree with the following statement: “If the purpose is to induce gifts that would not otherwise be given, then the 30% and 50% limits on charitable deductions are another way in which the subsidy is “upside down.” Instead of subsidizing the first dollar, we should subsidize the last.”
  - c. What do you think the rationale is for the 30% and 50% limits?
9. Let’s discuss the following problems on pp.888-89: a, b, c, f, g, hi, i, j, l.



### Discussion Questions #14

1. Tax benefit of donating appreciated stock
  - a. What is the benefit of donating appreciated stock?
  - b. Assume that Iris founded a high tech startup, which has gone public. She earns a high salary from the company. If she donates \$1 million of cash to charity and there is no deduction for charitable contributions, how much does the donation reduce the amount available to her for private consumption? In other words, how much does the donation really cost her?
  - c. Assume now that the contribution is deductible, and that Iris is in the top bracket. Since she lives in New York City, her combined federal, state, and local tax rate is approximately 50%, so let's assume it's 50% to keep the numbers round. How much does the donation reduce the amount available to her for private consumption? In other words, how much does the donation really cost her?
  - d. Assume that Iris has a zero basis in her shares (which is another way of saying that she paid nothing for them), that she has owned them for ten years, and the shares now trade for \$100 per share. The federal tax on appreciated stock (so-called capital gains) is (usually) lower than on ordinary (e.g., salary) income, so her combined tax rate is approximately 35% (and, again, let's assume 35% to keep the numbers round). If Iris sells 10,000 shares, she receives \$1 million. How much does she get to keep after taxes? How much of the \$1 million is available to her for personal consumption?
  - e. If Iris donates \$1 million of appreciated stock to charity, can she deduct the fair market value (\$1 million) or her basis (zero)? See Section 170(e) (1). Does the government ever tax the appreciation of the stock? Does it ever collect this \$350,000?
  - f. If Iris can use \$1 million of appreciated stock to shelter \$1 million of salary income, she frees up \$500,000 of salary income for her own consumption, which she otherwise would have had to pay in tax. How much less is this than she would have if she sells the stock, instead of contributing it to charity? In effect, how much does donating \$1 million of stock cost her (in terms of reduced personal consumption)?

## 2. *Blake*

- a. Let's start by focusing on what is at stake in this case. Assuming the form in this transaction is respected, what did the taxpayer donate to the Kings Point Trust of the U.S. Merchant Marine Academy ("the Academy")? What did the Academy do with this asset? What was the amount of the taxpayer's deduction?
- b. If the form is respected, how much is the taxpayer's charitable deduction?
- c. Again, assuming the form is respected, what asset did the taxpayer sell to the Academy? How much did the Academy pay?
- d. Assuming the form is respected, what are the taxpayer's tax consequences in selling the asset he claims to have sold to the Academy?
- e. Shortly after buying this asset, the Academy sold it. How much did it receive? Is this fact helpful or harmful to the taxpayer's tax argument?
- f. At the end of the day, how much did the Academy actually keep from this transaction? How does this compare with the deduction the taxpayer claimed?
- g. Instead of respecting the form of the transaction, the government invokes a doctrine that, it claims, entitles it to disregard the form. What doctrine does it invoke?
- h. Under the government's recharacterization, what did the taxpayer sell to the Academy? What did the taxpayer donate? What were the tax consequences of the sale? How much was his charitable deduction?
- i. Is it a good idea to donate an asset with a built-in loss to charity?
- j. How did the Court come out? What was the relevance of promissory estoppel? Did you agree? Can the step transaction still be applied even if there is no legal obligation to proceed with subsequent steps, but parties clearly intended to proceed and had an understanding that they would proceed?
- k. If you were advising the taxpayer on this transaction (before they had done it), what changes would you suggest in order to strengthen their tax position?

## 3. Ordinary Income Property

- a. Alejandro purchased 1,000 shares of XYZ for \$20 per share in January. Over a year later, when the shares were trading at \$100 per share, he contributed these shares to Goodwork, a 501(c)(3) organization. How much can Alejandro deduct? Assume that Alejandro is subject to a 40% marginal tax rate on ordinary income. How much does the deduction reduce his tax bill?
- b. Same as "a," but Alejandro donates the shares after owning them for 5 months. Must he pay tax on the built in gain? How much can he deduct? How much tax does he avoid?

- c. Same as “b,” but assume instead that Alejandro sells 1,00 shares for \$100,000 in July (after holding the stock for 6 months). How much tax does he owe?
  - d. Same facts as “c,” and Alejandro also donates \$100,000 in cash to charity. How much tax does he avoid? Putting parts “c” and “d” together, how much tax (on net) does he owe?
  - e. What is the issue in Rev. Rul. 79-256? What are the two scenarios? What is the IRS’s conclusion?
  - f. What would the taxpayers in the ruling have had to do to change the result?
4. Tangible Personal Property
- a. Bart, a graduate of Columbia Law School, is an avid art collector. He bought a painting five years ago for \$10,000, which is now worth \$200,000. He offers to donate the painting to the law school. “You can hang it in your office or you can sell it, whatever is best for the school,” he tells the dean.
    - i. Why might Bart be better off donating the painting to an art museum? See Section 170(e)(1)(B).
    - ii. What if the painting is used in a class on art and the law?
    - iii. If Bart does contribute it to a museum, why might he stipulate in the gift agreement that the museum can’t sell the painting for three years? See Section 170(e)(1)(B) & (e)(7).
  - b. What was Congress’s concern about donations of used cars and how did Congress respond? See 170(f)(12).
  - c. Same question for contributions of household items? See 170(f)(16).
5. Christine owns 1,000 shares of stock that she purchased for \$30,000. The shares are now worth \$100,000 per share, for a total value of \$100,000.
- a. If Christine sells the shares to Dan for their \$100,000 fair market value, what are her tax consequences?
  - b. Assume instead that Christine sells the shares to Charity for \$40,000. Can she claim a deduction? If so, for how much?
  - c. How much (if any) of the \$40,000 that Christine receives is taxable? Put another way, how much (if any) of her tax basis can she use?
6. Future Interests and Easements
- a. Eleanor owns a Tiffany window that is worth \$100,000. Each morning, she loves to look at the window as light streams through it. She commits to give the window to her local art museum upon her death. Can she claim a current deduction for the window? See Section 170(a)(3).

- b. Frank purchases a 15 acre plot of land with a large weekend home in the Hamptons, paying \$20 million. He provides an easement to a local land trust which provides as follows: "The primary purpose of this Easement is to enable the Property to remain in conservation use for flood management and wildlife habitat. Secondary uses include open space and recreation. This Easement will preserve and protect in perpetuity these conservation values, the Property's character, use, and utility, and prevent any use of the Property that would significantly impair or interfere with its conservation values, character, use or utility." He and the land trust value this easement at \$1 million.
- i. Are conservation easements deductible? See Section 170(f)(3) & Section 170(h).
  - ii. What methodology is used to value them?
  - iii. Do you think the value of Frank's property has declined by \$1 million? Is he giving up the right to do something he would otherwise have done?
  - iv. Why do you think aggressive valuations are common in conservation easements?
7. What process does the IRS require for gifts of property worth more than \$5,000? What penalties are imposed if the taxpayer does not follow this process? Or misstates the value of a donation?

