

IS THERE A LAW OF CHARITY?

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"Charity," Paul told the Corinthians, "[b]eareth all things, believeth all things, hopeth all things, endureth all things. Charity never faileth."¹ Assuming that Paul meant to use the Greek word *αγάπη* the way the King James Version translated it – as "charity" rather than "love" – it was a broad claim indeed. If charity does "all things," failing not at all, it truly embraces a vast array of human behaviors.

Does this vast coverage correspond to the law's coverage? Is there a correlation between the Pauline vision and the meaning the American legal order has given to the word over the past 200 years – or the meaning it has been accorded in English law over the past four centuries? If, instead of an Apostolic oration, we want to turn to somewhat more contemporary lay or legal definitions of charity, the question persists: what is the correlation between (a) these definitions of charity and (b) what the law does in charity's name? Or, to put it more starkly, what has modern charity law to do with "charity"?

That is the first of four inquiries this paper makes (or at least introduces). The *second* inquiry is this: If charity definitions do not explain the development of charity law – in either the tax or nontax territories – then what *does* account for this development? And if that inquiry does not reveal an explanation based on any coherent theory of the nonprofit sector or its legal treatment, we ask, *third*, whether an effort should be made to find and apply a body of theory that can serve as a canon – a foundational understanding – to guide the progress of charity law? And if that enterprise does not appear promising, then, *fourth*, we ask: *quo vadimus*?

* Changes in or additions to the nonprofit sector law and literature since October 2002, when this paper was presented at the National Center on Philanthropy and the Law annual conference, are not reflected in this subsequently published version of the paper.

¹ 1 Corinthians, xiii: 6-7.

Before launching these inquiries, we pause briefly to consider the range of benefits that may flow from charitable status. This paper focuses primarily on federal tax exemption and deductibility, secondarily on state property tax exemption and charitable trust status. The tax-related benefits are obvious; the benefits from charitable trust status are principally said to be perpetual life, state enforcement and *cy pres* relief from obsolescence (although charities in corporate form share these entitlements). Were there time and space, we could extend the list of benefits – the list of what are called "privileges and exemptions" in the major catalogue thereof² – to many other areas, such as exemption from state inheritance and succession taxes and other state taxes and from Federal Social Security and unemployment taxes, favorable postal rates, capacity to engage in tax-exempt bond financing, avoidance of various forms of regulation under the pension, antitrust, and securities laws – and several other "privileges and exemptions," many of which are tied to "charitable" status.

I. What has modern charity law to do with the concept of "charity"?

Where can we find, as a starting point, a definition of charity – something that will serve as an equivalent of the Constitutional clause that launches Constitutional explication? St. Paul's oration is not only ancient; it does not seek to define. A lay definition might be a candidate. The Oxford English Dictionary, after providing definitions that have "specially Christian associations," provides as its first non-religious definition: "Love, kindness, affection, natural affection: now esp. with some notion of generous or spontaneous goodness."³ This capacious definition is difficult to accommodate within what was probably the first legal setting in which American courts and legislatures struggled with charity's meaning: the charitable trust context. For example, if charity in its non-legal sense really begins at home – bestowing benefits on the

² Bazil Facchina, Evan Showell and Jan E. Stone, *Privileges and Exemptions Enjoyed by Nonprofit Organizations: A Catalog and Some Thoughts on Nonprofit Policymaking* (N.Y.U. Program on Philanthropy and the Law, 1993).

³ The Compact Edition of the Oxford English Dictionary (1971), p. 383. Two familiar poverty-related definitions – "Benevolence to one's neighbors, especially to the poor" and "alms-giving" – appear at a lower level in the apparent hierarchy of definitions. *Ibid.*

near and dear – it does not follow that a trust instrument that includes family members (of course, without making them "ascertainable beneficiaries") would be a valid charitable trust. Even if lay ideas of charity do not embrace kinfolk, they probably include many other purposes – such as the health and safety of animals – that would not, it appears, have received recognition for 19th Century charitable trust purposes on this side of the Atlantic. (For that matter, despite the animal-regarding priorities of the British people, the charitable trust law in England provided charitable status to animal-protection charities only when they provided "benefit to the community and not merely the animals...."⁴) And while the "goodness" concept would seem to know no boundaries, the Charity Commission for England and Wales took the position, from 1963 to 1992, that organizations operating under the fourth *Pemsel* heading (see below) – "purposes beneficial to the community" – "would be charitable only if they could show benefits to the community within the United Kingdom."⁵

However problematic the application of the broad meaning of charity in the charitable trust setting, the "fit" is even more awkward when we move to other settings. For federal income tax exemption purposes,⁶ the "fit" is both tighter and looser than the Oxford English Dictionary definition of charity. The tax exemption is *tighter* because many branches of "goodness" do not count for exemption purposes – e.g., philanthropy toward named (albeit utterly deserving) individuals – and yet it is *looser* because it is not at all clear that a public interest law firm that seeks to limit the scope of tort remedies, although blessed under §501(c)(3), would strike most OED readers as meeting a charitable "goodness" test. And the "fit" becomes tighter still when the scene shifts from exemption to deductibility: gifts to utterly worthy foreign charities – surely "goodness" itself – fail because of the rule that only domestic organizations are eligible pass receivers for deductibility purposes.⁷ Moving to American state property tax exemption, the OED definition again fails to square with the legislative or judicial criteria. Preserving open

⁴ J. W. Brunyate, "The Legal Definition of Charity," 61 *Law Quarterly Review* 268, 277 (1945).

