
HOW PUBLIC IS PRIVATE
PHILANTHROPY?

SEPARATING REALITY
FROM MYTH

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PhilanthropyRoundtable

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The fact that foundations and other charities have state charters does not alone make these organizations “state actors” or governmental or quasi-governmental entities accountable as such to the public.

- A. The grant of a state charter does not render a nonprofit corporation and its assets subordinate to the state.
- B. In general, foundations and other charities enjoy constitutional freedoms of association and expression, and are not subject to the constitutional constraints imposed on state actors.
- C. Foundations and other charities generally are not subject to public access laws.

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- A. The covenant underlying the exchange of federal tax preferences for charitable activity requires that exempt charities dedicate their assets to, and use them in furtherance of, charitable purposes and not for private benefit.
- B. Individuals and businesses benefit from tax-favored treatment. Their assets and resources do not thereby become public, and they are not thereby transformed into governmental entities. Foundations and other charities should be viewed no differently.
- C. Even if the tax-favored treatment of foundations and other charities is viewed as a government subsidy or grant, most charitable assets come not from government but rather from private funds.
- D. Foundations and other charities that are involved with government only indirectly, through their tax exemptions, should not face restrictions or impositions more onerous than the limitations that entities face when they are involved with government directly, through grants or contracts.

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LETTER FROM THE PHILANTHROPY ROUNDTABLE

The Philanthropy Roundtable is dedicated to helping donors achieve their charitable objectives. The Roundtable offers expert advice and counsel to the individual donors and foundations that are its members and brings donors together with others who share their interest in formulating and implementing philanthropic strategies that work.

Part of the mission of the Roundtable is to make its members aware of the features of the legal and policy climate that may affect donors' ability to achieve their charitable aims most effectively. In recent years, this climate has included increasing pressures from some public officials and advocacy groups to subject private philanthropies to more uniform standards and stricter government regulation. Such changes could significantly affect the ability of philanthropies to continue to play their role in supporting and nourishing American pluralism.

A major justification cited by advocates of these proposals is the claim that philanthropic assets are "public money." These advocates argue that the charitable tax exemption and deduction are government subsidies; thus, philanthropic funds are public money and should be publicly controlled. Some advocates also claim that philanthropic assets are public money because philanthropies operate under state charters and are subject to state oversight.

The Roundtable offered support, without any restrictions on content, to two noted legal scholars, Evelyn Brody and John Tyler, to enable them to prepare a monograph and a longer law review article evaluating the au-

thorities and precedents applicable to the “public money” claim. In this monograph, the authors present the results of their evaluation.

The authors have concluded that the “public money” claim is not well founded in legal authority. They find that state oversight of philanthropies is based on the need to ensure that philanthropies pursue charitable rather than private purposes, not on an assertion that philanthropies are subject to state direction or that their assets belong to the public. Similarly, the authors find, the fact that philanthropies have state charters does not make them state agencies or generally subject them to the constraints that apply to public bodies.

Finally, the authors find that philanthropies and their donors receive their federal tax benefits in return for the obligation to pursue public rather than private purposes and to comply with the laws designed to ensure the pursuit of such purposes; there is no evidence that these benefits were meant to give government other types of control over philanthropies.

Thus, advocates of greater government control of philanthropies may not justify their proposals with the claim that philanthropic assets are public money. The advocates may make other arguments for their position; but these arguments must be evaluated in light of the strong authority in favor of charitable independence, the contributions of foundations and other charities to American society under the traditional, limited philanthropy-government relationship, and the serious consequences that greater government control could have for this relationship.

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The Changing Debate

From colonial times, Americans have debated the role of philanthropy in our national life. The debates have reflected the diversity of our underlying views about the relationships among government, business, and civil society. The vigor of our disagreements has been a tribute to the strength of American pluralism and the worldwide significance of the American philanthropic sector.

Evidencing a recurrence of these discussions over the past decade, there has been a marked increase in the number and breadth of prescriptive proposals from both government and the philanthropic sector to impose legal limits on the purposes that philanthropies may serve, the strategies they may use to pursue these purposes, and the means by which they may govern themselves. Some of the proposals are targeted, such as calling for legislation to set the number of directors on tax-exempt boards. Other proposals are sweeping and would require philanthropies to adopt externally determined goals, such as representativeness and broad-based social justice purposes, either as limitations on or additions to the mandates of donors and legally constituted boards.

The “Public Money” Claim and Its Policy Implications

The reach of these proposals reflects the increasingly broad claims being made about the public’s purported right to direct philanthropic organizations—because, proponents assert or assume, philanthropic assets are “public money.” In a striking example, a bill recently introduced in the New York State Assembly that seeks to restrict asset sales by New York

museums is grounded on a proposed legislative finding that “all” museums within the state, because they are “directly chartered by the legislature,” are thereby rendered “creatures of State government” and, as such, are “subject to the public interest.”¹

If philanthropic assets are public money, the argument goes, then it follows that the public may impose rules concerning their expenditure and governance of the entities that hold them.² In this view, there are few principled limits on the right of the public to direct philanthropies and their funds. Thus, the public-money argument would significantly change the philanthropy-government relationship.

Under the traditional, limited relationship between philanthropy and government, voluntary organizations fulfill a critical role in realizing the promise of American pluralism. A fundamental change in this relationship could jeopardize the balance that voluntary organizations provide to our civil society.

The Need to Examine the Public-Money Argument

Such an alteration in the role of voluntary organizations should not be accepted without first seriously examining the validity of the public-money argument that supports it and the attendant consequences. The aim of this monograph is to begin such an examination. The analysis is not a detailed discussion of current debates over specific policies. Instead, this monograph deals more narrowly but no less ambitiously with possible sources of government’s legal authority, in the name of “public money,” to limit the

- 1 A6959 sec. 1 (draft Mar. 17, 2009) (available at <http://assembly.state.ny.us/leg/?bn=A06959&sh=t>). See also Maureen Glabman, *Health Plan Foundations: How Well Are They Spending Money?*, MANAGED CARE MAGAZINE (August 2008) (available at <http://www.managedcaremag.com/archives/0808/0808.foundations.html>).
- 2 For example, in 2008, Republican Governor Matt Blunt of Missouri tried to compel a private Missouri foundation to use 80 percent of its grant budget to support underfunded state health care programs. “There is a strong argument,” he explained, “that those assets rightly belong to Missouri taxpayers.” Letter from Governor Matt Blunt to Missouri Foundation for Health (May 27, 2008), *quoted in Yours, Mine, and His*, Editorial, ST. LOUIS POST-DISPATCH, May 29, 2008 (available at <http://www.stltoday.com/blogzone/the-platform/published-editorials/2008/05/friday-editorial-yours-mine-and-his/>).

missions, governance, and decision-making of philanthropic organizations. The analysis considers three chief arguments that are most commonly advanced, separately and in combination, for the claim that philanthropic assets are public money. Historically, the first argument advanced for this position is that philanthropies have public rather than private purposes and are subject to broad *parens patriae* oversight by state Attorneys General. The second argument asserts that, because philanthropies exist under state charters, they are government agencies, “state actors,” or quasi-public bodies subject to constitutional constraints or accountable to the public in the same way as is government. The third, most common, argument posits that funds held by nonprofit organizations are public money because governments forgo revenue by exempting such organizations from taxation and allowing tax deductions to donors.

Our review demonstrates that the applicable legal precedents recognize the importance of philanthropic independence, respect philanthropies as private entities, and accord them the right to autonomy without undue government or public direction and control. In sum, the public-money argument cannot justify overly prescriptive government regulation or public involvement because the rationale for the argument is largely mythical.

Our analysis does not defend philanthropies from government involvement by saying, “You can’t do this to us.” Instead, it says, more modestly, “You can’t do this to us on grounds that our assets are public.” Stated differently, if philanthropic assets cannot fairly be characterized as public money, proponents of increased government or public mandates must put forth other grounds for imposing on the purposes, structure, and operations of foundations and other charities. If successful, this monograph makes that case and effectively challenges the term “public money” and its application.

The Semantics of the Public-Money Debate

The modern labeling of philanthropic money as “public money” evidences a form of semantic elasticity and conflation by which words are initially used with one meaning but acquire another, often broader, meaning over time.³ In legal fields ranging from constitutional law to trademark law, we see examples of this phenomenon.⁴ In philanthropy, such semantic confusion is common, as we see even with how to label organizations in the sector. As it relates to the phrase “public money,” mere confusion seems to have given way to danger as the phrase “public money” has been given meanings that blur the complicated lines that separate philanthropic entities from government and from enterprises that pursue private profit.

A. The Roots of Confusion

Three common characteristics contribute to how people often refer to foundations and other charities. These entities typically are nonprofit corporations under state law, enjoy exemption from federal taxation under § 501(c)(3) of the Internal Revenue Code, and generally offer their donors charitable deductions. These features have resulted in seemingly interchangeable uses of the words “nonprofits,” “exempt organizations,” “501(c)(3) organizations,” and “charities” even though these words are not literally synonymous, as the long history of semantic confusion in the sector demonstrates.

- 3 The philanthropic entities to which advocates apply the “public” label include not just “public charities” but also organizations that are classified by federal tax law as “private foundations.”
- 4 The words “aspirin,” “escalator,” and “zipper” were introduced as names of particular brands. Over time, however, the terms came to be applied to whole classes of similar items and could no longer serve their original purpose of distinguishing those brands. The possibility of such creeping confusion is the reason why modern brands such as Xerox,[®] Kleenex,[®] and Coke[®] are protected with such vigor.

English common and statutory law relating to philanthropy, to which our law traces, has its origins in the law of charitable trusts. Even before the adoption of the Statute of Charitable Uses in 1601, the English have referred to philanthropic entities as “charities.” To laymen, the term “charity” calls to mind alms-giving, anti-poverty, or at least purely donative efforts.⁵ The common law definition of charity, however, has long embraced a wide variety of organizations including not only social service and grantmaking organizations, but also hospitals, universities, religious organizations, and arts and cultural entities.

American law took a different approach because of the historical preference that resulted in most U.S. charities being formed as nonprofit corporations. (Some state statutes refer to “nonstock” or “not-for-profit” corporations.) But the term “nonprofit” is imprecise in at least two ways. First, nonprofit corporations, contrary to what the label suggests, are not actually required to operate at a zero profit margin. Instead, nonprofit corporations, just like business corporations, are permitted to earn a surplus, or profit, from year to year. What distinguishes nonprofit corporations is the fact that they, unlike their for-profit counterparts, are not permitted to distribute this surplus, or profit, for the private benefit of their members, if any, or of any other person.⁶ Second, nonprofit corporations include not just philanthropic organizations but also mutual benefit organizations such as social clubs, labor unions, and trade associations.⁷ In short, nonprofit corporations having charitable purposes are a subset of the nonprofit sector.

5 The same donative connotation, albeit to a lesser extent, attaches to the broader terms “philanthropic” and “benevolent.”

6 Henry Hansmann has called this limitation the “nondistribution constraint.” Hansmann, *Economic Theories of the Nonprofit Sector*, in *THE NONPROFIT SECTOR* 27, 28 (W. Powell, ed., Yale University Press, 1987).

7 The Revised Model Nonprofit Corporation Act (1987) attempted more precision, offering three classifications of non-business corporations: public-benefit corporations, mutual-benefit corporations, and religious corporations. The term “public-benefit” has the advantage of being an affirmative statement of the outward-looking purpose of such an organization but has not been widely adopted by legislatures. The more recent Model Nonprofit Corporation Act (3d ed. 2008) omits the tripartite distinction and merely offers some special provisions for “charitable corporations.”