### Discussion Questions # 15

1. Anthony is a wealthy entrepreneur who would like to dedicate \$10 million of philanthropy to addressing climate change. You are Anthony's attorney. He calls to say he is considering making a \$5 million give to Better Environment ("BE"), a public charity that supports research, efforts to educate the public, and various climate mitigation initiatives. But Anthony is not entirely sure that he wants to support Better Environment, as opposed to other nonprofits. He would like to make the \$5 million gift during the current tax year, so he can claim the deduction. He plans to contribute appreciated stock in Tech, the company he started, which is publicly traded and has a market capitalization of \$500 million (and Anthony currently owns \$60 million in stock). As founder of the company, his tax basis in this stock is a zero. Instead of making a \$5 million gift this year to BE, what else could he do to get a charitable deduction this year, while still waiting to firm up the details about how this money will be used? Please suggest three options.
2. Anthony decides to create a private foundation. To fund it, he gives \$5 million in appreciated Tech stock.
  - a. How much can Anthony deduct in the current year. Assume he is well compensated as the CEO of a public company, so that his adjusted gross income is \$5 million each year. See Section 170(b)(1)(B), (D).
  - b. If the foundation sells the stock as soon as it receives it, does the foundation have any tax consequences in making this sale? See Section 4940(a), (c)
  - c. If the foundation keeps the stock and makes grants in stock (rather than in cash) to BE and other public charities, do these charities have any tax consequences if they sell the stock. See Section 4940(c).
  - d. Is there any economic or legal issue if the foundation decides to keep 100% endowment invested in Tech stock? See Section 4943(c); Section 4944(a).
  - e. Can the foundation hire Carla, Anthony's daughter, to administer the foundation and pay her with foundation funds? See Section 4942(a), (g)
  - f. Instead of making grants to other charities, can the foundation run educational and other programs on its own? Does the tax law treat this sort of foundation more or less favorably than a grant-making foundation? See Section 170(b)(1)(A)(vii) & (F).
3. Anthony decides to create a donor advised fund instead of a private foundation. To fund it, he gives \$5 million in appreciated Tech stock.

- a. How much can Anthony deduct in the current year. Assume he is well compensated as the CEO of a public company, so that his adjusted gross income is \$5 million each year.
  - b. If the DAF sells the stock as soon as it receives it, does the DAF have any tax consequences in making this sale?
  - c. If Anthony advises the DAF to make a grant to Better Environment, is the DAF obligated to do so? If not, what do you think the DAF will do?
  - d. Can the DAF hire Carla, Anthony's daughter, to administer the foundation and pay her with DAF funds?.
4. Anthony decides to establish a supporting organization for BE. See Section 509(a)(3).
  - a. In doing so, is Anthony effectively deciding that the funds will go to BE?
  - b. What role can Anthony personally play in deciding how the money will be used? How is this arrangement different than if Anthony made a gift to BE?
  - c. How much can Anthony deduct in the current year. Assume he is well compensated as the CEO of a public company, so that his adjusted gross income is \$5 million each year.
  - d. If the supporting organization sells the stock as soon as it receives it, does it have any tax consequences in making this sale?
5. On January 1, 2021, Danielle contributed \$30 million to create a family foundation. She and her husband, Edward, and her daughter, Florence, and her attorney, George, serve as the foundation's board. Danielle has hired Helen to be the professional manager of the foundation. The Foundation pays Helen \$100,000 annually to play this role.
  - a. Since 2021 was a good year for the foundation's investments, the foundation has \$3 million of profit on its investments, so the endowment is worth \$33 million before the foundation makes any grants. How much is the foundation required to distribute in order to avoid an excise tax? See Section 4942.
  - b. What do you think is the rationale for requiring this minimum level of spending and grant-making? Is there a parallel requirement for public charities? If you were the chair of the House Ways and Means Committee, would you preserve this rule or try to change it?
6. Please assume the same facts as in question 5. Please assume that the \$3 million in profit was "realized," and is not unrealized appreciation.
  - a. Does the foundation owe any tax?
  - b. Why did Congress impose this tax on foundations? Does it apply to other nonprofits? If you were the chair of the House Ways and Means Committee, would you preserve this rule or try to change it?

7. Please assume the same facts as in the two previous questions. After distributing \$1.550 million in grants, \$100k in salary, and \$41,700 in tax in 2020, the foundation's endowment at the beginning of 2020 is \$31,308,300. Assume that the foundation's endowment shrinks by 20% in 2021 and is \$25,047,000 at the end of the year.
  - a. Even though the foundation has no income, must it make a distribution to avoid an excise tax? See Section 4942.
  - b. Does the foundation owe any tax?
8. Please assume the same facts as in the preceding questions. Danielle is launching a new business venture. She needs to borrow some money. A bank is offering her a \$10 million loan at a 5% interest rate. She is disappointed at the endowment performance in 2020, and is considering borrowing this money from the foundation and paying 4%. Her thought is that she needs to borrow this money and pay this interest rate anyway, and would rather pay it to the foundation, so the interest she pays can fund the foundation's good work.
  - a. You are Danielle's lawyer. Is there any legal issue here? See Section 4941.
  - b. What is the policy rationale for the relevant rule? Do you agree with it?
9. Please assume the same facts as above. Assume that Danielle founded a successful company, Danielleco. The company is now publicly traded with a market capitalization of \$300 million, and Danielle's stake (before making her gift to the foundation) was worth \$75 million. She funded her gift to the foundation with \$30 million of Danielleco stock.
  - a. There are two legal issues with keeping this stock. What are they? Do these legal issues mean that the Foundation cannot hold any?
  - b. If the Foundation has to sell this stock, must it do so immediately?
  - c. What are the policy rationales for the relevant rules? Do you agree with these rationales?
10. Please assume the same facts as above (one last time). Danielle remains in close touch with her college roommates, and calls you with the following questions. See Section 4945.
  - a. One of Danielle's roommates, Irene, is running for Congress. Danielle would like to support her campaign. Can the foundation be the source of these funds?
  - b. Another roommate, Janet, is a freelance journalist, who wants to write a book about charter schools and education policy. Danielle would like to provide funding for the book, so Janet can devote all of her time to it. As a policy matter, does this result seem right to you?
  - c. Kim, Danielle's other roommate, has formed a for-profit benefit corporation, "Green and Delicious," which is supposed to earn a profit while also doing good in the world. Kim's goal for Green and Delicious is

to open a chain of restaurants that use locally sourced ingredients in order to have a lower carbon footprint than other restaurants. Can Danielle use foundation funds to support Green and Delicious? As a policy matter, does this result seem right to you?