⁵ Charity Commission for England and Wales, RR1 - The Review of the Register of Charities (2001), p. 13.

⁶ §501(c)(3).

⁷ §170(c)(2)(a); see Harvey P. Dale, "Foreign Charities," 48 *Tax Lawyer* 655 (1995).

space and clean waters would meet a conventional "goodness" test, but many states confine property tax exemption to organizations that run operating charitable programs – as compared to environmental protection – on their real estate.

Lest we be chastised for paying too much heed to lay meanings, we turn to legal definitions and find that they come closer than the OED definition to charting the course of the law – but the "fit" remains weak. The most oft-quoted English legal definition, the *Pemsel* language of 1891⁸ (itself borrowing from the Preamble to the 1601 Statute of Charitable Uses⁹), is as follows:

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

There is no one American legal definition as revered as Britain's *Pemsel*, but a standard, if somewhat emotive refrain, comes from Massachusetts Chief Justice Gray in the 1867 case of *Jackson v. Phillips*:

"A charity, in the legal sense, may be more fully defined as a gift...for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."¹⁰

⁸Commissioners for Special Purposes of Income Tax v. *Pemsel*, [1891] A.C. 531 – an income tax case but cited since it was handed down as an authority for charitable trusts as well.

⁹Stat. 43 Elizabeth I, c. 4 (1601).

¹⁰*Jackson v. Phillips*, 14 Allen 539, 556 (Mass. 1867).

A more modern American definition – focusing on charitable trusts – appears in the Restatement of the Law of Trusts (Second)¹¹:

"A purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting property to be dedicated to the purpose in perpetuity."

The Restatement then "enumerates five broad sectors of activity similar to those in Justice Gray's definition...",¹² but concludes that "[t]here is no fixed standard to determine which purposes are of such social interest to the community...; the interests of the community vary with time and place."¹³ And Austin Wakeman Scott observed, "The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes."¹⁴ As early as 1921 Lord Sterndale stated that he was "unable to find any principle which will guide one easily, and safely, through the tangle of cases as to what is and what is not a charitable gift."¹⁵

One reason that the “fit” remains awkward is that the very open-endedness of the legal definition of charity (see the preceding paragraph) makes it difficult to determine whether there is a fit or not: what is the template? Moreover, to the extent that we can see a definitional shape, the fit with current law is – as in the case of the lay definition of charity – both tighter and looser. Thus – under tightness – the scope of federal tax exemption/deductibility and state property tax exemption does not match the breadth of the last *Pemsel* clause or the Massachusetts court quotation. For example, the “benefit to the community” that undoubtedly inheres in the creation of a major high employment enterprise will not qualify the business as charitable for purposes of exemption or

¹¹ (1959), §368, comment b.

¹² Marion R. Fremont-Smith, *Foundations and Government* (1965), p. 56.

¹³ Restatement of Trusts (Second) (1959), §368, comment b.

¹⁴ Quoted in Fremont-Smith, *op. cit. supra*, p. 57.

¹⁵ Quoted in James J. Fishman and Stephen Schwarz, *Nonprofit Organizations – Cases and Materials* (2d ed. 2000), p. 90.

eligibility for deductible gifts; the non-distribution constraint¹⁶ or its rough federal tax counterpart, the inurement clause,¹⁷ takes care of that. Another “tightness” indicator: not all jurisdictions believe that cultural activities necessarily qualify as charitable for property tax purposes despite the apparent “community benefit” conferred by the arts; this, at least, appears to have been the view of the New York State legislature in 1971, when it gave municipalities the authority to put a subset of charitable organizations (including bar associations and cultural institutions) back on the property tax rolls.¹⁸ And at least one jurisdiction – Massachusetts – once held, for property tax purposes, that an otherwise “charitable” cultural institution – the Boston Symphony Orchestra – lost its charitable status when it charged admission.¹⁹ At the same time – turning to looseness – the ambit of federal exemption sometimes seems broader than the classic legal definitions of charity. For example, does the preservation for Kansas City of the Royals baseball franchise – which qualifies for exemption²⁰ -- meet the “social interest to the community” test of the Restatement of Trusts?²¹

The search for “fit” is further complicated by the fact that, while charitable trusts do not stray semantically from the word “charitable” (however much the word may not mean, nowadays, what it once did), the other laws conferring “privileges and exemptions”²² on various nonprofits – principally federal exemption/deductibility and property tax exemption – engage in adjectival sprawl. “[R]eligious, charitable, scientific, literary, or educational” trip from the Code’s tongue in (§§501(c)(3) and 170(c)(2)(B)), not to mention prevention of cruelty to children or animals, national or international amateur

¹⁶ Henry B. Hansmann, “The Role of Nonprofit Enterprise,” 89 *Yale L. J.* 835 (1980).

¹⁷ §501(c)(3).

¹⁸ 1971 N.Y. Laws ch. 414; see Peter Swords, *Charitable Real Property Tax Exemptions in New York State – Menace or Measure of Social Progress?* (1981), p. 151.

¹⁹ *Boston Symphony Orchestra v. Board of Assessors*, 294 Mass. 248 (1936), discussed in Fremont-Smith, *op. cit. supra*, pp. 70-71.

²⁰ IRS Private Letter Ruling 9530024 (July 28, 1995), discussed in Fishman and Schwarz, *op. cit. supra*, pp. 456-7.