In light of these semantic difficulties, it has become common instead to refer to the various types of nonprofit organizations by their Congressional designation under section 501(c) of the Internal Revenue Code (the “Code”).⁸ Notably, section 501(c)(3) provides federal tax exemption for the following types of organizations:

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 . . . , 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 . . . , and which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office.⁹

“Tax-exempt” and “section 501(c)(3)” —like “nonprofit”—thus have become more or less interchangeable ways to refer to charities. Unfortunately, there are problems with the tax-based approach as well. First,

- 8 In footnotes, the “Code” or “I.R.C.” While the current statutory numbering system dates to the Internal Revenue Code of 1954, all of the Congressional legislative income-tax acts and codes dating back to 1894 “contain the substance of the original exemption in favor of charitable, religious, and educational institutions.” Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy* (1975), in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR 2025, 2025 (U.S. Treasury Department 1977) (available at <https://iupui.edu/handle/2450/805>). This project is known as the “Filer Commission” after its chairman, John H. Filer, and citations below are to “FILER COMMISSION RESEARCH PAPERS.”
- 9 Treasury Regulations § 1.501(c)(3)-1(d)(2) explains: “The term ‘charitable’ is used in section 503(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumerations in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of ‘charity’ as developed by judicial decisions.” The regulation identifies “lessening of the burdens of Government” as one example of such other tax-exempt purposes.

mutual-benefit organizations are also tax-exempt, but under different subsections of section 501(c).¹⁰ Second, not all charities are tax-exempt: An entity's assets may be protected as charitable under state law even if the entity has never obtained, or if it obtained but later forfeited, exempt status. Third, "private foundations" are distinguished in section 509(a) of the Code from charities that are not private foundations, colloquially referred to as "public charities" (even though there is no such term in the Code as a "private charity" or a "public foundation").¹¹ A final problem is that, as discussed below, a state-law charity that engages in too much lobbying to qualify for section 501(c)(3) status may instead qualify as exempt under the less desirable section 501(c)(4).¹²

Outside the United States, the organizations that give us so much terminological trouble are commonly referred to as some variant of "non-governmental organizations." Ironically, the non-U.S. label, with its emphasis on these entities not being part of government, may be the term that best addresses the recent threats to the autonomy of the philanthropic sector in America.

B. The Modern Public-Money Claim

Today, we face the prospect of additional and consequential terminological confusion as a result of the claim—or assumption—that foundation and other charitable assets are not only dedicated to public purposes but are also publicly owned. This creeping change in terminology would legitimate the principle of increased government interference with foundations and other charities and de-legitimate the traditional principles of self-governance and private decision-making.

10 Not all tax-exempt organizations may offer their contributors tax-deductibility for donations and membership dues. Donations to § 501(c)(3) organizations are normally deductible as charitable contributions; but donations to organizations that are exempt under other parts of § 501(c) may be deductible, if at all, only as business expenses.

11 For ease of reference, we may refer to all charitable organizations that are not foundations under §509(a) as "other charities."

12 A large trade association devoted to the interests of § 501(c)(3) and § 501(c)(4) organizations as such calls itself Independent Sector, but this term has not broadly caught on as a way of referring to both types of exempt organizations.

The idea of philanthropic assets as public money is not an invention of the past decade. In 1968, Alan Pifer, then president of the Carnegie Corporation, noted the existence of the term in order to reject its implications:

There is a common misunderstanding that the public character of the foundation, and hence the public stake in it, derives from its tax-exempt status. How frequently has one heard it said that foundations are really spending public money, and therefore should be subject to greater governmental control. Such a view, however, is based on fallacious reasoning and reveals either surprising ignorance or a dangerous disavowal of one of the basic tenets of the American system.¹³

Compare the sense in which Merrimon Cuninggim, then president of the Danforth Foundation, suggested in a 1972 book that the term “public money” could apply to foundation assets.¹⁴ He struggled with the problem of devising a shorthand way to characterize foundation assets in light of the legal obligations of foundations to dedicate these assets exclusively to charitable purposes. While Cuninggim concluded that the assets merited the term “public money” in the sense that they no longer belonged to the donor, he proposed “non-governmental” as more accurate than “private” as a general description of foundations. But Cuninggim also insisted on an “immensely important distinction”: The decisions of foundations remained “private” and beyond the “hands of the general public or of Government.”¹⁵

13 ALAN PIFER, REPORT OF THE PRESIDENT OF THE CARNEGIE CORPORATION (1968), *reprinted in* AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, FOUNDATIONS UNDER FIRE 54 (Thomas C. Reeves, ed., 1970). Mr. Pifer reiterated this view in 1970 when he observed, “A second disturbing theme of the legislative proceedings in Washington has been the assertion that foundation income is really public money, because it is itself tax exempt and because it derives from . . . gifts which offer donors tax advantage.” ELEANOR L. BRILLIANT, PRIVATE CHARITY AND PUBLIC INQUIRY: A HISTORY OF THE FILER AND PETERSON COMMISSIONS 99 (2000).

14 MERRIMON CUNINGGIM, PRIVATE MONEY AND PUBLIC SERVICE (1972).

15 *Id.* at 4-5. Cuninggim’s fuller definition shows the complexity of his thinking: “Foundations are non-governmental agencies, privately established and managed, but in which the public has a stake and which are answerable to Government, possessing financial resources, usually in the form of endowment, and existing to serve the general welfare or some chosen segment of it, usually in the form of grants.” *Id.* at 5. In contrast, a 1975 report by the Council on Foundations, while recognizing the issue that Cuninggim raised, did not call charitable assets public money but instead stated that foundations should recognize the principle that foundation assets are “[n]ot our money, but charity’s”; this principle would serve to “minimize any tendency to act out of concerns related to personal benefit or convenience.” Chairman and Staff, Council on Foundations, *Private Foundations and the 1969 Tax Reform Act* (1975), in III FILER COMMISSION RESEARCH PAPERS, *supra* note 9, at 1557, 1592.

However, more recent invocations of the idea of public money have neglected to add Cuninggim's "immensely important distinction." Thus, a recent report by a private advocacy group has used the fact that foundation money no longer belongs to the donor, as well as the federal tax exemption and charitable deduction, to justify the assertion that specific segments of the public—as determined by persons outside the charities themselves—are entitled to their "fair" distribution of charitable assets and to representation on the boards and in the management of foundations and other charities.¹⁶ Compare a 2004 proposal by the staff of the Senate Finance Committee to require that the size of a tax-exempt organization's governing board be no fewer than three and no more than fifteen.¹⁷ Separately, a few states require that a majority of the directors of a nonprofit corporation be financially disinterested or unrelated to each other.¹⁸

In ways that are less visible but no less important, the Internal Revenue Service, through its administration of the Code, has increasingly focused on the governance, structures, missions, effectiveness, programs, and similar aspects of the operations of foundations and other charities. For instance, the IRS recently redesigned its Form 990, the tax information return that about half of

16 See NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, *CRITERIA FOR PHILANTHROPY AT ITS BEST: BENCHMARKS TO ASSESS AND ENHANCE GRANTMAKER IMPACT* (March 2009) (available at <http://www.ncrp.org/paib>).

17 STAFF OF THE SENATE COMMITTEE ON FINANCE, *TAX EXEMPT GOVERNANCE PROPOSALS*, Discussion Draft, 13 (June 22, 2004) (available at <http://finance.senate.gov/hearings/testimony/2004test/062204stfdis.pdf>). State nonprofit corporation statutes commonly require a minimum of three directors, but no state imposes a maximum.

18 California law requires that a charity's managers make up no more than 49 percent of its board. Cal. Corp. Code § 5227. Maine requires that no more than 49 percent of the board of a "public benefit corporation" be "financially interested persons." Me. Rev. Stat. Ann. tit. 13-B § 713-a(2). The broadest prescription for the governance structure of nonprofits (with exceptions for private foundations and religious organizations) appears in New Hampshire's Voluntary Corporations and Associations statute, as amended in 1996:

In the interest of encouraging diversity of discussion, connection with the public, and public confidence, the board of directors of a charitable nonprofit corporation shall have at least 5 voting members, who are not of the same immediate family or related by blood or marriage. No employee of a charitable nonprofit corporation shall hold the position of chairperson or presiding officer of the board.

N.H. Rev. Stat. Ann. § 292:6-a. The statute provides for a waiver of these restrictions by the state's director of charitable trusts upon application. *Id.*

filing public charities use. The redesigned Form 990 requires detailed disclosure of board member independence, compensation, and related policies.

Additionally, in determination letters denying or revoking tax exemptions, the IRS informally has been staking out positions on a range of substantive questions concerning particular activities or governance practices that may jeopardize an exemption. For example, it has been reported that the Service has demanded a minimum of three unrelated board members—even though there is no such requirement in any statute or regulation and the Service cannot deny exemption on this basis alone. In a 2008 report, a high-level advisory committee to the IRS Commissioner in the area of tax-exempt entities commented, “Our personal experience and research for this report suggest . . . that the IRS may require specific governance practices on an ad hoc and inconsistent basis.”¹⁹ The report added that in “various contexts,” the IRS “has created a *per se* requirement for exemption that requires the organization be governed by an independent body. The IRS’s position, however, has not always been sustained by the courts and we are concerned about *per se* requirements.”²⁰

These recent proposals and initiatives show that the public-money theory has become not a matter of mere semantics but rather the basis of far-reaching assertions of public authority. Historically, proponents have relied on three groups of arguments for their conclusion: (1) foundations and other charities must serve public rather than private purposes, for which the state Attorney General has traditionally provided oversight; (2) foundations and other charities are chartered by the state or otherwise qualify as state actors or quasi-public bodies; or (3) foundations and other charities receive tax-favored treatment. However, none of these theories actually supports the argument that foundation or other charity money is public or the corresponding assertions of public authority over governance, purposes, operations, or decision-making.

19 ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES, THE APPROPRIATE ROLE OF THE INTERNAL REVENUE SERVICE WITH RESPECT TO TAX-EXEMPT ORGANIZATION GOOD GOVERNANCE ISSUES 3 (June 11, 2008) (available at http://www.irs.gov/pub/irs-tege/tege_act_rpt7.pdf).

20 *Id.* at 31.

CHAPTER I: THE PARENS PATRIAE CLAIM

Neither the fact that foundations and other charities have public purposes nor the fact that they are subject to the Attorney General's parens patriae power supports a claim that these organizations must serve the same ends as those of government or that government may unduly intrude in their governance and other decision-making.

It is easy to see how the fact that foundations and other charities serve public purposes could be misconstrued as a requirement that the purposes of a particular entity should be subject to the will of the general public.²¹ In reality, however, the requirement that foundations and other charities provide public benefits does not render their assets or operations public or subject them to public direction. After all, it is a private decision that determines which charitable purposes to serve and how to serve them.

21 Thus, Jeffrey Hart has called foundations “shadow governments.” Hart, *Foundations and Social Activism: A Critical View*, in AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, THE FUTURE OF FOUNDATIONS 43, 47 (1973). For John Simon's disagreement and cogent defense of the unique role of foundations, see Simon, *Foundations and Public Controversy: An Affirmative View*, in *id.* at 58, 79-100. See generally JENNIFER R. WOLCH, THE SHADOW STATE: GOVERNMENT AND VOLUNTARY SECTOR IN TRANSITION (1990). Perhaps the “most troubling dilemma of the shadow state,” Wolch writes, “is that the voluntary sector may become a puppet or pawn in the service of goals that are antithetical to their organizational mission. Organizations that do not conform or are not ‘ideologically correct’ from the perspective of the state at a given historical moment may be denied access to direct and even indirect resources.” *Id.*, p. 217.

A. Private parties have the authority to determine the charitable purposes that particular foundations and other charities pursue.

Under state law, creators of a foundation or other charity choose its particular charitable purposes, organizational form, and governance structure, and they have broad authority to carry out the organization's purposes as they think advisable. Importantly, the requirement that a foundation or charity provide a "public benefit" does not imply that all members of the general public or of a particular jurisdiction must be the beneficiaries. Indeed, the use of the terms "public" and "community" in this context is not necessarily geographic: State law empowers the entity's founders and subsequent governors to determine whether operations will have a particular geographic scope. Moreover, there is no necessary consensus about "public benefit." Different charities focus on complementary, overlapping, or even competing goals as a matter of choice and as an elemental expression of values inherent in our civil society.