11. Why has Congress imposed fewer restrictions on public charities than on private foundations? Do you agree with this policy?
12. Lawrence is an extremely successful entrepreneur, who believes in higher education. Instead of supporting his alma mater, he donates \$500 million to create a new liberal arts college, "Lawrence College." He anticipates that this funding should be sufficient to enable the college not to charge tuition or to engage in significant fundraising. Assuming the \$25 million of endowment income is, indeed, sufficient, is Lawrence College a private foundation or a public charity? See Section 509(a)(1). Do you agree with the relevant rule?
13. Margaret is not happy with the congregation where she worships. She feels that the professional and lay leadership do not share her religious values. Margaret is very wealthy, and contributes \$30 million to found a new congregation. This endowment is sufficient to cover all of its expenses. Is this new house of worship a private foundation or a public charity? See Section 509(a)(1). Do you agree with the relevant rule?
14. Let's review problems 1 and 2 on pp. 745-47.



### Discussion Questions # 16

1. Disqualified person
  - a. What is the significance of being a disqualified person with respect to a private foundation?
  - b. In general, who count as disqualified persons?
  - c. Can someone who is treated as a disqualified person ever avoid this status? If so, how?
2. Adam, a hedge fund manager, creates a private foundation. He gives \$5 million and his wife, Betty, gives \$5 million on January 1, 2021. Unfortunately, Adam and Betty die shortly thereafter in a car accident. Carlos, who is Adam's partner at the hedge fund, makes a \$10 million donation to the foundation in Adam's honor, and continues to give \$1 million each year. Diane is Adam and Betty's only child. She never makes a gift to the foundation. Neither does her parent's estate.
  - a. On February 1, 2021, is Diane a disqualified person?
  - b. On February 1, 2031, is Diane a disqualified person?
  - c. On January 1, 2022, Diane joined the board of the foundation (at Carlos' invitation), but she concluded her service on December 31, 2023. On Feb 1, 2031, is she a disqualified person?
  - d. Same facts as "c." Is Diane a disqualified person on February 1, 2034?
  - e. Same facts as "d." Please also assume that Diane has a brother, Edward, who serves on the foundation board from the time of his parent's death until 2035. Is Diane a disqualified person on Feb. 1, 2034?
3. The reading mentions four ways for a 501(c)(3) organization to qualify as a public charity, instead of a private foundation. What are these four ways? (Note that there is also another way--qualifying as a support organization--but we will not focus on this alternative).
4. Felice was once a professor of art history at an elite university, but she left that post--frustrated by academic politics and various other shortcomings she observed at the university--to found a successful business, which is now a public company. Her shares are worth over \$1.5 billion.
  - a. Felice decides to found and endow "Felice College" with a \$200 million gift. She hired a college president, Gail, and Gail has built a faculty for both a college. Over 1,500 students are enrolled. Assume that Felice is the only donor (so far) and that she is chair of the board. Is Felice College a public charity or a private foundation?
  - b. Felice is very unhappy with her church. She finds the rituals uninspiring and does not like the minister. She decides to found a new church, the

Church of Felicity and Salvation, with a \$30 million charitable gift. She is chair of the board. She has hired a minister, who is dynamic and effective, so the congregation is growing. Is the church a public charity or a private foundation?

- c. Felice decides to create an art museum, contributing \$250 million to build a building and to assemble a collection of contemporary art. She hires an executive director and a staff. Felice is chair of the board, and recruits 10 other people to serve on the board, requiring each to contribute \$1 million to the museum. Admission to the museum is free and the museum has no other donors. Virtually all of the expenses are covered by investment returns from Felice's gift. Is the museum a public charity or a private foundation? What analysis do you need to do to answer this question? Is the analysis more complex than in parts "a"--"c"?

5. Public support

- a. Why do you think Congress distinguishes between public charities and private foundations? Why is it more lenient with public charities?
- b. Putting aside the "per se" public charities, what are the key factors in determining whether an organization is a public charity? As a policy matter, why are these relevant?

6. Harry once dreamed of running for public office, but his parents drafted him to run the family business instead. The company went public, and Harry's stock is worth \$600 million. Since Harry has remained interested in public policy, he launched a think tank, "Social Mobility in America" or "SMA," which focuses on developing policies to promote economic growth and social mobility. The think tank offers fellowships to academic experts, who produces original research. These fellows also write books, which SMA publishes and sells. The think tank also convenes panels and conferences on cutting edge issues of public policy. People pay to attend these conferences. As a 501(c)(3) organization, the think tank does not endorse candidates or lobby for specific legislation. Fifteen years ago, Harry gave a \$40 million endowment to launch the organization., SMA is now in its 15th year of operations and you have been asked to determine whether it is a public charity. The following table shows SMA's sources of funding to cover its \$7.5 million budget during the current year and the preceding four years. As you will see, Harry has been phasing out his support:

Year	Gifts from Harry	Gifts from Public	Revenue from	Unrelated business	Investment	Total Budget
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			mission	income (net of taxes)	Income	
11	\$2.5M	600k	\$2M	400k	\$2M	\$7.5M
12	\$2.5M	\$750k	\$2.1M	200k	\$2M	\$7.5M
13	\$500k	\$1M	\$3.25M	\$500k	\$2.25M	\$7.5M
14	\$250k	\$1.3M	\$3.5M	\$150k	\$2.25M	\$7.5M
15	\$100k	\$1.5M	\$3.4M	\$250k	\$2.25M	\$7.5M
Total	\$5.85M	\$5.15M	\$14.25	\$1.5M	\$10.75	\$37.5

- a. Since ASM is a think tank, is it a “per se” public charity?
- b. Mathematical test under Treas. Reg. 1.170A-9(f)(2)
  - i. What condition must SMA satisfy to pass the mathematical test?
  - ii. Which of the items above count as part of “total support”?
  - iii. How much total support is there over five years?
  - iv. Which items from the above table count as public support? Please assume that the gifts described as “gifts from public” are all less than \$10,000 per year and are all from unrelated people
  - v. Does SMA pass the mathematical test?
  - vi. By the way, why is there a rule for “unusual grants” in 1.170A-9(f)(6)(ii)? (Note that there are no unusual grants in this problem.)
7. Facts and Circumstances Test of Treas. Reg. 1.170A-9(f)(3)
  - a. Please assume the same facts as in 6. In general, what must SMA show to satisfy the facts and circumstances test? What are the key factors?
  - b. Assume the following additional facts. Harry has hand-picked the board, which is composed of colleagues from his business, his brother and sister, and his college roommates. These board members provide most of the donations that Harry himself does not provide. Although the organization’s ambition is to publish a significant volume of publications, this ambition has not been realized, but they did raise significant revenue from selling Harry’s memoir (since he bought 100,000 copies and has given them away to anyone who will take them). The policy conferences are “invitation only,” and Harry is involved in determining who is on the list. In applying the facts and circumstances test, what is your conclusion?