²¹ See text at note 11, *supra*.

²² See text at note 2, *supra*. This may be a useful place to note that the use of this expression may be resisted, in the case of tax exemption and deductibility, by those who subscribe to “tax-base-defining” theories, which challenge the notion that exemption or deductibility is any form of subsidy or “privilege.” These theories are briefly referred to below.

sports competitions and "testing for public safety."²³ Another form of sprawl complicating the effort to relate "charity" to exemption and deductibility is the fact that deductibility under the income tax (not the estate tax) is extended to non-§501(c)(3) organizations whose descriptors do not even include the word "charitable": veterans' organizations,²⁴ cemetery associations²⁵ and, for some purposes, domestic fraternal orders.²⁶ For some limited purposes, the "charitable" adjective is thought to cover all the other adjectives listed in the federal word list,²⁷ but for most purposes the other words have a life and force of their own, thus further complicating an effort to make a direct comparison between the revered "charitable" definitions and the tax code's exemption/deductibility provisions. Moreover, when we turn to state property tax statutes, we encounter other adjectives – such as "eleemosynary" and "benevolent" – that may or may not mean something different from "charitable."²⁸

To this point, the lack of a match between charitable definitions and the law of charity has been asserted from a non-dynamic perspective – i.e., based on observations of the state of the law at a single point in time. Another way of searching for explanations of legal rules – in our case, to investigate the influence of "charity" definitions on the rules – is to examine the law as it undergoes change: change in the sense of new rules occupying previously vacant land or rules that reverse or modify prior policies. Here, as in scientific research, change provides a window on causation. And in the case of charity law, changes have indeed proliferated: the scope and thrust of the exemption and deductibility rules under §501(c)(3) have shifted – sometimes expanding and sometimes contracting – almost since the 16th Amendment ushered in the modern tax code, and there have been comparable shifts in charitable trust law and state property tax exemption rules – all of which provide "windows" of observation. Because charitable trust and property tax

²³ Although the last item does not qualify for deductibility under §170(c).

²⁴ §170(c)(3).

²⁵ §170(c)(5).

²⁶ §170(c)(4).

²⁷ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

²⁸ *Facchina, Showell and Stone, op. cit. supra.*

windows are more difficult to use – there are 51 different jurisdictions to examine – we focus here (although not exclusively) on the federal tax windows.

Here are some examples of expansion and contraction of "privileges and exemptions," brought about by the Congress, the federal courts or the Treasury – or their state counterparts. The examples (not exhaustive) are given in roughly chronological order:

- The Second Circuit's 1930 decision the *Slee* case held that legislative activity, unless in support of an organization's "end-in-chief," was inconsistent with §501(c)(3) status; Judge Learned Hand stated (without further explanation) that "[p]olitical agitation as such is outside the statute....Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."²⁹ The decision (which obliquely approved a 1919 Treasury regulation) defeated an effort of the American Birth Control League to lobby against birth control prohibitions without loss of exemption. The court engaged in no charity-defining discussion.
- Congress in effect ratified *Slee* in 1934, when it enacted a revision of §501(c)(3) that prohibited more than "insubstantial" legislative lobbying – without any effort to link this ban to "charity" definitions; the rationale for this legislation, according to Fishman and Schwarz, is "clouded in obscurity."³⁰
- A further ratification of *Slee* – to the extent that Judge Hand's "political agitation" reference embraced electoral campaigning – took place in 1954, when then-Senator Lyndon Johnson (said to have been outraged at what he thought was a

²⁹ *Slee v. Commissioner*, 42 F.2d 184, 185 (1930).

³⁰ Fishman & Schwarz, *op. cit. supra*, p. 522. See also Elias Clark, "The Limitation of Political Activities: A Discordant Note in the Law of Charities," 46 *Va. L. Rev.* 439 (1960); Laura B. Chisolm, "Exempt Organization Advocacy: Matching the Rules to the Rationale," 63 *Ind. L. J.* 201 (1987-88); and Miriam Galston, "Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities," 71 *Tex. L. Rev.* 269 (1993).

political opponent's use of exempt funds) succeeded in introducing a Senate floor amendment that, when enacted, revised §501(c)(3) to prohibit political campaign involvement. The legislative history is silent on the rationale.³¹

- Meanwhile, in 1950, Congress enacted another but rather different contractionist change: the Unrelated Business Income Tax (UBIT).³² It is included in this list because, in effect, it limited the scope of the income tax exemption by removing unrelated business activity (with exceptions) from the range of activities deemed to be part of the exempt mission of a §501(c)(3) entity. Those leading the charge for the UBIT were not for the most part concerned with lack of charitability; instead, they complained of the "unfair competition" that nonprofits' business dealings inflicted on for-profit businesses. The defenses mounted by the nonprofits – economic and prudential arguments – were apparently strong enough to ward off total loss of exemption as a sanction for unrelated business income; the compromise result has been in the Code ever since.
- Turning from contractionist changes to expansions, 1959 saw the introduction of a new set of §501(c)(3) regulations that reversed earlier doubts (in some cases leading to denials) concerning the exempt status of groups engaging various forms of social activism. Here, the Treasury, at least on paper, engaged directly in the process of charitable definition. Indeed, regulations³³ started with a definition of charity for §501(c)(3) purposes that copied almost exactly the 1867 Massachusetts Supreme Judicial Court language quoted above,³⁴ but then went on to include:

"promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions, (ii) to eliminate

³¹ Fishman & Schwarz, *op. cit. supra*, p. 522.