From time to time, particularly with respect to the federal or state tax exemption, a question arises about whether the requirement of "charitable purposes" includes a specific obligation to serve the poor. Policy-makers currently hear increasing demands that charities—particularly the two largest nonprofit sub-sectors, hospitals and higher education—provide greater distributional equity. Notably, prompted by financial pressures and concerns about the health needs of the uninsured, politicians are tempted to make charity care a condition of tax exemption for nonprofit hospitals.

However, this view assumes that charity should supplement government, not complement it. Government, because of its powers to tax and to allocate resources across the population as a whole, has by far the comparative advantage in the general distribution of income and benefits. Foundations and other charities, for their part, have a comparative advantage in ascertaining local or specialized needs and delivering services flexibly and compassionately. Thus, for example, government provides

subsidies like Medicare or Medicaid reimbursement or tax benefits like education tax credits to individual consumers for services delivered by private providers, nonprofit and sometimes proprietary.²² While many foundations and other charities—notably in the current challenging economic environment—have chosen to focus their efforts on serving the needy or disadvantaged communities, this is a choice that results from private decision-making.

As with for-profit business, there are certain interests that the public has in the operations of foundations and other charities, but that interest does not transform into a legal right to dictate operations or expenditures. For instance, for-profit businesses are not immune from the influence of boycotts, negative marketing campaigns, and competition. The influence, of course, derives from the impact of such activities on the business' customers and shareholders. Although foundations and other charities do not have customers or shareholders, the public may—and does—influence foundations and other charities through various means while preserving the organizations' independence, autonomy, and privacy.

Similarly, a demand that foundations and charities serve governmental purposes neglects the benefits that charities provide precisely because they are not the government. Nonprofits, including foundations, are important vehicles for expression. Their views differ on many subjects. Consider family planning, educational strategies, and environmental issues. Many nonprofits express non-majoritarian ideas. Congruence with government at the community, state, or national level is neither the assigned function of foundations and other charities nor desirable for our society as a whole.

22 See GOVERNMENT ACCOUNTABILITY OFFICE, NONPROFIT SECTOR: SIGNIFICANT FEDERAL FUNDS REACH THE SECTOR THROUGH VARIOUS MECHANISMS, BUT MORE COMPLETE AND RELIABLE FUNDING DATA ARE NEEDED (GAO-09-193, 2009).

B. The state’s authority to regulate and supervise charities does not grant the state directive power over foundations or other charities or transform their assets into property of the state or the general public.

Under American common law and its predecessor English common law, the state, usually through its attorney general, has a responsibility to ensure that charitable assets are used for their intended purpose. To fulfill this responsibility, the attorney general is given broad investigative powers. The attorney general’s office typically achieves its aims by counseling charity fiduciaries concerning their duties and, when necessary, achieving settlements with them. Although an attorney general has the authority to sue for breaches of fiduciary duty that have not otherwise been remedied, however, compulsory power over charities is generally reserved to the courts.

The attorney general’s powers with respect to charities do not derive from a view of charitable assets as governmental or public assets. Instead, these powers reflect the fact that there is often no one else with standing to enforce charitable fiduciary duties. The attorney general’s standing to bring suit does not confer authority to serve as a “super” member of charity boards; and state oversight authority does not extend to a general governmental power to mandate that governing boards include public officials or community representatives.²³ Similarly, the law generally refrains from dictating how a charity constitutes its governing board and how the board should carry out its duties of setting policy and supervising officers.²⁴

23 See, e.g., a Texas appeals court decision refusing a request to authorize the expansion of the board of a \$120-million family foundation from three to seven:

If . . . a court could disregard the settlor’s plan for administration of a public charity simply because the judge believed that another plan would be better, such rule would substantially discourage the establishment of charitable trusts, or, at least, encourage the settlers to seek other jurisdictions in which to establish them. The adoption of such a rule also would upset the stability of many of the charitable foundations that now exist in Texas. . . . [Many,] including the largest ones, have fewer than seven trustees.

Moody v. Haas, 493 S.W.2d 555, 567 (Tex. App. 1973). The court expressed its disapproval of expert testimony calling for board representation of geographic, professional, and minority-group diversity and noted that the “selection of individuals who are to administer the trust may substantially influence not only the manner in which the trust is administered but also the areas of the charitable purpose that will be emphasized. *Id.* at 562, 564.

24 See generally Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L. J. 1008-17 (2004). For examples of the few states that have departed from this general principle, see note 19, *supra*.

However, not all courts can be relied on to prevent states from impairing traditional charitable independence and even from acting, in effect, to confiscate charitable assets. Consider the attempt by the Milton Hershey School Trust to diversify its holdings by selling a controlling amount of stock of the Hershey Foods Corporation of Hershey, Pennsylvania. In 2002, after the trust announced its intention to sell the stock, the Attorney General, a Republican candidate for Governor, drafted legislation to require, among other things, that a Pennsylvania charitable trust considering the sale of a controlling interest in a business consider the welfare of the affected community and obtain the approval of the Attorney General and the court. Invoking the proposed legislation, the Attorney General then filed suit to halt the sale in the absence of court approval.

The Attorney General's petition to the Orphans' Court invoked case law granting the Attorney General authority "to inquire into the status, activities and functioning of public charities."²⁵ The petition also asserted as follows:

Any public sale of the controlling interest in Hershey Foods Corporation by the School Trust, *while likely to increase the value of the trust*, could also result in profound negative consequences for the Hershey community and surrounding areas, including, but not limited to, the closing and/or withdrawal of Hershey Foods Corporation from the local community together with a dramatic loss of the region's employment opportunities, related businesses, and tax base.²⁶

The petition then expressed the view that "the ultimate beneficiary and real party in interest of all charitable trusts is the general public to whom the social and economic advantages of the trusts accrue" and declared, "Accordingly, the broad interests of the Attorney General necessarily entail protecting the public against any social and economic *disadvantages* which may be occasioned by the activities and functioning of public charities"²⁷

25 Attorney General, Commw. of Pennsylvania, Petition for Citation for Rule to Show Cause (Aug. 12, 2002), *available at* www.findlaw.com.

26 *Id.* at ¶ 14 (emphasis added).

27 *Id.* at ¶ 18 (emphasis in original).

The Orphans' Court issued a preliminary injunction against the stock sale, agreeing with the Attorney General that "[p]roperty given to a charity is in a measure public property" and that "the Attorney General has the authority to inquire into whether an exercise of a trustee's power, even if authorized under the trust instrument, is inimical to the public interest."²⁸ The Pennsylvania Commonwealth Court upheld the preliminary injunction.²⁹

State attorneys general and courts that overreach in the manner reflected in *Hershey* may discourage the creation of charities in their states and even prompt an exodus of charities from their jurisdictions. Furthermore, in light of controversies like *Hershey*, creators of charities and donors who contemplate contributing significant assets to charities are well advised to keep a close eye on the regulatory environments in their states. Finally, the example of *Hershey* counsels general vigilance against administrative, legislative, and judicial parochialism in charity oversight.³⁰

28 The opinion of the Orphans' Court is reproduced at the end of the majority opinion in *Hershey*, *infra* note 30, 807 A.2d at 327.

29 *In re Milton Hershey School Trust*, 807 A.2d 324, 330 (Pa. Commw. 2002).

30 See generally Carl J. Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J. L. & PUB. POLICY 355 (2006). Schramm notes that once attorneys general become involved,

... the record shows that the scope of state investigation and action has far exceeded the common law power to ensure that funds within a foundation are being applied in the public interest. Furthermore, the vagueness of most state charity statutes allows investigations to proceed as though the attorney general actually possessed the authority to ensure that funds are used in the subjectively-determined "best" interest of the public.

Id. at 412-413. Schramm concludes by calling for "an implicit private-public treaty among donors, trustees, and the government" and adds,

The burden also falls on the donor and trustees to not tempt government to examine the actions of the foundation and potentially restrict its freedom. . . . [F]oundations must articulate programs that, using a wide perspective, advance human welfare in the context of democratic capitalism. For its part, government generally ought to defer to the trustees and executives, with four exceptions: egregious cases of frivolous action, instances where foundation resources are diverted for private gain, programs that set out to erode or destroy aspects of our system of democratic capitalism, or instances where foundation resources are used to advance political ends.

Attorneys general must refrain from adopting the convenient notion that foundations are to operate democratically under the direction of either constituent groups or elected officials. Such an approach not only offends the historical theory of foundation freedom of action but also trades away the potential such organizations possess for long term fundamental change (since that change may offend current political sensibilities).

Id. at 413-14.

CHAPTER II: THE “STATE ACTORS” CLAIM

The fact that foundations and other charities have state charters does not alone make these organizations “state actors” or governmental or quasi-governmental entities accountable as such to the public.

Nonprofit corporations, like business corporations, cannot exist without state charters. In the nonprofit context, three types of legal consequences have, from time to time, been asserted to flow from this fact: that the state can dictate a nonprofit’s charitable purposes and governance structures and even claim its assets; that the nonprofit is a state actor subject to constitutional constraints that apply to government; and that the nonprofit is a quasi-governmental entity subject to public “right to know” statutes. However, precedents establish that the mere grant of a state charter does not render a nonprofit a government agency, that foundations and charities enjoy the constitutional freedoms of association and expression applicable to private persons, and that they are not subject to the constitutional constraints on state actors or the public access laws applicable to government and quasi-government entities.

A. The grant of a state charter does not render a nonprofit corporation and its assets subordinate to the state.

Most foundations and other charities exist by authority of state laws allowing the formation and operation of nonprofit corporate enterprises. Nevertheless, as the New York State Court of Appeals held in a landmark ruling, the issuance of a charter to an organization is not to be viewed as the state’s endorsement of the organization’s particular purposes. Indeed, as the court recognized, the constitutional rights of speech and associa-

tion would lose their meaning if the state could withhold charters from organizations whose purposes were lawful but with whose positions the state or a majority of the public disagreed.³¹

Moreover, notwithstanding the grant of a state charter, the selection of the purposes and governance structures of a charitable trust or corporation remains committed to the discretion of private parties. In the seminal 1819 case *Trustees of Dartmouth College v. Woodward*,³² the Supreme Court held that the charter of a nonprofit corporation is a contract protected by the Contracts Clause of the Constitution against unilateral amendment by a state legislature. Rejecting an attempt by the New Hampshire legislature to expand the number of directors of the college and convert it to a university, Chief Justice Marshall stated that the legislature's act "may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given."³³ The Court noted pointedly that the purposes of the contributors, as stated in the charter of the college, were "the promotion of [C]hristianity, and of education generally, not the interests of New-Hampshire particularly."³⁴

Justice Joseph Story, in his influential concurring opinion, added, "That the mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authority."³⁵ Justice Story explained:

- 31 *Association for Preservation of Freedom of Choice v. Shapiro*, 174 N.E.2d 487, 489, 490 (N.Y. 1961). The court declared that "approval of a corporate charter devoted to . . . a purpose [to advocate for a change in the law or even the form of government] does not imply approval of the views of its sponsors. It simply means that their expression is lawful, and their sponsors entitled to a vehicle for such expression under a statute which cannot constitutionally be made available only to those who are in harmony with the majority viewpoint. Dissenting organizations have equal rights, so far as freedom of expression is concerned, as any other groups, and are entitled to an equal and objective application of the statute." *Id.* at 490. See generally NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR* (2001).
- 32 17 U.S. 518 (1819). Today, such protection against impermissible state action would likely be found under the Due Process Clause of the Fourteenth Amendment.
- 33 *Id.* at 653.
- 34 *Id.* at 640.
- 35 *Id.* at 660-661 (Story, J., concurring).