- c. Instead of the facts in “b,” please assume the following facts instead. Harry is chair of the board, but the rest of board includes ten retired Senators and cabinet members from both parties and five members of the business community (selected in part for their generosity), who were recruited mostly by the retired politicians; Harry was not close to any of them before they joined the board. SMA has a very strong marketing team, and they raise  $\frac{2}{3}$  of their public donations through online marketing (in gifts of \$500 or less). Some members of the board also are generous (five of them have each given \$400k over the past five years). The board is fairly hands off, and defers to Irene, a former White House staffer who is the think tank’s executive director. Under Irene’s leadership, SMA produces 30 research reports and 5 books each year--more than many other think tanks its size. Some conferences are invitation only and off the record but most are open to the public and streamed online. In applying the facts and circumstances test, what is your conclusion?
8. 509(a)(2) Test
- a. What is the difference between the test under Section 509(a)(2) and the test under Treas. Reg. 1.170A-9? What factor is considered under the former but not the latter?
  - b. Under Treas. Reg. 1.509(a)--3(a), what two conditions must a nonprofit satisfy to qualify as a public charity?
  - c. Again, please assume the same facts as in “6.” Assume also that SMA’s revenue from its mission comes from a diverse pool of thousands individuals who are interested in public policy. They buy books and pay fees to come to conferences. None of them spends more than \$1,000 per year.
    - i. Please apply the “one-third support” test under Treas. Reg. 1.509(a)--3(a)(2). What is the numerator? Are gifts from Harry included?
    - ii. What is the denominator? See Section 509(d). Does ASM pass this test?
    - iii. Please apply the “not-more-than-one-third” support test under 1.509(a)--3(a)(3). What is the numerator?
    - iv. What is the denominator? Does ASM pass this test?
  - d. Let’s change the facts. Assume that two corporations--X and Y--pay for their executives to go to ASM’s conferences and buy ASM’s books in bulk. As the table below shows, X and Y account for a very significant proportion of ASM’s revenue from its mission. Is this relevant to the analysis? See Treas. Reg. 1.509(a)--3(b)

Year	Revenue from Mission	X's purchases	Y's purchases	Rest of Revenue from Mission	Total Budget
	\$2M	600k	400k	1M	7.5M
	\$2.1M	600k	500k	1M	7.5M
	\$3.25M	1M	1.25M	1M	7.5M
	\$3.5M	1.25M	1.25M	1M	7.5M
	\$3.4M	1.15M	1.25M	1M	7.5M
	\$14.25	4.6M	4.65M	5M	37.5M

- e. Applying Treas. Reg. 1.509(a)--3(b), how much of X's purchases can be included in the numerator of the one-third support test? How much of Y's purchases? Does ASM pass the test?

9. Private Operating Foundation ("POF")

- How is the treatment of a POF better than the treatment of other private foundations? What is the policy rationale for this?
- How does a private foundation qualify as a POF? What is the test? See Section 4942(j)(3).

10. Taxable Expenditures

- What are the consequences if a foundation makes a "taxable expenditure"? See Section 4945(a) & (b).
- Like public charities, are private foundations barred from lobbying and electioneering?
- Why are grants to individuals limited? What concern is the government targeting? Are grants to individuals barred entirely or are some permitted? If the latter, then which?
- Why do some private foundations make grants only to public charities? If they want to make a grant to a for-profit business or to an individual, can they do that? What about to another private foundation?
- What is "expenditure responsibility"? What is involved?

11. Let's discuss problems (b), (c), and (i) on pp. 821-22

### Discussion Questions #17

1. Missions
  - a. Do you agree that the appeal of nonprofits stems mostly from their missions?
  - b. Why might a charity's mission become stale? What should the charity do when this is the case? Why might this not always happen?
2. Motivation
  - a. What advantages do nonprofits have in attracting and motivating talent?
  - b. What are the downsides of relying on idealism to motivate nonprofit professionals and boards?
  - c. What types of rewards cannot be used at nonprofits to motivate professionals and boards?
  - d. Aside from idealism, what other motivations are relevant at nonprofits? Why are they sometimes not wholly effective?
3. Diversity
  - a. Why are nonprofits well suited to promoting and celebrating diversity?
  - b. Why do nonprofits sometimes fall short in promoting diversity—and, indeed, why are they themselves sometimes prone to be insufficiently diverse?
4. Autonomy
  - a. Nonprofit leaders quoted in the book say that nonprofits have close ties to the community and that they have their "ears tethered to the ground." Do you find this persuasive? Is this equally true of universities? Churches? Community centers? The Metropolitan Opera?
  - b. In this respect, are nonprofits different from the federal government? What about local governments? Big businesses? Small businesses?
  - c. You are the head of a foundation. You are trying to decide which charities to support. Your foundation has a very broad mission -- "doing good in the world." Assume that you are considering support for basic scientific research, inner city charter schools, or soup kitchens. How should you go about choosing among these options?
  - d. You are the head of a mutual fund. You are trying to decide which portfolio companies to invest in. Your mutual fund has a broad mandate-- "to earn superior risk-adjusted returns." Should you invest in biotech? Big tech? Consumer products? Real estate? How should you go about answering

this question? Is this a harder or an easier question than the prior question?

- e. You are the head of a foundation. You are trying to decide which charities to support. Your foundation has a very focused mission -- improving high school graduation rates and test scores in Newark. You want to decide which high schools to fund. How do you go about deciding/ Is this a harder or an easier question than the prior question?
  - f. Chapter 3 argues that even well intentioned and competent managers and boards find it challenging to run nonprofits efficiently. Why?
  - g. Chapter 3 argues that there are particular problems when nonprofit boards are not well intentioned and competent. What are those problems? How do they compare with management and governance challenges at for-profit firms?
  - h. True or false: Nonprofits can break our hearts.
5. Funding
- a. What is the “double benefit” associated with charitable donations? Do you think it is likely to arise also when people pay taxes?
  - b. The federal government subsidizes charities by exempting their income and awarding a deduction for charitable contributions. To what extent does the government steer these subsidies to particular causes or organizations?
  - c. What are the potential advantages and disadvantages of a subsidy that is awarded as a match, so that the government does not decide which causes receive the funding?
  - d. What are the downsides of depending in philanthropy?
6. Which (if any) of the criticisms of nonprofits resonated with you?
7. How to Save the World argues that there are two key goals nonprofits need to pursue to advance their mission more successfully.
- a. What are these twin goals?
  - b. The book argues that there are synergies between these two goals. What are these synergies?
8. Andy is the CEO of an organization. Beth and Charlie work for him. Charlie was his college roommate. They have known each other for years. When Andy is stressed, Charlie knows how to cheer him up. Beth joined the organization five years ago. Assume that Beth works harder than Charlie, is more thorough, and is more respected by her peers, but Andy is swayed by his friendship with Charlie and is planning to promote him, instead of Beth.
- a. If Beth and Charlie each manage divisions of a for-profit company, and Andy is considering one of them to be his Chief Operating Officer, what objective evidence might be available to the company’s board, if they have