³² Harvey P. Dale, "About the UBIT...", 18 *N.Y.U. Conference on Tax Planning for 501(c)(3) Organizations*, ch. 9 (1990).

³³ Treas. Reg. §1.501(c)(3)-1(d)(2) (T.D. 6391) (1959).

³⁴ See text at note 10, *supra*.

prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency."

What brought about this provision, it was reported at the time,³⁵ was not a process of Treasury rumination over the definition of charity but something much less academic. A number of Pennsylvania citizens engaged in civil rights, urban development, and other social reform activities, unhappy with IRS action on their exemption applications, complained to the senior Senator from that state, Hugh Scott, who then went to his fellow Republicans in the White House – with a favorable Treasury outcome.

- Two years later a new nonprofit enterprise, the Voter Education Project (VEP) (then an arm of the Southern Regional Council), which intended to help African-American voters in the South to register and to vote – and to protect them from intimidation and violence, applied for a ruling that this activity comported with §501(c)(3). Counsel filing the application thought the odds were not very good – too close to the electoral process for comfort – but a favorable ruling resulted. It is not known whether the IRS spent much time on issues of charitability; in any event, a key contention in support of the application was the urgency of protecting the franchise for African-American citizens. Indeed, this sense of national need had been the basis for the suggestion made to a private foundation³⁶ by two high White House and Justice Department officials that VEP be created, but whether their involvement was communicated to the Treasury or IRS is not known to the present writer.³⁷

³⁵ This was the account given to me in 1959 by a tax lawyer in close touch with the Treasury.

³⁶ It was the Taconic Foundation, I mention this fact to explain the basis of my information about the VEP and the Cooperative Assistance Fund (CAF) – see next text paragraph – for I served as an officer of the Taconic Foundation when both groups were being formed and was a witness to the 1961 VEP negotiations, a participant in the 1968 CAF negotiations, and a participant in negotiations with the Treasury in 1969 concerning the legislation affecting VEP.

³⁷ The expansionist result described in this paragraph came close to suffering effective reversal in 1969, when the Senate Finance Committee approved a provision in the Tax Reform Act that would have prohibited

- Just as the VEP's chances were considered a long shot in 1961, another initiative in 1968, originating from the same private foundation, was also thought to be a difficult case. A newly formed organization, the Cooperative Assistance Fund (CAF), that was to pool the resources of several foundations for purposes of making "program-related investments," applied for an exemption. What apparently turned out to be a key stumbling block for the IRS was CAF's intention to carry out its economic development purposes partly through providing debt or equity investments – often at sub-market terms – to for-profit businesses operating in poverty areas. It is not known to the author whether this was an obstacle because of definitions of charity or because the plan appeared to confer an excessive private benefit on private persons or because of fears of complaints from non-minority investment-seekers. In any event, although arguments about charitable status were probably proffered in dealing with IRS, counsel for CAF emphasized the importance of advancing minority enterprise development. The exemption was granted and was reaffirmed in the 1969 Tax Reform Act.³⁸
- On the contractionist front, the Tax Reform Act of 1969 enacted a number of restrictions on private foundations. For present purposes, the more relevant provisions are those that circumscribed the scope of activities permitted to foundations as compared to public charities: a total restriction on lobbying (i.e., not permitting foundations the benefit of an insubstantiality rule), the voter education compromise strictures referred to above, and a requirement of IRS advance approval of the criteria for travel or study grants.³⁹ None of these provisions was based on notions of “charitable” status; they were all provisions

foundations from providing any support to voter education or registration activities; emergency efforts on the Senate floor succeeded in reinstating the compromise provision that is now §4945(f).

³⁸ See §4944(c) and – expressly approving investments in for-profit businesses – Sen. Rep. 91-552 (1969). To the same effect, see Treas. Reg. §53.4944-3(b), Examples (1)-(6), and Rev. Rul. 74-587, 1974-2 Cum. Bull. 162.

meant to preclude claimed abuses of the foundation form, each based on a specific complaint voiced in the House hearings.

- At about the same time, the House Ways and Means Committee considered and then dropped a more general effort to limit the scope of foundation activities – one that might have had grave implications for all public charities: the Committee published a tentative proposal that foundations be precluded from "any activity intended...to influence the decision of any government body."⁴⁰ This proposal clearly did not emanate from any notion of charitability; it was a response to laments about the alleged power of private foundations to act as a "shadow government."
- In the same year, 1969, the IRS engaged in an "expansionist" move in the health care field – a relaxation of earlier restrictions. Earlier IRS policy had required hospitals, as a condition of exemption, to treat poor patients regardless of their ability to pay – i.e., "charity care."⁴¹ In 1969, the IRS removed this criterion, leaving in place what appeared to be a requirement that an exempt hospital operate an "emergency room available to all persons" and that it "provide hospital care for all those persons...able to pay the cost thereof either directly or through third party reimbursement...."⁴² This ruling, and Court of Appeals decision that sustained it against a challenge by health and welfare groups and indigent individuals,⁴³ relied on charitable definitions contained in the Restatement of Trusts (Second), referred to above; health care was an independent category of charity, separate from relief of the poor. But both the Treasury and the Court of Appeals placed great emphasis on major new modes of access to health care

³⁹ §§4945(d)(1),(2),(3), described as "Programmatic...Grantmaking Controls" in John G. Simon, "Private Foundations as a Federally Regulated Industry: Time for a Fresh Look?", 27 Exempt Org. Tax Rev. 66, 67-68 (2000).