The fact, then, that the [charitable purpose] is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, it were correct, it would follow, that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke.³⁶

Justice Story based his view not only on precedent but on policy:

When the corporation is said [by the state] . . . to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the public interests, to regulate, control, and direct the corporation, and its funds and franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where the whole interests and franchises are the exclusive property and domain of the government itself.³⁷

Justice Story's understanding is essential to a political and economic system founded on respect for the distinction between public and private and on the principle that governmental authority, absent the most exigent circumstances, is subordinate to liberty and individual rights. Without this understanding, as discussed further below, every person that benefits from state decisions could be subject to the constitutional constraints and to the transparency and accountability regimens that apply to the state itself.

36 *Id.* (footnote omitted).

37 *Id.* Justice Story added with some passion,

Yet, who ever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy, as we now find of law to sustain it.

Id.

The state not only charters corporations, for-profit or nonprofit, but it also retains regulatory powers over them. The state properly regulates the governance structures and practices of business corporations to protect the interests of shareholders, just as the state regulates the governance structures and practices of nonprofit corporations in order to protect the purposes they serve. No one expresses doubt that for-profit corporations are otherwise autonomous. Except as regulation is needed to ensure that assets are used for charitable purposes and are protected from improper fiduciary behavior or from being used for private benefit, foundations and other charities should enjoy the same freedom of self-determination as business corporations—if not more so, because of the important associational and non-market interests they serve.

Ultimately, the Constitution sets the outer bounds of state regulatory authority over nonprofits. Almost 140 years after *Dartmouth College*, the State of Maryland attempted to confiscate, through legislation, assets that were dedicated to the benefit of the University of Maryland system but were held by a separate nonprofit corporation. The Court of Appeals of Maryland prevented the act of the legislature from taking effect.³⁸ More recently, in a case discussed further below, the State of Illinois claimed that an Illinois foundation created under specific legislation and having public officials as board members was a part of the state, so that the leg-

38 In 1951, the Maryland legislature enacted a statute replacing the nine members of the Endowment Fund of the University of Maryland, a nonprofit corporation, with the Regents of the University of Maryland and persons that the Regents might appoint. The Maryland high court ruled in *Board of Regents of the University of Maryland v. Trustees of the Endowment Fund of the University of Maryland*, 112 A.2d 678 (Md. 1955), that the legislature had exceeded its authority in reserving to itself an absolute right to amend the Endowment's charter unilaterally. The court stated, "The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted . . . or arbitrarily to make alterations that are inconsistent with the scope and object of the charter to destroy or impair any vested property right." *Id.* at 682-83 (quoting *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634 (1936)). The court held that the change made by the legislature altered a fundamental feature of the endowment's constitution: "The charter plan was designed to retain to the donors, through the exercise of discretion by their chosen representatives and their self-appointed successors, a voice in the management and expenditure of the fund, subject, of course, to a veto power by the Regents. The views of this independent group may, from time to time, differ widely from those of the current managers of the University." *Regents*, 112 A.2d at 684.

islature could confiscate its assets for the state's purposes. The Seventh Circuit refused to support the state's claim and ruled that the legislature's action was an impermissible taking.³⁹ Citing *Dartmouth College*, the court stated, "The fact that the state legislature authorized the creation of the plaintiff foundation does not make the foundation a state agency; for the legislature also authorizes the creation of business and professional corporations, not to mention religious and charitable corporations, without thereby acquiring a right to confiscate such entities' assets."⁴⁰

39 *Illinois Clean Energy Community Foundation v. Filan*, 392 F.3d 934 (7th Cir. 2004). The foundation, with \$225 million in assets, was established in 1999 by Commonwealth Edison of Illinois under a state enabling statute as a condition to the utility's obtaining state approval to sell its seven fossil fuel plants. Under the statute, the mission of the foundation is to make grants to public and private institutions in Illinois for projects to conserve energy and improve the environment. In 2003, the legislature sought to compel the foundation to "turn over to the state's treasury and state environmental agencies up to \$125 million, which is to be used for funding the agencies and repaying state general obligation bonds." Judge Richard Posner ruled the legislative act to be an impermissible taking:

The coercive element in the history of the [original] authorizing statute is irrelevant. Suppose the state didn't think that lawyers should be permitted to incorporate, and passed a law requiring that all professional corporations of lawyers be converted to partnerships. Would the partnership assets be public property? Obviously not. Supposing the state could indeed have forced ComEd to disgorge \$125 million of its profits from the sale of the power plants, or indeed much more, to the ratepayers, could it then, years later, have ordered the ratepayers to contribute their rebates to the state treasury, on the ground that it was really the state's money? We cannot see what difference it makes that the disgorgement was to a foundation rather than to individuals. By forcing a transfer of private property from one private entity to another, the state did not destroy the private character of the property. If the state orders a criminal to make restitution of a sum of money to the victim of his crime, it cannot snatch the money back from the victim on the ground that it's the state's money.

Id. at 936.

40 *Id.* "This suit would go nowhere," Judge Posner added, "had the statute creating the plaintiff foundation reserved the right of the state to confiscate the foundation's assets. There is no such reservation." *Id.* Finally, he observed:

All the state is left to argue is that the appointment of five-sixths of the foundation's trustees by state officials made the foundation a state agency. Not so. By whomever appointed, the trustees of a charitable foundation have a fiduciary duty to conserve the foundation's assets. . . . It would be a fiction therefore to suggest that because public officials appoint most of the trustees, the state "controls" the foundation. If it really controlled it, we wouldn't have this lawsuit.

Id. at 937-38 (citations omitted).

Thus, more is required than a state-issued charter before a nonprofit corporation can be treated as the state or as a quasi-governmental body.

B. In general, foundations and other charities enjoy constitutional freedoms of association and expression, and are not subject to the constitutional constraints imposed on state actors.

A foundation or other charity that is properly characterized as a “state actor” within the meaning of the constitutional jurisprudence would be subject to constitutional constraints on governmental action. In such a case, the foundation or other charity could be held liable for violating the Equal Protection Clause of the Fourteenth Amendment (applicable to action by one of the states) or the Due Process Clause of the Fifth Amendment (applicable to federal action) or some other constitutional constraint on government.

These constitutional constraints and potential liabilities arise only from official action; they ordinarily do not apply to private persons, including entities.⁴¹ Thus, within certain limits, private organizations normally can operate in all their fractious and insular splendor, free of what Nancy Rosenblum has called the “logic of congruence”—that is, the demand that “the internal life and organization of associations mirror liberal democratic principles and practices.”⁴² Importantly, while some may not approve of or agree with the membership structure and purposes of some

41 Separately, a federal civil rights statute provides that no person acting “under color of any statute . . . of any State” shall deprive another of any right, privilege or immunity “secured by the Constitution and the laws” of the United States. 42 U.S.C. § 1983. If a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action “under color of state law” for § 1983 purposes. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982). See the discussion below, note 49, of *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000). See also a variety of other specific federal and state nondiscrimination statutes, such as the New Jersey statute applicable to “places of public accommodation” at issue in *Boy Scouts of America v. Dale*, *infra* note 44, discussed below.

42 NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36–41 (1998). See generally Brody, *Entrance, Voice and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821 (2002).

expressive associations, as members of the public all of us are free to criticize and press for change in such policies, but the desire for democratic norms here cannot be backed by legal compulsion.⁴³

Despite the choices made by some organizations, the resulting variety is desirable. Its availability is a spur to philanthropy and participation. Private organizations can adopt their own rules of internal decision-making, such as rules denying some members the right to vote or granting some members greater voting power than others. Such groups can exercise the power of exile through their right to expel members who break their rules. A member who is unhappy with a group's policy and unable to persuade the group to change it can always exercise the power of exit and form another group.⁴⁴ Nonprofits can and do form on all sides or no side of contentious issues and are protected in doing so. We value, as Justice Powell famously stated, "the important role played by tax exemptions in encouraging diverse, often sharply conflicting, activities and viewpoints."⁴⁵

We accept the high transaction costs that come with dissension and with entering and exiting associations because the alternative—the obliteration of differences—has still higher costs, in the form of reduced autonomy and liberty.⁴⁶

43 See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (upholding the right of the Boy Scouts of America to expel a troop leader who is homosexual). As described in Part III, below, tighter limitations are generally permitted regarding tax-exemption. See, e.g., *Bob Jones University v. United States*, 461 U.S. 576 (1983) (as a matter of statutory interpretation, ruling that a university engaging in racial discrimination is not entitled to exemption under Code § 501(c)(3)). See also note 65, *infra*, and accompanying text.

44 Compare the market power of a dissatisfied donor who withholds future contributions.
45 *Bob Jones University*, *supra* note 44, 461 U.S. at 609 (Powell, J., concurring in part and concurring in judgment).

46 After *Boy Scouts*, the simultaneous exercise of voice and exit dramatically illustrated the benefits and costs of the freedom to associate. Some parents withdrew their sons from the Boy Scouts; some municipalities have sought to terminate the Scouts' right to use public facilities; reform Jewish leaders recommended ending troop sponsorship; local United Ways have debated terminating support; some troops defied the restriction, and were expelled, but a local council in another state agreed with its United Way funder not to discriminate. A new association for boys that does not discriminate against gays—Scouting for All—sprang up.

However, litigation arises from time to time about whether a particular private entity can properly be treated as a state actor, and thus subject to the constitutional constraints and potential liabilities that apply to government. Acknowledging the difficulty of making a state-actor determination, the Supreme Court has discussed the controlling policy:

Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptional) that is not. The judicial obligation is not only to “preserve an area of individual freedom by limiting the reach of federal law’ and avoid the imposition of responsibility on a State for conduct it could not control,” but also to assure that constitutional standards are invoked “when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.” If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a “close nexus between the State and the challenged action” that seemingly private behavior “may be fairly treated as that of the State itself.”⁴⁷

The consequences of being characterized as a state actor could be catastrophic to a foundation or other charity, and broadly characterizing foundations and other charities as state actors would be revolutionary in terms of the traditional relationships between such organizations and government. Accordingly, courts have insisted on a fact-intensive, case-by-case analysis of the issue, refusing to approve any categorical assertions that foundations and other charities are subject to state actor constraints. Furthermore, under the criteria developed and applied by the courts, it is the rare foundation or other charity that would qualify as such.

47 *Brentwood Academy v. Tennessee Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 295 (2001) (emphasis in original) (footnote omitted).

Courts have almost uniformly refrained from holding that a foundation or other charity is a state actor merely because it is state-chartered or tax-exempt or receives and expends public funds or has public officials on its board of directors. However, certain classes of nonprofits are particularly vulnerable to treatment as state actors—notably, nonprofits performing “public functions” that are “so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.”⁴⁸ These cases might include, for example, organizations such as public hospitals and museums that were spun off by the state. Typically, under the enabling legislation or governing documents of such organizations, some or all of the directors are government officials or their appointees; funds come from the state, directly or through low-cost or no-cost financing; and the organization is required—if not under either the enabling statute or the governing documents, then under an umbrella statute applicable to quasi-public bodies—to follow government rules in matters like compensation and employment.

48 *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968). In *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000), the Second Circuit ruled that Yale University was not a state actor or instrumentality, and so did not violate plaintiffs’ religious rights protected under the Constitution and § 1983 by requiring all unmarried freshmen and sophomores under the age of 21 to reside in college dormitories, all of which are co-educational; nor did Yale’s refusal to exempt religious observers from co-educational housing violate the Fair Housing Act, 41 U.S.C. § 3601 *et seq.* Because Yale is so old that it came into being by a specific statute, the *Hack* court followed a 1995 Supreme Court case setting forth the test for such a corporation: “[O]nly if (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains ‘permanent authority to appoint a majority of the directors of the corporation’ will the corporation be deemed a government entity for the purpose of the state action requirement.” 237 F.3d at 83-84 (citation omitted). The *Hack* court ruled, “Here, the first two factors are easily satisfied: the State of Connecticut created the corporate entity by special law, and higher education is a governmental objective (although not the exclusive province of government). Two of nineteen board members is, however, a long way from control.” Moreover, the court added, “It is equally clear that the state could not control Yale’s policies and operations even if it chose to become involved. Yale, as a private university, did not act under color of law.” *Id.* at 84.