- questions about this personnel decision and want to discourage Andy from making it?
- b. What if the organization is a humanitarian organization. Is the same objective evidence available? Is it easier or harder to base personnel decisions on friendship or nepotism, instead of on the merits?
9. Dan is the CEO of an environmental organization. He grew up hiking on trails and has an almost spiritual appreciation of nature.
- a. Over the years, the environmental movement has become more quantitative in its policy arguments, looking for the most cost-effective ways to remediate environmental harms. Dan resists this approach. He likes to say that “the things that make life worth living can’t be measured.” As a result, Dan’s organization is losing influence. You serve on the board of the organization. You wonder whether it’s time for Dan to retire. A colleague on the board pushes back, saying “no one cares more or works harder.” Does this response reassure you?
  - b. Ellen is a stalwart volunteer at her church. She is happy to put in hours of work to organize the annual fundraiser. This event used to be a great success, but others at the church worry that the event is essentially the same every year, and it’s not especially well calibrated to the tastes of younger people. But Ellen is very territorial about the event. Her position has always been, “I am happy to do this work, but only if I get to make the decisions.” You are the new head of the board. Although Ellen is still very motivated to advance the church’s interests, why might you still want to replace her?
  - c. True or false: “Even idealists can be incompetent.”
  - d. True or false: “Some true believers are not team players.”
10. Fran is the CEO of a nonprofit hospital. She’s been there a long time, so people often say, “Fran is the heart and soul of this hospital.” But in recent years, she has seemed less energetic. She also is less willing than she used to be to consider policy changes. As a result, some of her direct reports have left to work at other hospitals. Donations also are declining.
- a. George serves on the board. His son has a severe health condition, and he’s donated generously to the hospital to show his gratitude. Fran has always ensured that George’s son gets top priority when he comes for treatment. How motivated do you think George is to do a rigorous assessment of Fran’s performance, which might lead to her dismissal?
  - b. Hal is a junior partner at a law firm. When he was named to the hospital board last year, his mentor said, “That’s great, Hal. Everyone is really impressed.” Hal is hoping to recruit George and other board members as clients for the firm. How motivated do you think Hal is to do a rigorous assessment of Fran’s performance, which might lead to her dismissal?



- c. Ilsa, another board member, works long hours as an investment banker. She misses many board meetings. When she's there, she savors them as a respite from the rough and tumble of the commercial world, and feels good about the hospital's research initiatives, as well as its efforts to provide care to vulnerable populations. How motivated do you think Ilsa is to do a rigorous assessment of Fran's performance, which might lead to her dismissal?
11. Janet is the CEO of an environmental organization, which has endorsed a carbon tax. Ken leads another environmental organization, which condemns a carbon tax as immoral. "You shouldn't be allowed to pay to murder the planet," Ken often says. He presses for the immediate elimination of carbon-based fuels. Ken and his colleagues stage a sit-in in the lobby of Janet's organization, demanding that they change their position.
- a. Janet says to Ken, "wouldn't it make more sense for you to protest an oil company?" Do you agree with Janet?
  - b. Does this hypothetical seem realistic to you?
  - c. Do you expect rival for-profit businesses to stage sit-ins at each others' headquarters?
  - d. True or false: "Conflicts over principle can be more heated and harder to resolve than conflicts over profit."
12. Lynn is the new CEO of a consumer products company. This for-profit firm has been selling a type of cookie for decades, and its market share has steadily declined. Focus groups regularly say they find it unappealing. Monica, who runs the group that makes cookies, has been at the company for decades. When Lynn suggests discontinuing the unpopular cookie, Monica replies, "this cookie built this company's reputation. We can't do that!" In response, what evidence can Lynn offer to justify eliminating the cookie and, if necessary, firing Monica?
13. Nancy, Lynn's sister, is the new head of a soup kitchen. The soup kitchen has served liver and onions every Thursday night for decades. Nancy starts her tenure by spending time with the soup kitchen's beneficiaries. A number volunteer that they don't like liver and onions. She mentions this to Oscar, who has planned the soup kitchen's menus for decades. He has a very negative reaction, saying, "I have been doing this for a long time. I'm not sure who you spoke to, but I know for a fact that liver and onions is one of our most popular offerings." What evidence can Nancy offer to justify changing the menu and, if necessary, replacing Oscar? Is this case harder or easier to make at a nonprofit than at a for-profit firm?

### Discussion Questions #18

1. Review: What are the two goals nonprofits need to pursue?
2. What is a planning process? Do you think it can help with either goal? With both goals?
3. Why did JDC need a new planning process? What was the first step in launching it? Who was involved and why?
4. In deciding which colleagues should participate in a planning process and, relatedly, how large the group should be, what are some of the competing considerations?
5. What is the “silo” problem? How did JDC address it?
6. Adam is a new CEO of Nonprofit, a social welfare organization that delivers food and medicine to economically vulnerable elderly.
  - a. Nonprofit serves two metropolitan areas, Metropolis and Big City. Metropolis has experienced an economic revival in the past two years, but Big City is struggling. Nonprofit began in Metropolis and has a lot of history there. Betty, who is Nonprofit’s chief planning officer, has told Adam that she thinks some of the resources currently allocated to Metropolis should be redirected to Big City. Is this an issue that would appropriately be addressed in Nonprofit’s annual planning process? How would you suggest that Betty should prepare for this discussion? What materials should she prepare?
  - b. Charles is Nonprofit’s head of fundraising. He hears about Betty’s idea to shift resources away from Metropolis, so he comes to see Adam. “You realize that most of our donors live in Metropolis,” he says, “and that includes three-quarters of the board.” What concern is Charles expressing? Is this a concern that can be addressed through the planning process? How specifically should Adam use the planning process to mediate between these two competing considerations?
  - c. In addition to the CEO, the chief planning officer, and the head of development, Nonprofit has a head of marketing, a head of human resources, a chief financial officer, and a general counsel. Each of them have their own teams. (Nonprofit is a large organization). For example, the chief planning officer supervises a “Metropolis” department as well as a “Big City” department. Obviously, Nonprofit also has a board of directors, which is composed of twenty members.

- i. Adam needs to decide who should participate in the planning process. What different groups do you think should participate at some point in the process?
  - ii. At what point do you think the board should be involved in the process?
  - iii. Assume that Adam wants the process to proceed in stages. He wants to hold a meeting on Big City's needs first. Who do you think should be there? What materials should Betty's team prepare in advance?
  - iv. Adam then wants to have a meeting on Metropolis's needs. Who do you think should be there? What materials should Betty's team prepare in advance?
  - v. Adam is going to need to figure out how to divide resources between Big City and Metropolis. What advantage do you see in having a separate meeting on this after the separate discussion of Big City and Metropolis? Who do you think should be at this meeting?
  - vi. Assume that Adam is persuaded by Betty's claim that it would be good for Nonprofit's clients to cut the budget of Metropolis and reallocate funds to Big City. He is going to need to change the minds of a number of people on this. Who do you think he should start with and why? How can he use the planning process to try to accomplish that?
  - vii. Why can't Adam just make the decision on his own? Why are all these meetings necessary?
  - viii. True or false: An effective planning process helps a nonprofit allocate resources where they are needed the most. If true, how does it happen?
  - ix. True or false: An effective planning process helps build support internally among a nonprofit's professionals for a new plan. If true, why is it important? How does it happen?
  - x. True or false: An effective planning process helps build support within the board for a new plan. If true, why is it important? How does it happen?
7. Dan is the new head of Big Green, an environmental organization. He worked as a Senate staffer for many years before joining this nonprofit. Big Green traditionally has done impact litigation, bringing lawsuits to stop development in undeveloped areas, to block pipelines, and to hold polluters responsible. The board of Big Green is very focused on climate change. They are concerned that impact litigation can not accomplish enough in the effort to reduce greenhouse gas emissions. This is why they have gone outside the organization to hire Dan,

and they have chosen someone who does not have a litigation background. They want Dan to ramp up Big Green's efforts at public education--something Big Green has tried to do, but in a limited way. They also want Big Green to create a new lobbying arm to make the case to governments at different levels.