⁴⁰ Committee on Ways and Means, U.S. House, Press release, May 27, 1969, p. 4.

⁴¹ Rev. Rul. 56-185, 1956-1 Cum. Bull. 202.

⁴² Rev. Rul. 69-545, 1969-2 Cum. Bull. 117.

resulting from Medicaid and Medicare legislation, from increased private insurance and from increased governmental provision of hospital care.⁴⁴ In other words, an issue of social welfare needs and priorities – an obvious area of contest between health care advocates and hospitals – appears to have been even more salient a decisional factor than charity definitions.

- In the early '70's, the IRS entered into a major controversy over public interest law firms, first issuing a press release announcing a study of public interest law firms' eligibility for exempt status, and then, after a "firestorm of protest,"⁴⁵ producing a much more modest set of regulatory controls meant to assure the "charitability" of these firms through policing the way they select issues for litigation and insuring that their services are distinguishable from those of private firms.⁴⁶ Of all the "change" examples listed here, this is the one most evidently arising out of a concern for the meaning of charity.
- In the mid-1970s, in a far less celebrated chapter of this history, the IRS imposed and then relaxed another set of restrictions. These restrictions took the form of denials of exemption – or the raising of questions about exemption – in the case of environmental groups on the ground that there was insufficient evidence of the likelihood of environmental benefit.⁴⁷ As far as can be ascertained, this policy was short-lived. In any event, the rejections did not purport to rest on lack of charitable status but on the notion that tax exemption should not be extended to feckless actors.

⁴³ Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C.Cir. 1974), reversed on standing grounds, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

⁴⁴ These assurances of full access, to put it mildly, appear to have been premature.

⁴⁵ Fishman & Schwarz, *op. cit. supra*, p. 396.

⁴⁶ See, e.g., Rev. Rul. 75-74, 1975-1 Cum. Bull. 152.

⁴⁷ Marcia K. Sowles, "The Charitable Status of Public Interest Litigation Groups: The Mixed Reaction of the IRS and the Need for a Comprehensive Theory," Yale Law School seminar paper (1980).

- Another instance of (partial) relaxation of earlier restrictions – this time, Congressional relaxation – took place in 1976 when §501(h) was enacted. It permitted all §501(c)(3) organizations – except foundations and (surprisingly) churches – "to opt out of the 'no substantial part' test and instead be governed by mechanical rules that set ceilings for different types of lobbying expenditures."⁴⁸ The ceilings in fact provided far more freedom to lobby for most organizations. This change was prompted not by charity interpretations but by pressure from the nonprofit community to be spared from uncertainty about the dangers of loss of exemption, so that they might participate more fully in public policy formation.
- A final item in this (admittedly incomplete) federal list involves another instance of contraction – this time in the cause of racial justice. In the *Bob Jones* case,⁴⁹ the Supreme Court held that a university denying admission to applicants engaged in interracial marriage or advocating interracial marriage or dating was not entitled to §501(c)(3) status. In overriding the university's assertion of a right to pursue its underlying religious principles, the court relied, in part, on the charity law doctrine that charitable status is denied to groups that violate clearly established public policy. The Chief Justice's majority opinion, over the objection of Justice Powell, advanced a second rationale less clearly based on charity law doctrine: that tax exempt organizations must establish that they "demonstrably serve and [are] in harmony with the public interest." However, even the first rationale reciting charity doctrine can plausibly be construed as less important to the decision than the overriding national interest in extinguishing vestiges of racial discrimination.

Although our focus has been on federal tax changes, two expansions or contractions of "privileges and exemptions" at the state level should be noted:

⁴⁸ Fishman & Schwarz, *op. cit. supra*, p. 544.

⁴⁹ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

- The Massachusetts case of *Jackson v. Phillips*, referred to earlier, held that a trust to benefit fugitive slaves was a proper charitable trust, but that a trust to promote the rights of women was not, for it sought "directly and exclusively to change the laws."⁵⁰ Although a focused lobbying activity, of the kind that would fall afoul of §501(c)(3) for tax purposes, would presumably encounter trust law difficulties if conducted by a charitable trust, activity broadly seeking to "change the laws" in behalf of charitable purposes would no longer doom such a trust. Here, we have an example of an expansion – a relaxation of restriction – more clearly linked to definitions of charity than most of the federal examples.
- State property tax decisions promoting or cutting back on redistributive objectives illustrate both expansionist and contractionist tendencies. In the 1920's and 1930's, for example, the Connecticut Supreme Court effectively contracted the "privileges and exemptions" of private schools for redistributive reasons; the schools lost their property tax exemptions because of high tuition fees and inadequate or nonexistent scholarship programs. A subsequent legislative change, providing exemption for entities "organized exclusively for ...educational...or charitable purposes," led the Court to resume tax exemption for such schools. This expansion, according to one commentator, "may be characterized as one which refuses to apply the test of being 'charitable' to those types of institutions whose functions are specifically enumerated in the exemption statute (i.e., 'educational,' historical,' etc.)."⁵¹ On the other hand, in the health care field, more recent contractionist moves – again with redistributive goals – have *not* been reversed: Pennsylvania's tax assessors have successfully challenged the exemptions of several nonprofit hospitals under statutes implementing the state Constitution requirement that exemption attach only to "institutions of purely public character" – interpreted to include a significant free-care requirement. Similar free-care mandates have been imposed on tax-exempt hospitals in Utah following a state

⁵⁰ 96 Mass. (14 Allen) 539, 571 (1867).