The issue of whether grantmaking foundations amount to state actors arose in the early 1970s in an idiosyncratic case in which a private plaintiff sued 13 western New York charitable foundations, alleging racial discrimination against himself, his children, and his foundation. The plaintiff claimed that the defendant foundations, for reasons of race, had refused to hire him as a director, refused to give his children scholarships, and refused to give grants to his foundation.⁴⁹ The plaintiff also alleged a pattern of discriminatory employment and investment by the defendant foundations.⁵⁰ He sought injunctive and declaratory relief, damages, the revocation of defendants' tax exemptions, and an order directing the defendants to surrender all of their assets to the U.S. Treasury.⁵¹

A panel of the Second Circuit refused to dismiss the case, remanding it for further proceedings. In doing so, the panel enumerated a list of factors that should be taken into account in determining whether a private entity is a state actor:

(1) the degree to which the “private” organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a “private” association in associational or other constitutional terms.⁵²

49 Jackson v. Statler Foundation, 496 F.2d 623, 625 (2d Cir. 1974).

50 *Id.*

51 *Id.*

52 *Id.* at 629.

The panel found that the Internal Revenue Code subjected the defendant foundations to close regulation. Furthermore, the panel, in contrast with other authorities, seemed to characterize the foundations' tax exemptions as marks of specific government approval. The panel stated:

The exemptions in question . . . are not the type of government assistance such as police or fire protection, which is routinely provided to all without any connotation of approval. Organizations must apply for exempt status. Moreover, the acts of application and approval are not value neutral. In effect, the government would appear to be certifying that every foundation on its tax-exempt list is laboring in the public interest.⁵³

However, the panel limited the reach of its holding by stating that its “definition of ‘state action’ is applicable only to claims of racial discrimination. . . . [C]onduct which is admittedly part private and part governmental must be more strictly scrutinized when claims of racial discrimination are made.”⁵⁴

Statler Foundation lives on in the jurisprudence less for the panel's holding and discussion than for Judge Henry Friendly's widely cited dissent from the full Second Circuit's denial of a rehearing.⁵⁵ Judge Friendly argued that the panel had been too open to characterizing foundations and other charities as state actors. Indeed, he termed the panel's opinion “the most ill-advised decision with respect to ‘state action’ yet rendered by any court” and called it a holding that “unless corrected will be the source of enormous damage to the great edifice of private philanthropy which has been one of this country's most distinctive and admirable features.”⁵⁶

53 *Id.* at 633 (citations and footnote omitted).

54 *Id.*

55 *Id.* at 637 *et seq.* (Friendly, J., dissenting from denial of reconsideration *en banc*). Judge Friendly's opinion was joined by two of the three other dissenters.

56 *Id.* at 636-37. Judge Friendly noted that the dissent did not apply to the denial of rehearing with respect to the Buffalo Foundation, a majority of whose board was appointed by public officials. *Id.* at 637 n. 1.

Judge Friendly's dissent echoed the view of *Walz v. Tax Commission of the City of New York* (discussed in Part III, below) and gave his own opinion as to the limited effects of a tax exemption:

Because of its broad availability, a tax exemption, in itself, has never previously been thought to impose the government's imprimatur sufficiently to convert the recipient into a *de facto* arm of the government. An exemption or other tax benefit, available to a wide range of institutions, has always been regarded as the least possible form of government support, except for the police and fire protection provided all citizens.⁵⁷

His dissent also emphasized the need to protect the value of foundation activities and practices and the danger of imposing unnecessary constraints on such activities:

The interest in preserving an area of untrammelled choice for private philanthropy is very great. Even among philanthropic institutions, the activities of charitable family foundations, receiving no government benefit other than tax exemption, should be the last to be swept, under a "sifting of facts and exercise of judgment," within the concept of state action. There are hundreds of thousands of foundations ranging from the giants to the pygmies. While most foundations, particularly large ones, give mainly to institutions serving all races and creeds, although hardly in the completely non-discriminatory way required of public institutions, I see nothing offensive, either constitutionally or morally, in a foundation's choosing to give preferentially or even exclusively to Jesuit

57 *Id.* at 638. Judge Friendly also dismissed the panel's view that the defendant foundations, as tax-exempt foundations, were "closely regulated." He argued, "The 'state action' cases that have stressed the heavy presence of government regulation are those in which private institutions are carrying out state policy against the plaintiffs or in which the state is benefiting directly from the private activity." He added, "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." *Id.* at 639.

seminaries, to Yeshivas, to black colleges or to the NAACP. Indeed, I find it something of a misnomer to apply the pejorative term “racial discrimination” to a failure to make a charitable gift.⁵⁸

Judge Friendly’s dissent also cautioned that donors “are not going to be willing to spend their time and money, or to have directors and staffs of foundations spend theirs, in defending actions like this one. If the federal courts take over the supervision of philanthropy, there will ultimately be no philanthropy to supervise.”⁵⁹ Finally, he expressed grave concern that the panel’s decision “will spawn countless civil rights suits against charitable foundations by disgruntled minority applicants, add unnecessarily to the crushing burden on the district courts and the courts of appeals, and, worst of all, seriously discourage private philanthropy by subjecting donors to the necessity of justifying their decisions in court.”⁶⁰

The dissent noted that “several of the defendant foundations commendably have given liberally to black and other minority causes”; but even this record would not save them, “and many others in later suits, from the necessity of full factual exploration and explanation of just what they have done over the years, with the attendant burdens on foundation directors and staffs and the courts.”⁶¹

Fortunately, Judge Friendly’s warning seems to have been heeded. Partly because of the unusual nature of the *Statler Foundation* case and partly because of the force of Judge Friendly’s dissent, later cases citing the *Statler Foundation* factors have almost always found that the private entity in question was not a state actor.⁶² Moreover, after *Statler Foundation*, the

58 *Id.* at 639-40.

59 *Id.* at 640.

60 *Id.*

61 *Id.*

62 See, e.g., *Gilinsky v. Columbia University*, 488 F. Supp. 1309, 1312 (S.D.N.Y. 1980). The *Statler Foundation* suit itself eventually foundered when the *pro se* plaintiff failed to pursue the case. See *Jackson v. Statler Foundation*, 1975 U.S. Dist. LEXIS 11389, 36 A.F.T.R.2d (RIA) 5579, 75-2 U.S. Tax Cas. (CCH) P9721 (W.D.N.Y. 1975).

Supreme Court “tightened the proof for a showing of state action.”⁶³ With the *Bob Jones* case, the debate over racially discriminatory schools, the issue raised by *Statler Foundation*, shifted from the question of whether such entities violate private plaintiffs’ rights to the question of whether the defendant foundations are entitled to federal tax exemption as a matter of Congressional intent. Indeed, Justice Powell’s concurrence in *Bob Jones* cited Judge Friendly’s *Statler Foundation* dissent.⁶⁴

C. Foundations and other charities generally are not subject to public access laws.

Even if a nonprofit organization is not subject to constitutional constraints as a state actor, it might be treated as a quasi-governmental public body, a broader category, under one or more state or federal “sunshine laws.” However, open meetings and open records laws that are intended to ensure effective oversight of government do not generally apply to foundations and other charities under the criteria established by legislatures.

Although the application of public access statutes has been frequently litigated, courts have shown no reluctance to reject suits that seek records held by typically private institutions. For example, the Massachusetts Supreme Judicial Court recently ruled against the application of the state’s public records law to Harvard University.⁶⁵

However, two general types of nonprofits are particularly vulnerable to these sunshine laws. First are those government-created nonprofits (per-

63 *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1191-92 (citation omitted) (S.D.N.Y. 1988) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982)). See also *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). In addition, it is rare that would-be beneficiaries of private philanthropy have standing to sue for largess or to challenge the tax-exempt status of an organization. See generally Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183 (2007).

64 *Bob Jones*, *supra* note 44, 461 U.S. at 610.

65 *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 840 N.E.2d 518 (Mass. 2006).

haps also vulnerable to state-actor claims) that should not be allowed to evade the public's rightful access to information simply because government has placed their functions under nominally private management.

In a second category are "state-institution-related foundations," private entities that raise funds for the benefit of public bodies such as state universities. (Notably, there is a recent trend for this type of foundation to supplement, or even pay most of, the salary of the supported state university's president or certain athletic coaches.) Media organizations often probe private contributions to these foundations to discover what the private donors might be getting in return.⁶⁶ State-institution-related foundations raise issues of private access to and control over public assets, including intangible assets such as the public institution's name and goodwill; the foundations' role in managing gifts, investments, and campus facilities; and their role in the governance of the related public institutions. Most contentious is the issue of information about the names and contribution levels of individual donors, because the donors have opposing privacy interests in protecting their personal financial information and organizational associations.⁶⁷

66 Cases holding nonprofit organizations subject to state open records laws include *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992) (defendant was a "public office" required to produce names of donors); *Gannon v. Board of Regents of the State of Iowa*, 692 N.W.2d 31 (Iowa 2005) (similar); *Champ v. Poelker*, 755 S.W.2d 383, 390-93 (Mo. App. 1988) (convention and visitors bureau performed public functions and was quasi-governmental body). Recently, in *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818 (Ky. 2008), the court held that the defendant was a public agency. Because the public's interest in the operations of the university's fundraising arm generally outweighed donor privacy interests, the foundation was required to disclose the names of 47,000 donors. However, the court upheld the privacy rights of 62 donors who had requested anonymity at a time when the foundation had not yet been determined to be a public entity for purposes of the state Open Records Act. *Id.* at 823. For an unsuccessful suit, see *Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178 (Pa. Commw. 2004), rejecting a suit by a newspaper group against a nonprofit corporation that was formed to monitor and enforce the terms of a merger of a private law school into a state university.

67 The Internal Revenue Code resolves the tension between privacy and disclosure interests by providing that Forms 990, including information about donors to private foundations, are subject to public disclosure; but the identities of donors to public charities, though included in the filings with the IRS, are exempt from public disclosure.

Whether an entity is held subject to state public access laws will usually depend on a combination of factors; generally, no one factor is determinative.⁶⁸ These factors include the following: (1) whether the organization primarily performs a public function, including performance under an agreement with the government; (2) whether it was created by a specific statute; (3) whether it exercises powers of government, such as the power to tax or enact policies or rules that affect citizens as citizens; (4) whether its board is composed of public officials or their appointees; (5) the extent to which the entity's revenue stream is comprised of public funds; (6) whether a public agency previously operated the entity's facilities or provided the services that the entity now provides; (7) whether government action is necessary to dissolve the entity or divest it of assets; (8) whether the entity's employees are government employees, receive government benefits, or are eligible to participate in programs for its employees; and (9) whether the entity must comply with state audit requirements or maintain its money on deposit with the state.⁶⁹

Courts that have found private organizations subject to public access laws have done so only after applying these factors to the organization's specific structure and operations. In such an inquiry, most foundations and other charities would not satisfy these factors or any significant subset of them. Thus, while particular foundations or other charities and their purposes have been found sufficiently public to be subject to public access laws, this fact does not support any categorical claim that such organizations are by their nature subject to such laws—or even a claim that most foundations or other charities are subject to such laws.

68 For example, the U.S. Court of Appeals for the Seventh Circuit found that such an organization was not public even though it was created by a state enabling statute, received dedicated funds from public sources, and had a board including public officials or their appointees. See *Illinois Clean Energy*, *supra* note 40, 392 F.3d at 935, 936.

69 See cases cited *supra* note 67.

CHAPTER III: THE PUBLIC-MONEY ARGUMENT

The existence of the federal tax exemption and charitable tax deduction does not support the public-money argument.

Foundations and other charities generally are not required to pay income, property, or other taxes.⁷⁰ Furthermore, donors who itemize their deductions are permitted, within certain limits, to deduct the value of their charitable contributions in computing their taxable income.⁷¹ As a result of these tax preferences, governments forgo tax money that they would otherwise collect. From these facts, advocates of the public-money theory argue that the forgone amounts are subsidies to foundations and other charities from government. It follows from this view that government—whether viewed as the grantor of the subsidies or as a donor—is justified in dictating the choice or focus of foundations’ or other charities’ missions, mandating details of governance, determining programmatic and operational effectiveness, and intervening in other aspects of internal operations.