- a. What challenges is Dan (an outsider) likely to face with his professional colleagues in pursuing the Board's plan?
  - b. What legal issue does Dan face in launching a lobbying arm?
  - c. Assume that Big Green has had a very bare bones planning process over the years. Each litigation group sends a one page cover memo to the CEO and a proposed budget, which generally is 3% more than they spent last year. The following week, the CEO gets back to them to confirm or correct this 3% assumption. Then a budget is proposed on this basis to the board, which has routinely approved it. Why will this process not be adequate for Dan's purposes?
8. Continuing with the facts of Problem 7, Ellen, who is the chair of the board, calls Dan and says, "I wanted to mention something that is on my mind. It's important for you to branch out in new directions, as we've discussed. But for this to be successful, you are going to need these groups to share information and coordinate strategy."
  - a. In placing this call, Ellen is implying that this might not happen on its own. Do you agree? What organizational dynamics prevent effective cooperation?
  - b. Why does the public education group need help from the litigators and lobbyists? What can they offer in return (especially to the lobbyists)?
  - c. Why might it be helpful for litigators to check in with the lobbyists before launching a particular litigation? (Hint: Assuming the litigators win in court, how can this victory still turn out to be counterproductive?)
  - d. As the reading mentions, some organizations require people to have a 15 minute conversation (assigned at random) every two weeks with someone who works in another part of the organization. What limitations do you see with this approach? Can you suggest other alternatives to address the "silos" problem in large nonprofits?
  - e. How can Dan use a planning process to try to enhance coordination?
  - f. The reading mentions "peer review." What is it and why was it used in JDC's planning process?
9. Continuing with the facts of problem 8, Frank is the head of Big Green's fundraising.
  - a. Why is it important for Frank's team to have current information about the public education and lobbying campaigns, including the reason for launching these new initiatives, their goals, and the strategies for pursuing them?

- b. Why might Frank's team not have access to this information?
  - c. Can Dan use a planning process to help them get this information?
- 10. Nonprofits have different cultures. The planning process should be tailored to the culture. At the same time, a new process can be used to try to change the culture.
  - a. As the reading mentions, I introduced a new planning process at JDC, which culminated in the production of a detailed plan for the coming year. In my second year, when I mentioned that we would run the process again, one of my colleagues said, "But aren't we going to just use the plan from last year?" How would you have answered him?
  - b. The reading refers to "analyzers" and "emoters." What cultural difference are these terms used to describe?
  - c. Which group (analyzer or emoter) is more likely to want a planning process? Do you have a suggestion about how to win over the other group?
- 11. Georgia is the head of Private High School. She has the following direct reports: Hal is the head of the humanities group (including English, history, and languages), Irene is the head of the "STEM" group (including science, math, and computer programming) Jeff is the head of student life (including athletics and extra curricular activities); Kim is the head of administration and finance; and Larry is the head of fundraising. Assume that Georgia expects the school's overall budget to increase by 3% next year.
  - a. Georgia asks each of her direct reports to prepare a draft budget. She asks them to prepare three different scenarios. In one, they have a 1% increase over last year. In a second, their budget increases by 10%. In the third, their budget contracts by 5%. She asks them to attach a memo explaining the relevant changes in the second and third scenario. Why did they choose the increases and cuts that they are recommending? What do you think is the purpose of these different budget scenarios.
  - b. Continuing with question "a," Georgia adds the following instruction: In preparing your second and third scenario, please do not worry about whether you have people on staff to do the things you want, and please don't worry about whether you would face "political" challenges in cutting people or programs you propose to cut. Assume you can "write on a clean slate." Why might she give this instruction?
  - c. Mary, who is the head of Georgia's board, calls Georgia and says: "I am hearing some grumbling about the multiple budget scenarios. Some of your colleagues feel that their time is being wasted. I am not saying that I agree with this criticism, but I wanted you to know that it's out there." How do you answer her?

- d. Nathan, another member of the board, calls to make a suggestion. “As part of the planning process, let’s have a discussion in which we talk about the relative importance (or unimportance) of different subjects taught at the school and we invite the heads of these departments to debate this point for us.” How do you answer him?
12. Continuing with the facts of problem 11, Georgia is struggling with some personnel issues.
- a. Hal has been at the school for a very long time. People describe him as “the heart and soul” of the school. But unfortunately, his most productive days are behind him. He arrives late, leaves early, and is not inclined to rethink how his department is run or who his teachers should be. Yet he is much beloved. Georgia has spoken to him about these issues, but his behavior hasn’t changed. Should she keep him on or replace him? What are the competing considerations?
  - b. Kim, the head of administration and finance, is competent but abrasive. She has a tense relationship with Irene and Larry, who both are (otherwise) extremely valuable employees. What (if anything) should Georgia do about Kim?
13. In law schools, one of the most important issues is who the school hires. This can be a somewhat contentious subject among faculty members.
- a. In faculty meetings years ago (while I was serving as dean), one faculty member observed that we consider candidates in isolation, and that this is the wrong way to go. Instead, he urged us to have a plan in which we articulate priorities--what subjects are most important?--and then we choose candidates to fill those slots. What advantages do you see in this suggestion?
  - b. In response, another faculty member came to me and said. “That’s not a good idea. We will have an easier time agreeing on specific candidates. A conversation about overall priorities is going to be contentious and it’s not necessary anyway.” What do you think?

### Problems Sheet #19

1. The first question

- a. What is the first of the “three questions”?
- b. When Lee Goldman started as dean of Columbia Medical School in 2005, how important was the challenge of responding to pandemics? When he concluded his service in June of 2020, how important was this challenge? What is the general lesson here?
- c. Is it more important to shelter the homeless or clean a polluted river? Why is this a hard question? If it’s not feasible to answer it, what suggestion does the reading make? What should nonprofits try to show instead?
- d. Returning to Anne’s team at GoodWork, they are trying to decide whether to provide child care and medical care to children in Appalachia or in Westchester County (a suburb north of New York City)? What information do they need in order to answer the first question?.

2. The second question

- a. What is the second question?
- b. What is the difference between an “output” and an “outcome”?
- c. To help children, Anne’s team at Goodwork is deciding whether to invest in providing Covid vaccines. If they decide to provide vaccines, they will track the number of children vaccinated. Is this an output or an outcome? How reliable a measure of social return do you think the number of vaccinations is? Why?
- d. The reading uses the phrase “impact multiplier.” What does it mean?
- e. If GoodWork decides to vaccinate pediatricians instead, what “impact multiplier” would they seek to generate?
- f. What is the mission of the “Institute for Priestly Formation”? Is their progress hard to measure? How do they do it?
- g. The Ruderman Foundation strives to help people with disabilities. At an earlier stage, they funded programs to empower people with disabilities to live independently (instead of in group homes) and to train them for jobs. Now their new focus is on Hollywood? Why? Do you agree with their new strategy?
- h. Many “legacy” (meaning “old”) charities are trying to engage Millennials on the theory that this generation’s support will be necessary in the coming years. Assume that GoodWork starts running service trips, in which groups of Millennials travel together to volunteer for a week working on GoodWork’s programs. The professionals at GoodWork do not think that the contribution of these (untrained and short-term) volunteers is especially valuable to

beneficiaries. Rather, the goal is to engage these volunteers so they will start giving money to GoodWork, will recruit others to do so, etc. How should GoodWork measure the impact of these trips?