Supreme Court decision to that effect.⁵² Throughout these property tax controversies, as in the case of the charitable trust controversies mentioned above, "charity" definitions are invoked more frequently than in the federal tax examples listed earlier. It is the case, however, that, in the health care area, state court and state legislative references to the meaning of "charity" are coupled with assertions of the public need for health care access; these assertions were similar to the public policy concerns that we noted in connection with the 1969 change in federal tax policy on free hospital care – except that the federal policy on free-care moved in the opposite direction.

This canvass of some of the twists and turns in the evolution of charity law in this century reveals a fair amount of interesting – sometimes very controversial – expansion, restriction and perhaps lateral movement. What it does *not* reveal, on the federal level (with two or three exceptions), is any effort by legislative, judicial or administrative decision-makers to ground these developments in the meaning of charity, however and by whomever defined. To paraphrase Chief Justice Marshall, this was *not* "a charity concept we are expounding."⁵³

If the development of charity law has been significantly hitched not to a definition of charity, then to what? We turn next to our second inquiry.

⁵¹ Joseph R. Stewart, "Federal Tax Benefits for Elite Private Schools." Yale Law School seminar paper (1973), pp. 21-22. This paper cites and discusses the cases referred to in the text.

⁵² *Utah County v. Intermountain Health Care, Inc.* 709 P.2d 265 (Utah 1985). The Pennsylvania and Utah history is briefly summarized in Fishman & Schwarz, *op. cit. supra*, pp. 460-62. For comprehensive treatment of property tax controversies involving charities, see, generally, Evelyn Brody, ed., *Property-Tax Exemption for Charities: Mapping the Battlefield* (2002).

⁵³ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

II. If the development of charity law has been significantly hitched not to a definition of charity, then to what?

When one reviews the list of the expansions and contractions and other shifts we have listed in the previous section (on both the tax and non-tax fronts), it is obvious that most of them grew out of a social, economic or political controversy or at least a social, economic or political dilemma – quite apart from charity-defining. Indeed, the very first legal development mentioned above – the enactment in 1601 of the Preamble to the Statute of Charitable Uses – had just such origins. Blake Bromley has written:

“The *Preamble* is a remarkable and troubling example of the State seeking to co-opt the agenda and resources of the charitable sector. It is disturbing to realize that the enumerated objects are almost solely a reflection of Elizabeth I’s political and economic policies and programs.”⁵⁴

And in the U.S., the original enactment of a federal income tax deductibility statute stemmed from a pragmatic dilemma: how to protect nonprofit groups from a decreased flow of gifts caused by World War I increases in income tax rates. The answer: deductibility.⁵⁵

Moving to the post-World War I decades, our list of federal and state changes in charity law reveals several varieties of the controversies or dilemmas we have referred to. Thus, where there was controversy, it was sometimes between nongovernmental actors championing opposed economic interests (e.g., the for-profit business sectors seeking relief from "unfair competition" versus charities seeking to maximize revenues; health care advocacy groups seeking greater access to affordable hospital care versus hospitals seeking to prevent revenue loss). The clash in several of these cases was between competing values (e.g., distributional claims versus the need to protect institutional capacity; racial non-

⁵⁴ Blake Bromley, “1601 Preamble: The State’s Agenda for Charity,” 7 *The Charity Law and Practice Review* 209 (2002).

discrimination versus religious-based claims of institutional autonomy; broad participation in public policy formation versus political "neutrality" in the use of taxpayer "subsidies"). In other cases not involving a clash between opposed actors or values, the dilemma was one of how to advance the public good along a certain line (e.g., how to discourage environmental groups that seemed clueless; how to advance minority voter participation in the South). This policy-driven decisional process is not unique to the United States: George Keeton, writing 40 years ago about British charity jurisprudence, declared:

“In deciding what is and what is not a charity, the courts are really making decisions upon questions of public policy which in an age of rapid social change, are of steadily increasing importance.”⁵⁶

The American list of social, economic and political controversies and dilemmas, set forth above, is – in the non-pejorative sense of the word – motley. The heterogeneity of these controversies and dilemmas – even though some of them have some common themes – frustrates any attempt to derive useful generalizations about a social-economic-political explanation for the development of charity law. When this paper was first underway, there was an authorial hope that charity law decisions could be understood, if not by reference to historic definitions, then by reference to a set of general “what’s at stake” propositions. In other words, “what’s at stake” – politically, economically, socially – in questions about the size and shape of the income tax exemption or the income tax deduction or the property tax exemption or about what is and what is not a charitable trust? That authorial hope has been crushed by heterogeneity; the political-economic-social “what’s at stake” questions are too many and too focused to provide a Big Picture – unless there is a mosaic that can be uncovered by someone else’s superior synthetic powers.

⁵⁵ Commission on Private Philanthropy and Public Needs, *Giving in America* (1975), p. 106.

⁵⁶ George W. Keeton, quoted in Fremont-Smith, *op. cit. supra*, p. 34.

Accordingly, those who seek a more coherent set of guiding principles against which to examine – and decide upon – changes in the “privileges and exemptions” of the charitable sector may be prompted to look beyond charitable definitions and beyond “what’s at stake” issues – to look to the world of theory. Are there primal texts about the charitable sector – theoretical explanations of the charitable universe (or its legal arrangements) – that can guide the development of charity law? That is the point of our next inquiry.