In a corollary to this position, some contend that foundations and other charities, in exchange for government tax benefits, are obligated to deliver services—or in some cases products—that would otherwise be the responsibility of government. This *quid pro quo* argument demands, at a minimum, that nonprofits provide quantifiable, objective benefits to the public in amounts at least equal to the amount of the forgone taxes.⁷² In

70 I.R.C. §§ 501(c)(3), 509(a); as to property-tax exemption, see many state constitutions and the statutes of most states.

71 I.R.C. § 170. Corporations, too, may generally deduct their charitable contributions.

72 See Suzanne Perry, *Paying It Forward—and Back*, CHRONICLE OF PHILANTHROPY, Sept. 2, 2008 (reporting arguments to this effect by Sen. Charles Grassley (R-Iowa) and Rep. Xavier Becerra (D-Cal.)) (available at <http://philanthropy.com/premium/articles/v20/i22/22000601>).

addition, some variants of the argument would require charities to use certain quotas or “fair shares” of their resources for purposes determined by the public or government.⁷³ In other variants of the *quid pro quo* argument, a charity would be required to pursue particular purposes or activities that government determines to be desirable, possibly even to the exclusion of other purposes and activities also charitable under federal and state laws.⁷⁴

However, these *quid pro quo* and tax-treatment arguments fail for at least five reasons: (1) the nature of the covenant that underlies the tax preferences; (2) the inconsistent tax-policy implications of viewing the favored treatment of charitable activity differently from the favored treatment of individual or business activity; (3) the substantial presence of inarguably private dollars among foundation and other charities’ assets; (4) the incongruity inherent in treating organizations that engage only passively with government more harshly than organizations with direct, active relationships with government; and (5) the right of foundations and other charities to be free of government-imposed unconstitutional conditions.

A. The covenant underlying the exchange of federal tax preferences for charitable activity requires that exempt charities dedicate their assets to, and use them in furtherance of, charitable purposes and not for private benefit.

Congressional legislation in the form of the Internal Revenue Code provides for the federal tax treatment of charities. The federal tax exemption for foundations and other charities derives from Code section 501(c)(3).

73 See Makani Themba-Nixon, *Can Counting Really Make the Difference?*, in PHILANTHROPIC INITIATIVE FOR RACIAL EQUITY, 1 CRITICAL ISSUES FORUM: MEASURING WHAT WE VALUE 14, 15 (2008); Arturo Vargas, *Data Collection is an Important Tool for Building a More Vibrant Non-profit Sector*, 1 CRITICAL ISSUES FORUM, *supra*, at 16, 17; BRADLEY CENTER, HUDSON INSTITUTE, MANDATING MULTICULTURAL MUNIFICENCE?, Transcript of Proceedings (April 7, 2008) (comments by John Gamboa and Pablo Eisenberg). See also JOEL FLEISHMAN, THE FOUNDATION: A GREAT AMERICAN SECRET; HOW PRIVATE WEALTH IS CHANGING THE WORLD 52 (2007).

74 See NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, *supra* note 17.

Entities are exempt if they are organized and operated for certain prescribed purposes and feature no impermissible private benefit, no more than insubstantial efforts to influence legislation,⁷⁵ and no intervening in political campaigns. The deductibility of charitable contributions is found in Code section 170, which essentially repeats the criteria of section 501(c)(3).

There is ongoing debate about the reasons for the enactment and maintenance of the tax-favored treatment of foundations and other charities. The debate includes the question of whether the tax benefits are properly categorized as a subsidy or whether they instead represent a view that charitable income falls outside the tax base as properly defined.⁷⁶ The tax-favored treatment of charitable organizations has also been justified on the more general ground that such organizations serve higher purposes deserving of encouragement as a matter of law and policy and should not be financially inhibited by taxation of their income.⁷⁷

Under the narrow *quid pro quo* theory of exemption, the state bestows the exemption and forgoes tax revenues while the charity reciprocates by (at a minimum) fulfilling obligations that those tax revenues would

75 Under Code § 4945 and corresponding regulations, the limitations on private foundations' ability to influence legislation are more restrictive than are the limits on public charities.

76 For discussion of this debate, and of the complexities of both the subsidy and base-defining approaches, see Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998). Notably, the "tax expenditure budget" prepared by the congressional Joint Committee on Taxation calculates the forgone taxes from the charitable contribution deduction and from tax-exempt bonds issued by non-profit hospitals and educational institutions, but views the income-tax exemption of charities as part of the properly determined tax base. Thus, current federal tax policy for charitable activity combines the subsidy and base-defining approaches.

77 See John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (citing discussion by Sen. Henry French Hollis (D-N.H.) of the War Revenue Act of 1917, 55 Cong. Rec. 6728 (1935)).

have enabled the state to meet.⁷⁸ However, this rationale fails to explain the fact that neither the income-tax exemption nor the charitable deduction is limited to organizations that lessen the burdens of government.⁷⁹ Instead, the exemption extends to many organizations whose activities are not the responsibility of government in the first place, including not just churches (in whose activities government is constitutionally prohibited from engaging) but also many associational and other nonprofit organizations. Even the broader versions of the *quid pro quo* approach typically look principally to a type of monetary or quasi-monetary exchange, asking only, “What are we as a society getting in exchange for the tax-favored treatment we bestow?”⁸⁰ The approach often discounts and neglects the intangible benefits provided by foundations and other charities.

It is not only the *quid pro quo* approach that is oversimplified and incomplete; each of the major theories of the tax exemption and charitable deduction is unable to explain some salient features of nonprofit tax law and

- 78 See Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 & n.34 (citing H.R. Rep. No. 75-1860 at 19 (1937)); John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 862 (1993); Laurens Williams & Donald V. Morehead, *An Analysis of the Federal Tax Distinctions Between Public and Private Charitable Organizations* (1975), in IV FILER COMMISSION RESEARCH PAPERS, *supra* note 9, at 2099, 2112 (citing H.R. Rep. No. 75-1860 at 20 (1937)).
- 79 Some state property-tax regimes require an exempt charity to reduce the burdens of government as well as to provide some (unspecified) level of benefits to those who cannot afford any fees charged by the charity. See generally Brody, *The States’ Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 EXEMPT ORG. TAX REV. 269 (June, 2007). The subsidy theory, in whatever form, places charities in a position subordinate to that of the state, which can determine the size and nature of the burdens that charities are required to relieve. It has been suggested that a state, to the extent it is unhappy with or uninterested in subsidizing certain activities, can simply fine-tune its property tax exemption for this purpose. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 598-600 (1997) (Scalia, J., dissenting). See generally Brody, ed., *PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD* (2002).
- 80 Perry, *supra* note 73; Ray D. Madoff, *Dog Eat Your Taxes?*, Op-Ed, N.Y. TIMES, July 9, 2008; Howard Husock, *Nobody Does It Better*, Op-Ed, WALL ST. J., Oct. 24, 2008. It does not appear that any court following the *quid pro quo* approach has actually quantified the required relationship between forgone taxes and benefits received by the public. See *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983); *Walz v. Tax Commission of the City of New York*, 397 U.S. 644, 676 (1970).

policy. For example, if we view the exemption as part of the proper definition of the tax base, why, as a matter of tax policy, is the exemption for charitable activity available only to organizations and not to individuals, and why is the charitable deduction only available for contributions to organizations and not to individuals?⁸¹ Under either the subsidy or the tax-base theories, why do we limit lobbying or ban political activity even though a particular charitable purpose might be best accomplished through legislative or political change? The most thorough and nuanced analysis to date of the very complicated U.S. tax treatment of charities explains this treatment by referring to a variety of policy goals, grouped under the headings of the support function (*i.e.*, subsidy), the equity function (notably including redistribution), the regulatory function (imposing constraints on managerial behavior), and the “border patrol” function (maintaining the distinction between charities, on the one hand, and business and government, on the other).⁸²

One reason for some of the theoretical difficulties in determining the basis of the tax-favored treatment of charities is the absence of substantive evidence in the legislative record of the enactment of and modifications to the exemption and charitable deduction. Because of this near-vacuum, theories have been developed and documented after the fact. Some scholars argue that the evidentiary void does not pose such difficulties and in fact is wholly unremarkable, reflecting deference to the widespread belief that the desirability of exemption is self-evident.⁸³

81 See Colombo, *Marketing*, *supra* note 78, at 682. Theory aside, there are practical explanations for the fact that we do not allow individual income from charitable activities to be tax-exempt and do not allow charitable deductions for contributions to individuals. For example, it is much harder to hold an individual accountable for insuring that he or she pursues charitable purposes and does not engage in private benefit transactions. To some extent, the inefficiencies and possible inequities of the current distinctions are the price of achieving a higher degree of oversight and accountability.

82 John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 267-306 (Walter W. Powell and Richard Steinberg, eds., 2d ed. 2006).

83 See Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L. J.* 299, 301 (1976). The authors state that there is only cursory explanation by legislators, commentators are “almost equally silent,” and the paucity of explanation “may have reflected a conviction that the wisdom of tax exemption was self-evident, and the basic policy was politically invulnerable to change, or that taxation in this area would bring in little revenue.” *But see* Brody, *Of Sovereignty*, *supra* note 77; Belknap, *supra* note 9.

The income tax enacted during the Civil War, which applied only to specific types of corporations, did not contain an exemption for charities. Accompanying the passage of the first general corporate income tax in 1894, however, was an express desire that charitable organizations should not “suffer under the bill”; thus, the exemption was allowed and has appeared in every such income-tax bill since that time.⁸⁴ The allowance of a charitable deduction in the 1917 income tax bill was justified by the burden that high wartime marginal tax rates imposed on patriotically generous donors who otherwise might no longer be able to support the equally patriotic American Red Cross.⁸⁵

What is clear from the legislative history is the absence of evidence of either a specific “original bargain” apart from the terms of the legislation itself or of any other explanation for the charitable exemption and deduction. This near void of evidence provides significant support for the idea that due deference must be given to the practices that have governed the relations between charities and government throughout American history and the preceding English history. The absence of evidence of an extra-legislative, let alone quantifiable, bargain also provides significant support for the idea that the preferred treatment of foundations and other charities is based not simply on quantifiable benefits they may provide but on the recognition that charities benefit society in both financial and non-financial ways that are of fundamental importance. One scholar has referred to the “metabenefits” that accrue to society from the manner in which foundations and other charities produce their goods or deliver their services.⁸⁶ Among the metabenefits he notes are a spirit of volunteerism, pluralism, initiative, and experimentation, as well as an educated population.⁸⁷ These values should never be disregarded in adopting law or policy; doing so could cause unintended harm to our civil society.

84 See Brody, *Of Sovereignty*, *supra* note 77, at 605; Belknap, *supra* note 9, at 2025.

85 See John A. Wallace & Robert W. Fisher, *The Charitable Deduction Under Section 170 of the Internal Revenue Code* (1975), in IV FILER COMMISSION RESEARCH PAPERS, *supra* note 9, at 2129, 2131-32.

86 Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Synthesis*, 27 STETSON L. REV. 395, 402-403 (1997).