3. The third question

- a. What is the third question?
- b. The mission of HerJustice is to provide legal services to underprivileged women who otherwise don't have access to legal services. HerJustice does child support cases, but the organization does not represent clients in housing court who have been evicted. Why? Is the idea that deadbeat fathers are a more serious issue than eviction?
- c. Legal Momentum also provides legal services to women. Two of their main initiatives are impact litigation and a helpline. Why?
- d. In focusing on the well-being of children, GoodWork's professionals are quite concerned about the rhetoric of Metropolis's mayor. He has been inflaming tensions and arguing (without evidence) that low income families are the source of crime, when in fact they often are the victims. Ed, who is a board member of GoodWork, has urged Fran (the CEO) to make a public statement condemning the mayor. Why might Fran hesitate to make this statement? How (if at all) is this relevant to the third question?
- e. In addition to "the three questions," are there other issues that you think nonprofits should consider in setting priorities? For example, would you add a fourth or fifth question?

4. One of the great strengths of nonprofits is that they have the autonomy to run experiments, testing new ideas and strategies.

- a. Was launching "Giving Tuesday" within 92Y's mission? Why did they decide not to require others launching "Giving Tuesday" campaigns to credit 92Y? Do you agree with their analysis?
- b. Assume that GoodWork helps underprivileged elderly people, and one of its core strategies is to deliver food to those who are at risk of going hungry. Assume also that for-profit firms begin delivering food based on orders placed online. Assume that GoodWork runs the numbers and determines that it is more cost-effective to pay for-profit firms to deliver food, instead of maintaining their own infrastructure to do so. Should GoodWork make this change?
- c. Assume that one of the virtues of food deliveries is that elderly clients benefit from the companionship of social workers delivering this food. Does your analysis in "a" change?
- d. If GoodWork still wants to proceed with this plan (i.e., of using for-profit firms to deliver food), what else could they do to provide companionship? (Hint: can technology be helpful here?)



- e. What change did Leonard Leo introduce at the Lawyer's Division of the Federalist Society? Why?
- f. What experiments did Lincoln Center run in order to earn extra money?
- g. How did Lee Goldman solve the space problem at Columbia Medical School? What were the advantages and disadvantages of his approach?
- h. Why did JDC have to "tighten its belt" in caring for elderly people in the former Soviet Union? How did they do it?

### Discussion Questions #20

1. Alison has just been named chair of the Board of Directors of Town Soup Kitchen, and Barbara is the CEO. You are Alison's friend. She has never been the head of a nonprofit board before, so she calls to ask for your advice.
  - a. "The board hasn't done a review of Barbara's performance in ten years," she tells you, "so I am not inclined to do one any time soon." What advice would you give her?
  - b. "We have a policy that anyone is welcome at the soup kitchen, and we don't do means testing of any kind," she says. "I'd like to ask Barbara for an analysis of this issue, which the board can discuss." Does that seem like a good idea? What is your answer?
  - c. "There should be more vegan options," she says. "Why don't I put this on the agenda for tomorrow's meeting? It is a good opportunity to mention this concern to Barbara for the first time." What do you think?
  - d. "I want to start vetting the menu every week," she tells you. "If I am going to be involved here, I want to be sure everything is done the right way." Do you agree?
2. Christine has been hired to become the new CEO of a nonprofit called the Shakespeare Theater Company, which performs plays by Shakespeare, Greek tragedies, and other traditional works in Pretty Village. The board members who served on the CEO search committee want the nonprofit to update its repertoire, performing contemporary works as well. Other board members are less comfortable with this change in direction, as most of the nonprofit's senior professionals share this concern.
  - a. Christine's predecessor had a copper bust of Shakespeare in his office. It is in dire need of being polished and restored. Christine likes the bust and wants to keep it in her office. During her first week, she decides to send it to be restored, a process that will take three months. She mentions this plan to you. Do you have any advice for her?
  - b. Christine wants to change the nonprofit's name to "Pretty Village Theater Company," instead of the "Shakespeare Theater Company." She wants to do this in her first two months as a signal that "things are going to change," so she starts looking for a branding firm. Do you have any advice for her?
  - c. Christine is thinking of proposing an experiment: performing one modern work every month. She is thinking of forming a task force, which would analyze the issue and make a proposal. She would include two board members from the search committee and two professionals who favor a

- change in direction. As a general matter, do you think this is a good approach? Are there any modifications you would suggest?
- d. The Theater desperately needs a comprehensive renovation. The uncomfortable conditions are causing audiences to shrink (along with the number of performances). Christine wants to start a capital campaign to fund a major renovation or move to a new space. But the first donors she approaches say, "With all due respect why should anyone sink money into a nonprofit whose days are numbered?" Do you have any suggestions for Christine?
3. Donna is the new CEO of Humanitarian Organization ("HO"), a nonprofit that helps 80,000 vulnerable elderly people in Faraway Country by providing food, medicine, and home care. Traditional Funder, which provided \$12 million of funding annually, has changed their priorities, and thus will no longer fund this program. The program still has other generous funders, but Traditional Funder's exit will leave a significant gap in the budget. To continue the program, Donna will need to find new sources of funding, reallocate resources from other programs, and cut costs.
    - a. Donna asks Edward, the head of the Faraway Elder Care program (and her direct report), to identify potential savings. Edward proposes to provide cash cards, so clients can buy food themselves, so HO won't deliver food anymore unless clients are bed-ridden. Fran, a board member, is very upset when she hears this. "For decades, we've been delivering food. The quintessential image of HO is of a young person knocking on the door, wearing a yellow "HO" shirt. These visits brighten the day of our clients. How can we walk away from that?" What advice do you have for Donna and Edward?
    - b. In order to adjust to the loss of Traditional Funder's grant, Donna and Edward have to lay off a number of professionals in Faraway Country—not just underperformers, but also capable and dedicated professionals. A number of the professionals who remain, and are involved in implementing these cuts, worry that their positions eventually will be terminated as well. Some of the most capable managers are leaving. Do you have suggestions about how to manage this sort of process?
    - c. To raise more money for the program, Donna knows that the most effective strategy is to bring donors to see the work in Faraway Country. Why is this effective? Why is this strategy hard to implement?
    - d. As an alternative, Donna meets with the senior management team of DonorsChoose, whose website offers donors the opportunity to support specific projects in U.S. public schools. Donna wants to create a similar website for H.O. The website would have biographies and videos of specific clients (hopefully about 10,000 of the 80,000 clients who receive care). Donna's vision is that donors will be invited to support a specific client, and

that they will receive a video from the client thanking them for their support. The video won't be in English (since clients generally don't speak English), so subtitles would be added. Assume that the cost of care in Faraway Country is low (e.g., just a few dollars per day for food, and maybe \$20 per day for home care). In deciding whether to pursue this marketing idea, what financial constraint should Donna keep in mind in deciding whether the idea is viable?