III. Is there a body of theory that can serve as the canon – the fundamental understanding – to guide the development of charity law?

There is, to be sure, no want of theories to explain and/or justify the legal status of the charitable – or, more broadly, the nonprofit – sector and, in particular, to explain and/or justify tax exemption and deductibility and other “privileges and exemptions” attaching to charitable trusts and other entities within the sector. These theories are drawn from social science disciplines or based on other forms of public policy analysis or based on taxation theory. Many of them have been the subject of previous National Center on Philanthropy and the Law conferences, and others have been included in summaries of the literature on the nonprofit sector.⁵⁷ Here is a brief, captions-only list of a number of these theories:

(a) Theories relating generally to the importance of the nonprofit sector (and therefore implicitly to the legal “privileges and immunities” of charitable entities). For example, the nonprofit sector is variously recognized:

- As meeting heterogeneous demands for collective goods – Burton Weisbrod.⁵⁸

⁵⁷ See several of the chapters in Walter Powell, ed., *The Nonprofit Sector: A Research Handbook* (1987) and in a successor volume (forthcoming), edited by Powell and Richard Steinberg.

⁵⁸ Burton A. Weisbrod, “Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy.” In Weisbrod, ed., *The Voluntary Nonprofit Sector* (1977).

- As a decentralizing force in an age of big government – a source of pluralism and heterodoxy in society – Kingman Brewster.⁵⁹
- As a response, through the "nondistribution constraint," to "contract failure," one form of market failure – Henry Hansmann.⁶⁰
- As a response to "government failure": constitutional prohibitions or majoritarian or egalitarian constraints on innovative or efficient government programs – James Douglas.⁶¹
- As an outlet for free expression – Alan Pifer.⁶²
- As an avenue to the building of community life – John Gardner,⁶³ Carl Milofsky.⁶⁴
- As an avenue to socioemotional health through service to others – Giandomenico Majone.⁶⁵
- As an efficient utilizer of volunteer labor – Estelle James.⁶⁶
- As an efficient method to avoid certain types of transaction costs – Michael Krashinsky.⁶⁷
- As a font of innovation and experimentation in various arenas – John Gardner.⁶⁸

(b) Theories specifically relating to federal or state tax exemption or deductibility.

⁵⁹ Kingman Brewster, Address to the Yale Alumni Fund Dinner, 28 *Yale Alumni Magazine* (February, 1965), pp. 10-11.

⁶⁰ Hansmann, *op. cit. supra.*

⁶¹ James Douglas, *Why Charity? The Case for a Third Sector* (1983).

⁶² Alan Pifer, "The Nongovernmental Organization at Bay," *Carnegie Corporation Annual Report* (1966).

⁶³ A key excerpt from John Gardner's 1979 speech, "Empowering Communities," may be found at <http://www.pbs.org/johngardner/sections/writings.html#speeches>.

⁶⁴ Carl Milofsky, *Not-for-Profit Organizations and Community: A Review of the Sociological Literature* (Yale University Program on Nonprofit Organizations Working Paper No. 6) (1979).

⁶⁵ Giandomenico Majone, *Professionalism and Nonprofit Organizations* (Yale University Program on Nonprofit Organizations Working Paper No. 24) (1980).

⁶⁶ Estelle James, "The Nonprofit Sector in Comparative Perspective." In Powell, ed., *op. cit. supra*, pp. 397-415.

⁶⁷ Michael Krashinsky, *Transaction Costs and a Theory of the Nonprofit Organization* (Yale University Program on Nonprofit Organizations Working Paper No. 84) (1984).

- "Tax-base-defining" theories:
 - In relation to federal income tax exemption – Boris Bittker & George Rahdert;⁶⁹ Richard Goode.⁷⁰
 - In relation to federal income tax deductibility – William Andrews;⁷¹ Boris Bittker.⁷²
 - In relation to federal estate tax deductibility – John Simon.⁷³
 - In relation to state property tax exemption – Thomas Heller;⁷⁴ Peter Swords.⁷⁵

- "Capital subsidy theory" – to compensate for the negative effects of the nondistribution constraint on capital formation – Henry Hansmann.⁷⁶
- "Altruism theory" – nonprofits as sources of a "metabenefit": the altruistic provision of goods and services" – Rob Atkinson.⁷⁷
- "Donative theory" – subsidization of "organizations capable of attracting a substantial level of donative support from the public" – Mark Hall & John Colombo.⁷⁸

⁶⁸ John Gardner, Speech at Commonwealth Fund Board Retreat, set forth at <http://www.pbs.org/johngardner/sections/writings.html#speeches>.

⁶⁹ Boris I. Bittker and George K. Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L. J.* 299 (1976).

⁷⁰ Richard Goode, *The Corporate Income Tax* (1951), p. 40.

⁷¹ William D. Andrews, "Personal Deductions in an Ideal Income Tax," 86 *Harvard L. Rev.* 309 (1972).

⁷² Boris I. Bittker, "Charitable Contributions: Tax Deductions or Matching Grants?," 28 *Tax L. Rev.* 37 (1972).

⁷³ John G. Simon, "Charity and Dynasty under the Federal Tax System," 5 *Probate Lawyer* (Summer 1978), pp. 22-23.

⁷⁴ In Yale University Program on Nonprofit Organizations, "Parsing Property Tax Policy." *Research Reports* No. 2 (Fall 1982), pp. 5-7.