87 *Id.*

Although it is not clear whether the original covenant between government and foundations and other charities should be characterized as a subsidy, a definition of tax base, a combination of the two, or something else, it is possible to enumerate the conditions and obligations that the Code has imposed on foundations, other charities and donors and that they all have accepted. The most important obligation is that charitable organizations commit their missions and operations to charitable purposes within the meaning of the Code and corresponding Treasury regulations, judicial interpretations, and administrative guidance. In addition, exempt organizations agree to public disclosure requirements designed to allow government and the public to hold these organizations accountable for meeting these obligations. Among the disclosure requirements are the filing of a tax information return, including information about the organizations' finances, and agreeing to the public availability of that return.⁸⁸

Public charities must make sure to avoid “excess benefit” transactions with insiders by complying with the requirements of Code section 4958. Private foundations operate under even tighter restrictions that include a mandatory minimum payout rate, a variable tax on investment income, disclosure of specific investments and the identities of their donors, and prohibitions on “self-dealing” transactions (other than the payment of reasonable compensation for services), excess business holdings, investments jeopardizing their missions, and certain other transactions such as impermissible lobbying and political activity.⁸⁹

While the wisdom of the extent or design of the statutory constraints may be—and is—debated, the requirements are clearly legitimate within the tax exemption system defined by the specific terms of section 501(c)(3), which focuses on ensuring that the activities of exempt organizations are charitable rather than private. Beyond ensuring this prin-

88 I.R.C. § 6033, Returns by Exempt Organizations; I.R.C. § 6104, Publicity of Information Required from Certain Exempt Organizations and Certain Trusts.

89 See I.R.C. Chapter 42.

ciple, the restrictions do not impinge on foundations' or other charities' governance, structure, operations, or decision-making. The law treats these matters as internal to charitable organizations and generally commits them to the organizations' discretion as autonomous entities.

Therefore, to the extent that a covenant exists between charities and the Congress (or charities and the states, to the extent of analogous state provisions), the bargain may be summarized as follows: Organizations that are exempt from taxation, and that may receive charitable contributions for which donors are allowed tax deductions, commit themselves, under section 501(c)(3) (or similar state law), to using their assets and resources to further charitable exempt purposes and not for private benefit. The commitment includes compliance with statutes and regulations that provide more detailed guidance about what constitutes charitable activity and what does not. Compliance includes the obligation to provide the information required to demonstrate specific compliance with section 501(c)(3) (and state law).

As a matter of law, the covenant does not otherwise compromise or undermine the inherent private character of these organizations and their entitlement to autonomy and independence.

B. Individuals and businesses benefit from tax-favored treatment. Their assets and resources do not thereby become public, and they are not thereby transformed into governmental entities. Foundations and other charities should be viewed no differently.

Throughout American history, governments at all levels have used tax abatements and other tax incentives to encourage certain activities.⁹⁰ In the early years of the republic, state governments made no sector distinctions in bestowing and withholding tax subsidies: In New England, canal, turnpike, bridge, and manufacturing companies enjoyed the same

90 See Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 440 (1996).

types of tax exemption that were granted to eleemosynary entities like Yale College. In recent history, during the first wave of tax reform under President Ronald Reagan, certain sectors of the business community actually enjoyed negative income tax rates through the combination of accelerated depreciation and investment tax credits for new equipment. Yet organizations in these sectors and industries have not been viewed as governmental, and any limits imposed on their independence have not derived from their tax-favored treatment.

There is a long list of tax-favored treatments—such as deductions, exclusions from income, credits, exemptions, abatements, and deferrals—that various levels of government afford to individuals and businesses for reasons other than the proper measurement of income, without impairing or prejudicing the underlying autonomy and private nature of the beneficiaries of such treatment. For example, individuals enjoy deductions for the mortgage interest and property taxes they pay on their homes; the exclusion of all or most of their gain on the sale of their principal residences; deductions or exclusions for retirement contributions, health insurance, and tuition; and tax credits for higher education, dependent care, and children.⁹¹ Government does not claim that it is thereby entitled to dictate the lifestyle, consumption and savings patterns, childbearing and child-rearing choices, furniture tastes, or college majors and courses of study, or to make any other such decisions for individuals who claim these deductions and credits.

Businesses also benefit from tax-favored treatment designed to encourage certain activities that legislatures deem in the public interest and worthy of public support. Examples of such tax provisions, excluding those

91 See Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 416 (1999) (tax expenditure analysis poses challenges to home mortgage deduction, child tax credit, and earned income tax). The list of additional tax preferences is long (e.g., exclusion of scholarships from income, I.R.C. § 117; tuition tax credit, I.R.C. § 25A; limited interest deduction for education loans, I.R.C. § 221; interest exclusion for Education Savings Bonds used for tuition payments, I.R.C. § 135(a)). See Colombo, *Marketing*, *supra* note 78, at 660; Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 705-13 (1999).

necessary for the proper measurement of business profits, include the research and development tax credit, accelerated depreciation deductions for equipment investment, tax credits for “green” activities, and tax benefits, such as tax increment financing, associated with economic development. Government does not thereby claim to be entitled to determine the nature of the underlying research or strategies regarding the exploitation of the results, the timing of equipment upgrades, decisions about whether to merge with a competitor or draw down a line of credit, choices about whether the board should have five or nine directors, or whether the organization should be viewed as doing well or poorly. These tax-favored treatments are not even contingent on the fundamental issue of whether the business is being efficiently or effectively run.

Conversely, when for-profit enterprises are regulated, it is not their tax-favored treatment that is invoked to justify or support regulation. Laws and regulations in areas such as securities, banking, and the environment do not depend on the tax-favored treatment of the regulated enterprises. For instance, securities and commodities trading laws have their origin in the fact that markets in these areas were uneven playing fields whose inefficiencies threatened the underlying stability of capital markets as a whole.⁹² Sarbanes-Oxley was enacted because of fraudulent behavior that destroyed prominent businesses and the accompanying jobs, savings, and investments. In the wake of the 2008 economic meltdown, the discussions of greater regulation of the banking industry have involved not the tax preferences enjoyed by the industry but the behavior of the banks themselves and government as explicit shareholder, bondholder, and/or creditor. Similarly, as we see in the current multi-billion-dollar (if not trillion-dollar) rescue of the financial, housing, and automobile sectors, direct government investment in an industry is likely to increase the government’s intrusion in the operations of the industry; but such intrusion does not derive from tax status or treatment.

92 See generally THOMAS K. McCRAW, *PROPHETS OF REGULATION* (1984).

In order to justify receipt of a tax benefit, recipients are usually required to demonstrate merely that they actually undertook the activity or incurred the expense giving rise to the tax-favored treatment. The tax benefit does not impose any other restrictions on the recipients. The recipients' assets are not deemed public because of the tax benefit, and the recipients are not thereby treated as public entities. There is no compelling reason to hold foundations and other charities to a different standard with regard to their autonomy and the independence of their decision-making and operations.

Indeed, in the nonprofit context courts and commentators have stressed the limited relationship that a tax exemption creates between government and the beneficiary. In the 1870s, Charles W. Eliot, then president of Harvard University, dismissed as “sophistical and fallacious” the assertion that “to exempt an institution from taxation is the same thing as to grant it money directly from the public treasury.”⁹³ The net effect of the two types of transactions on the public treasury may be the same, but the relationships created by the transactions between government and private decision makers are very different.⁹⁴

Exemptions and deductions granted by government entail very little government involvement in the recipients' decision-making. Indeed, the role of government is essentially passive. For example, with the charitable contribution deduction, the donor, not the government, decides which qualified charities will or will not receive contributions and determines any designations or restrictions accompanying the contributions.⁹⁵ Nor

93 Belknap, *supra* note 9, at 2038 (quoting CHARLES ELIOT, VIEWS RESPECTING PRESENT EXEMPTION FROM TAXATION OF PROPERTY USED FOR RELIGIOUS, EDUCATIONAL, AND CHARITABLE PURPOSES 382-83 (1874)).

94 *Id.*

95 FLEISHMAN, *supra* note 74, at 22 (noting that the advantage of exemptions and deductions over direct government subsidies is to allow individuals to make choices in directing their support rather than having such support determined “through the haggling and logrolling of politically elected legislative bodies or the choices of a particular governmental administration, Congress, or agency . . .”).

does the charitable exemption involve a decision to favor any specifically identified organizations. As one commentator on foundations observed, exemptions actually “insulate private charitable enterprises from the government domination which is invited by the alternative method of direct grants by government.”⁹⁶

The lack of government involvement on account of exemptions and deductions stands in contrast to the government’s role in providing direct subsidies, grants, and government contracts, in which government personnel affirmatively decide what organizations will receive how much money, for what purposes, and subject to what restrictions. Justice Brennan’s concurring opinion in *Walz v. Tax Commission*, a noted Supreme Court case upholding the property-tax exemption of churches as part of a neutrally conceived exemption regime, characterized direct subsidies as “pregnant with involvement” by government⁹⁷ and drew the distinction between subsidies and tax exemptions: “A subsidy involves the direct transfer of public moneys to the subsidized taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.”⁹⁸ Justice Brennan noted that direct subsidies involve government “forcibly,” by diverting taxpayer income to the recipient, whereas with an exemption, government “merely refrains from diverting to its own uses income independently generated . . . through voluntary contributions.”⁹⁹

96 Belknap, *supra* note 9, at 2038.

97 *Walz*, *supra* note 81, 397 U.S. at 675 (Brennan, J., concurring). Government would not have been permitted to provide a direct subsidy to the church, as opposed to a tax exemption, because of the Establishment Clause of the First Amendment. “Obviously,” Justice Brennan stated, “a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and details administrative relationships for enforcement of statutory or administrative standards, but that is not this case.”

98 *Id.* at 690, 691.

99 *Id.* (citations omitted).

In sum, the reasoning in the nonprofit context is the same as the reasoning that prevents business or individual assets from being treated as public money on account of tax-favored treatment. There is no compelling reason to hold foundations and other charities to a different standard with regard to their independence, privacy, and autonomous decision-making and operation. As a legal matter, for foundations and other charities to be treated consistently with other sectors, they should be required to use the funds for charitable, exempt purposes and to document and report the fact that they have done so.¹⁰⁰ The receipt of tax benefits should not entitle government or the public to dictate other aspects of the organizations' activities.

C. Even if the tax-favored treatment of foundations and other charities is viewed as a government subsidy or grant, most charitable assets come not from government but rather from private funds.

The most common version of the public-money theory says that government may direct foundations and other charities because of the “contributions” made by government on account of the tax subsidies it gives them. However, even if we accept a tax subsidy theory, the public-money advocates must still overcome the other four arguments set out in this Part III concerning the limitations on government control. Furthermore, even if we accept a tax subsidy theory, the government’s “contributions” would make government not the sole contributor of every philanthropy but only a contributor to the extent of forgone taxes, which often represent only a portion of a foundation or charity’s resources.

Most charitable assets and resources have their source in private contributions, fees for goods and services, and investment returns. The bulk of contributions are not attributable to the donors’ tax savings on contri-

100 Individual organizations may choose to pursue greater degrees of external accountability and transparency for public relations or other purposes. Some may even legitimately encourage such openness as a matter of individual and sector credibility. Such self-determination and informational efforts are a far cry from externally imposed mandates or their equivalent.

butions. As a threshold matter, individual taxpayers can deduct their contributions only if they itemize their deductions (and only about a third of taxpayers do). At the other extreme, a donor whose gifts exceed a certain percentage of income must carryforward the excess (and an unused carryforward expires after five years).¹⁰¹

Otherwise, the “price” of giving varies by the taxpayer’s marginal tax rate. Consider this example: A donor whose income is marginally taxed at 35 percent contributes \$100 to a charity. Leaving aside other tax rules, the donor, by deducting the contribution in computing his or her taxable income, saves \$35 in taxes. But the balance of the contribution, \$65, would not have been paid to the IRS, and is clearly “private money.”

The same type of reasoning applies to the tax exemption. Let us assume that tax policy can effectively identify the amounts that would be treated—in the absence of the exemption—as the gross income of a nonprofit and the expenses of producing this income, so as to determine the net taxable income of the nonprofit. We will further assume that tax policy can apply a properly determined tax rate to this net taxable income. Consider a nonprofit generating \$100 in income that would be marginally taxed (absent the exemption) at 35 percent.¹⁰² The nonprofit would

101 Simplifying the rules of §170, if the donee is a public charity, then cash contributions may reduce the donor’s adjusted gross income (AGI) by up to 50 percent. If the donee is a private foundation, then cash contributions may reduce AGI by up to only 30 percent. If instead the donor contributes appreciated capital assets and deducts fair market value rather than basis, then the percentage-of-income limit is 30 percent for a public charity donee and 20 percent for a private foundation. Furthermore, for private foundations, only publicly traded securities qualify for the fair-market-value deduction. Corporate donors, generally subject to the same rules, can deduct up to 10 percent of gross income in any one year. An unlimited estate-tax deduction is available for charitable bequests. This discussion ignores the alternative minimum tax, other rules that affect marginal tax rates, and the estate tax (whose top rates have sometimes exceeded top income-tax rates).