- e. Does Donna need Edward's support for this idea? Does she need the support of managers in Faraway country? If so, why might this group have reservations? Do you have ideas about how to get their support?
4. Adrian is the CEO of a nonprofit. Bob is her Chief Planning Officer, and Charlotte is the Chief Financial Officer. Bob and Charlotte would each like Adrian's job. Adrian and Bob plan a new initiative, which does not go well. Diane is the donor who funded it. Adrian and Bob are deciding what to tell Diane about the unsuccessful experiment.
    - a. True or false: Adrian and Bob could incur legal liability by saying, "The experiment was bold and really illuminating, and we couldn't have done it without you."
    - b. True or false: Adrian and Bob could incur legal liability by saying, "The experiment showed us how to deliver service just as effectively for only ½ the cost" when this is not accurate.
    - c. Why might Adrian and Bob feel strongly that they need to tell the truth? Please offer reasons rooted in principle, as well as reasons rooted in self interest.
    - d. Why might Adrian and Bob be tempted to shade the truth, giving a more optimistic picture than is warranted?
    - e. If Adrian and Bob do provide false or misleading information, please offer to reasons why Charlotte might tell Diane that she is being misled.
    - f. True or false: Even when nonprofit professionals and boards are tempted to offer misleading information, they still have reasons not to do so.
    - g. Assume that Adrian and Bob want the information they share to be more credible. They approach Ellen, a professor at the local university, asking her to provide an analysis, which they will disclose on their website. Why might this sort of expert opinion add value? Why might it not?
  5. Your college roommate, Fran, is the CEO of a museum. She has just launched two new exhibits, *A* and *B*. *A* has attracted a large audience (3,000 visitors in the first week) while *B* has attracted a disappointing audience (300 visitors in the first week). Fran is thinking of posting the number of visitors on her website, issuing press releases, and reporting these numbers to her board. Before deciding whether to do so, she calls you to ask for advice.

- a. Do you think Fran should release the number of visitors to *A*? Why or why not?
  - b. Will Fran be more or less enthusiastic about releasing the number of visitors to *B*? Why or why not?
  - c. What problem do you see if she chooses to report the numbers for **A**, but not *B*?
  - d. In light of your answer to “c,” what is the case for *never* releasing these numbers for any exhibit?
  - e. In light of your answer to “c,” what is the case for *always* releasing these numbers for any exhibit?
  - f. True or false: Nonprofits have strong incentives to share good news.
  - g. True or false: Nonprofits might hesitate to share bad news but, if they don’t, others may assume the news is worse than it is, so they should release this news as well.
6. George is executive director of a civil rights organization, which monitors hate groups online, scouring websites and blog for misinformation, hate speech, and bioted videos that they and their members post. George has hired Hannah to design a computer program that uses artificial intelligence to evaluate this material, so his organization can vet more materials more quickly.
  - a. In posting reports on these hate groups, which “M” is George advancing? (Mission, Matching, Motivation, or Monitoring)?
  - b. George decides to share Hannah’s program online so other groups can download and use it. Which “M” is George advancing?
  - c. George posts a discussion of why his organization opted to invest in artificial intelligence, instead of hosting academic conferences on hate groups? He offers metrics to justify this choice. Which “M” (or “Ms”) are advanced by these posts?
  - d. It turns out that Hannah’s program doesn’t work well. Unfortunately, it generates many false positives (benign speech flagged as hate speech) and many false negatives (hate speech that is missed). George hires Irma (another expert) to review the program, and she figures out where Hannah went wrong. The program can’t be easily fixed. You are George’s sibling. He asks you whether he should publicize this failure. What do you think are the benefits and costs associated with sharing this information?
7. Janet is CEO of a nonprofit hospital, which focuses on researching and treating infectious diseases. When Covid 19 became a pandemic in early 2020, Janet slashed staffing on other initiatives, including their efforts to combat influenza, in order to focus on Covid 19. By the end of 2020, her hospital was dedicating  $\frac{2}{3}$  of its budget to treating Covid patients and testing different treatment methods. Unfortunately, the results have not been good so far, but Janet hopes the work they’ve done will eventually bear fruit.

- a. Janet is thinking of posting a document on the hospital's website explaining their new strategy and documenting the results. Meanwhile, Kate is a successful entrepreneur who has supported the hospital generously because she lost her mother to influenza five years ago. What are the advantages and disadvantages of highlighting the new strategy in writing, so Kate will know the details?
  - b. Janet is eager to motivate her team to do their best work. What are the advantages and disadvantages of describing the results from the first year in writing and posting this report online?
  - c. Leah is the hospital's most generous donor. She supports the pivot to Covid, and she wants to know the results. Do you think she can get them, even if Janet doesn't share them publicly?
  - d. Martin donates \$500 per year to the hospital. He also supports the pivot to Covid and wants to know the results. Do you think he can get them, even if Janet doesn't share them publicly?
  - e. Natalie runs a rating agency that evaluates nonprofit hospitals. She has heard about the pivot to Covid and wants to know how this initiative is doing. Do you think she can get them, even if Janet doesn't share them publicly?
  - f. Oscar is an investigative journalist, who covers the nonprofit sector. How motivated do you think he will be to do a story on Janet's hospital? Do you think he is likely to do a followup story every six months? Do you think Janet will be willing to share information with him, even if she hasn't shared it publicly?
  - g. Why might it be a good idea (or a bad idea) for Janet to post the report she sends to Leah online, making it available to anyone who is interested to learn more about the hospital's work?
8. Form 990
- a. True or false: Form 990 requires nonprofits to share information about the compensation of senior professionals and the board.
  - b. True or false: Form 990 asks nonprofits to share information about key governance issues, including whether they have conflict of interest policies.
  - c. True or false: Form 990 requires nonprofits to provide a financial statement, which reports different types of income and expenses.
  - d. True or false: Form 990 requires nonprofits to share information about the impact and cost-effectiveness of their programs.
9. Overhead ratios
- a. What are overhead ratios?
  - b. Why do rating agencies use them to evaluate the quality of nonprofits?
  - c. What is the argument for relying on them?
  - d. What is the argument against relying on them?

10. Penelope is the head of a humanitarian organization, which provides job training to single mothers. To track her organization's progress, Penelope measures the income of clients before they enroll in the program and compares it with their income six months after they finish the program. Quincy is the head of Foundation, who is considering a grant to Penelope's organization.

- a. Quincy sends Penelope a draft gift agreement. It would require Penelope to do a survey asking people enrolled in training programs to describe how satisfied they are with the program, answering various questions about the quality of the teaching, materials, space, and the like on a scale of 1 to 10. Penelope has not been asking these questions. She calls you and asks whether she should agree to these terms. What do you tell her?.
- b. You are on the board of Quincy's foundation. Assume that you know about the questions he has asked Penelope to answer, and that Penelope has asked not to answer them, proposing the alternative described above instead (comparing incomes). Quincy tells you that he still wants Penelope to answer his questions. "We ask all of our grantees to do this survey, and we then compare the scores." Do you agree or disagree with Quincy on this?