⁷⁵ Peter Swords, *Charitable Real Property Tax Exemptions in New York State – Menace or Measure of Social Progress?* (1981), pp. 200-226.

⁷⁶ Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 *Yale L. J.* 54 (1981).

⁷⁷ Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Syntheses*, 27 *Stetson L. Rev.* 395 (1997). This article also reviews other theories of exemption.

⁷⁸ Mark A. Hall and John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 *Ohio St. L. J.* 1379 (1991).

- “Sovereignty” theory – exemption resulting from tendency to view charitable sector as quasi-sovereign – Evelyn Brody.⁷⁹
- Relief of government financial burdens rationale – House Ways and Means Committee.⁸⁰

Taken together, these theories have the same approximate vector: they generally – but with significant differences – support the presence and possibly the growth of a nonprofit sector. But no one theory explains or justifies all the various privileges and exemptions enjoyed or sought by charities. Indeed, they cut in different directions: thus the donative theory would support tax deductibility for some currently-eligible organizations but not others,⁸¹ while the altruism theory would have a vastly greater coverage.⁸² If one theory or a few of the theories were universally embraced, and they supported some of the privileges and exemptions but not others, perhaps legislative, judicial and administrative law-givers would be persuaded to follow whatever expansionist or contractionist policies these theories dictated. Or if, within each “privilege and exemption” category – e.g., income tax exemption or property tax exemption – there was a broad consensus about the applicability of one or a few theories, then it might be possible to derive a theoretically-based body of charity law for each such category. (In that case, one might follow Judge Jerome Frank’s idea that the word “gift” should be spelled differently for each tax category – gift tax, income tax, estate tax – in which “gift” was (differently) defined – thus, “gift,” “gaft,” “geft”⁸³; so, here, “charity,” “cherity,” “chority.”)

But such universal embrace of any one or a group of theories – either for all privilege-and-exemption categories or for any one category – does not prevail and is not even on the horizon. For example, continuing controversy surrounds the tax-base-

⁷⁹ Evelyn Brody, “Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption,” 23 *J. Corp. L.* 585 (1998).

⁸⁰ H.R. Rep. No. 1860, at 19 (3d Sess. 1938) (on the Revenue Act of 1938), p. 19.

⁸¹ See Hall and Colombo, *op. cit. supra*.

⁸² See Atkinson, *op. cit. supra*.

⁸³ *Commissioner v. Beck’s Estate*, 129 F.2d 243, 246 (1942).

defining theories. And there is considerable debate about whether the major justifications for the nonprofit sector lie in positive accounts of its virtues or in the sector's capacity to address the short-falls of other sectors – “market failures” or “government failures” – or in some combination of these rationales. Moreover, not all of the theories supporting the importance of the charitable sector also purport to support legal privileges and exemptions for the sector. In addition, when it comes to non-federal issues, the existence of 51 sovereignties makes it even more difficult to talk about universally accepted theories.

The search for theoretical understandings and justifications may one day lead to universally – or at least very widely – embraced theories. It is an important search. Indeed, much of the work already devoted to this task is enlightening and a valuable contribution to ongoing policy discussions about “privileges and exemptions.” What has been observed in the prior paragraphs does not gainsay these contributions. It is, however, the case that a single central canon – a fundamental theoretical understanding (though not necessarily as fundamental as $E=MC^2$) – is not available, and the prospects for an early development of such a canon are far from promising.

Without that canon, and without an alternative guiding light in the form of charitable definitions or a macro-“what's-at-stake?” analysis – i.e., without anything to guide charity law that can count as “*a Constitution* we are expounding” – what are we to do? That is our final point of inquiry.

IV. Quo vadimus? Where do we go from here?

At least for the present, until the development of one of the foundational alternatives discussed under parts I, II and III of this paper, where we go from here is to muddle through. Legislatures, courts, administrative agencies will continue with ad hoc resolutions of controversies and dilemmas over privileges and exemptions – resolutions, one hopes, worked out as honestly and thoughtfully as possible. Muddling through is,

after all, a venerable – and, from some distinguished perspectives, honorable and essential⁸⁴ -- process of public policy formation.

It is, however, an untidy process. It results in heterodox, non-synchronous, uncoordinated decision-making – not fully tamed. But that, after all, is the hallmark – and, some would say, the glory – of the charitable world or the nonprofit universe: heterodox, non-synchronous, uncoordinated – and not fully tamed. Indeed, it is quite possible that more order in the law might produce an unwanted level of order in the “third sector.” And that, as foreign experience tells us, could be an unwelcome outcome.⁸⁵

And so – to return to the question posed in the title of this paper, is there a law of charity? Probably not.

But perhaps that may change. To quote the closing sentence of Grant Gilmore’s book on another legal front, *The Death of Contract*:

“Contract is dead – but who knows what unlikely resurrection the Easter-tide may bring?”⁸⁶

⁸⁴ See Charles E. Lindblom, “The Science of Muddling Through,” 19 *Public Administration* 59 (1959).

⁸⁵ Summaries of nonprofit regulation in other countries are to be found in Lester M. Salamon, *The International Guide to Nonprofit Law* (1997) and Thomas Silk, ed., *Philanthropy and Law in Asia* (1999). The impact of relatively high levels of regulation and constraint on the performance of foreign nonprofit sectors is not trivial, although it cannot be captured in a footnote. A good starting point, however, is Douglas, *op. cit. supra*.

⁸⁶ Grant Gilmore, *The Death of Contract* (1974), p. 103.