102 In fact, the charity would likely have little or no operating income. Thus, the tax exemption for charities is better thought of as an exemption for investment income. See Daniel I. Halperin, *Does Tax Exemption for Charitable Endowments Subsidize Excessive Accumulation?* (available at <http://ssrn.com/abstract=1143458>, Working Paper Series, posted June 10, 2008).

pay \$35 to the Treasury. However, the remaining \$65 of income would not be payable to the Treasury. The \$65 would be “private” income of the nonprofit, which the nonprofit could devote to its chosen charitable causes in the manner it determined.

Unless income-tax rates exceed 50 percent for a prolonged period of time, most of the resources of foundations and other charities will be private.¹⁰³ Organizations managing mostly private assets for charitable exempt purposes should not suffer diminished autonomy because a portion of their assets might otherwise have been paid as taxes. Even if tax rates exceeded 50 percent, this fact would not render charitable assets public. To argue otherwise risks falling into the trap of the narrow *quid pro quo* approach by focusing solely on objective valuation metrics to the exclusion of the intangible but no less valuable contributions that foundations and other charities provide to society.

Some public-money advocates acknowledge this weakness by referring to philanthropic assets as “partially public money.” The partially-public-money argument appears to view the government as being entitled to influence the purposes, governance, and operations of foundations and other charities just as would a donor. Of course, donors can restrict the charitable use of their gifts, as the government does in its capacity as active grantmaker. However, donors—even major donors—are not as such endowed by the law with a role in the governance of the organization.

D. Foundations and other charities that are involved with government only indirectly, through their tax exemptions, should not face restrictions or impositions more onerous than the limitations that entities face when they are involved with government directly, through grants or contracts.

103 Moreover, policymakers can alter the tax treatment of contributions. For example, the Obama administration has proposed to cap the tax savings from itemized deductions (including charitable contributions) at 28 percent; but doing so should not impact on the independence, autonomy, or privacy of the donee organizations.

A private organization, either nonprofit or for-profit, that receives a government grant or contract may be required to abide by restrictions in addition to the organization's obligation to perform its central task under the grant or contract. For example, defense firms under contract with the government may be required to follow government procedures in letting bids for subcontracts or to do business with certain numbers of minority-owned or woman-owned businesses. Social service organizations that accept more than \$500,000 in government grants or contracts agree to requirements including compliance with the Single Audit Act.

However, the government grantee or contractor has autonomously and affirmatively chosen, in furtherance of goals that it has independently set, to enter into the grant or contract. Moreover, the grantee or contractor has done so in exchange for direct and specific benefits from government.

Furthermore, the restrictions under the contract rarely affect matters of internal governance and, in any event, apply only for the term of the benefits. There is no suggestion that the contract has created public ownership of the contractor's assets. Equally important, the grantee or contractor does not surrender indefinite control of its goals, operations, or capacity for self-direction.

In contrast, under the public-money theory of the tax-favored treatment of nonprofits, an exempt organization, in exchange for a benefit much less direct and specific than the benefit received by a grantee or contractor, would be required to accept government direction and control that are more fundamental and longer-lasting. Sound policy would not make this kind of distinction.¹⁰⁴

104 Pifer, *supra* note 14, at 54-55, stated as follows:

Throughout our history we have believed in pluralism and have practiced it. We have recognized that the nation's public purposes are considerably more extensive in scope than its governmental purposes, and through the aegis of the state, we have enabled a wide variety of private institutions, including foundations, to be chartered to accomplish certain public, though nongovernmental, purposes. We have also, through the aegis of the state, given tax exemption to those institutions to facilitate their work and have regarded this as being eminently in the public interest. Therefore, to attribute the public stake in the foundation to its tax-exempt status or to regard this status as a "privilege" is wholly erroneous. It is, in Professor Milton Katz's pithy phrase, "to mistake an effect for a cause."

E. The tax-favored treatment of foundations and other charities, like the tax-favored treatment of businesses and individuals, does not entitle government to impose unconstitutional conditions on recipients.

It should go without saying—but, in the case of the public-money theory, it unfortunately cannot—that the limitation of government in order to preserve liberty is one of the bedrock principles of our constitutional regime.¹⁰⁵ This principle applies not only to for-profit enterprises but to the nonprofit sector as well. The principle formed the basis of a warning by federal appellate court Judge Richard Posner about the danger of the IRS being able to revoke an exemption, without finding a breach of fiduciary duty, simply because it disagrees with decisions by a nonprofit entity's management.¹⁰⁶ The same principle is the basis of the Supreme Court doctrine of “unconstitutional conditions.”

When engaged in direct grantmaking and contracting, the government may generally choose the message it wishes to express, either directly or by funding the speech of others. A government grant or contract is not a constitutional right; thus, the government may condition such a benefit on the recipient's waiver of otherwise available constitutional rights, notably including the rights of free speech and association. However, the Constitution provides an outer limit to the conditions that governments can impose on grants of benefits. The conditions may cover only what

105 See Belknap, *supra* note 9, at 2031, stating that the charitable exemption “probably” developed in America out of a widely present political philosophy embodying the spirit of classical liberalism, the “dominant tenets” of which “were distrust of government and faith that the progress and well-being of mankind could best be achieved by natural forces harmonizing the individual actions of men who were left untrammelled.” See also Heather Higgins, *To Whom Does Your Money Belong?*, Letter to the Editor, WALL ST. J., Oct. 31, 2008, at A16 (quoting Thomas Jefferson: “A wise and frugal government, which shall leave men free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned—this is the sum of good government”).

106 *United Cancer Council, Inc. v. Commissioner*, 165 F.3d 1173, 1178-79 (7th Cir. 1999). See also Brody, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?*, 21 U. HAW. L. REV. 537, 583 n.152 (1999) (quoting Judge Posner in *United Cancer Council*).

the recipient does with funds provided by government, not the recipient's actions in general.¹⁰⁷ As the Supreme Court has explained, unconstitutional conditions “involve situations in which the government has placed a condition on the recipient of [a] subsidy rather than on a particular program or service, thus, effectively prohibiting the recipient from engaging in [constitutionally] protected conduct outside the scope of the federally funded program.”¹⁰⁸ For example, the government may condition a contract on the contractor's following nondiscriminatory hiring policies in carrying out the contract, but may not impose conditions on the contractor's policies in areas unconnected with the contract.

Similarly, a tax exemption is not a constitutional right. Governments generally are granted broad latitude in designing tax schemes, including the tax regime that offers exemptions to nonprofits, and may impose conditions on such exemptions. These conditions do not in themselves implicate the doctrine of unconstitutional conditions, but limits similar to those that exist with respect to grants and contracts apply. In *Regan v. Taxation With Representation*, the Supreme Court upheld Congress's right, as a condition of section 501(c)(3) tax exemption, to refuse to allow a nonprofit to engage in more than insubstantial lobbying. But the Court based its holding in part on the right of the section 501(c)(3) organization to create an affiliated section 501(c)(4) organization to engage in such lobbying. The charitable activity of the section 501(c)(3) group, including advocacy that did not amount to lobbying, could be supported

107 In *Rust v. Sullivan*, 500 U.S. 173, 196 (1991), the Supreme Court upheld federal rules prohibiting a federally funded family planning program from providing abortion counseling, on grounds that the grantee “can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy . . . through programs that are separate and independent from the project that receives [government] funds.” See generally Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); NATIONAL CENTER ON PHILANTHROPY AND THE LAW, EMANATIONS FROM RUST: THE IMPACT ON THE NONPROFIT SECTOR OF THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS (Conference Papers, 1992).

108 *Rust*, *supra* note 108, 500 U.S. at 197.

by tax-deductible charitable contributions; the (c)(4)'s lobbying activity could not, but the (c)(4) could exercise the affiliated group's free speech rights by lobbying.¹⁰⁹

The jurisprudence on the doctrine of unconstitutional conditions is sparse. Conditioning a grant on a grantee's giving up its right to its chosen legally-permitted form of self-governance—for example, by requiring that all of its directors be democratically elected by all of its members—would be a significant limitation on the grantee's right of expressive association and could well be deemed an unconstitutional condition.¹¹⁰

- 109 *Taxation with Representation*, *supra* note 81, 461 U.S. at 545. The Court distinguished *Speiser v. Randall*, 357 U.S. 513 (1958), which disallowed, as an unconstitutional condition, a California provision requiring any person seeking a property tax exemption to declare that he or she did not advocate the forcible overthrow of the U.S. government. *Speiser* stated that to “deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.” *Id.* at 518. In contrast, in the case of *Taxation With Representation* (“TWR”), the Court stated, “Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.” *Taxation With Representation*, 461 U.S. at 545. It should be noted that in addition to a (c)(3)'s ability to create a § 501(c)(4) organization, the (c)(4) can create a separate segregated fund or political action committee under § 527 to engage in political activity.
- 110 The Maine legislature recently considered a legislative proposal that would have applied to nonprofit corporations receiving at least 25 percent of their total funding from government sources and would have prohibited such corporations from paying any officer or director more than \$250,000 per year in compensation. Me. Rev. Stat. Ann. tit. 13-B § 718.2.A (enacted April 16, 2008) (available at LEXIS, Maine Library, ME Full-Text Bills Folder, as 2007 Bill Text ME S.B. 636). However, the legislation as ultimately enacted merely requires the nonprofits to report such compensation publicly. Me. Rev. Stat. Ann. tit. 13-B § 718.2.A.

CONCLUSION

Foundations and other charities exist at a critical intersection between the governmental and business sectors of our political, economic, and social system. They are dedicated to serving the public through the pursuit of charitable purposes but are created and operate as private, autonomous organizations. Their accountability is complex in nature and extent, derived in part from law and in part from the need for legitimacy. This complexity enables charities to serve as private arenas for the development of the public virtues of idealism, inventiveness,¹¹¹ and civic association; to provide essential goods and services that are undersupplied by government and the marketplace;¹¹² and to offer both an alternative to dependence on government and a softening of the rough edges of capitalism.¹¹³ It is in this sense that charities and foundations are “a ‘powerful third force,’ distinct from government and business,” as one term for the charitable sector—“independent sector”—suggests.¹¹⁴

We have concluded that based on more than four centuries of law and policy, foundations and other charities are not inherently public bodies and their assets are not “public money.” Each step in the argument that

111 K. Martin Worthy, *The Tax Reform Act of 1969: Consequences for Private Foundations*, 39 LAW & CONTEMP. PROBS. 232, 254 (1975).

112 See generally MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION (2004); Crimm, *supra* note 79, at 439; Colombo, *Harvard*, *supra* note 79, at 864-65; Leslie Lenkowsky, *In Philanthropy, It's Not Just About the Numbers*, CHRONICLE OF PHILANTHROPY, Jan. 29, 2009 (available at <http://www.philanthropy.com/premium/articles/v21/i07/07005501.htm>).

113 See CLAIRE GAUDIANI, THE GREATER GOOD: HOW PHILANTHROPY DRIVES THE AMERICAN ECONOMY AND CAN SAVE CAPITALISM 14 (2003). See also Schramm, *supra* note 31, at 368.

114 FLEISHMAN, *supra* note 74, at 14; see also GAUDIANI, *supra* note 114, at 23. See note 13, above, regarding the term “independent sector.”

charities or their assets are fundamentally public seeks to erode this distinction. As Justice Story warned in *Dartmouth College*, each step brings us closer to government asserting the right to control and direct foundations and other charities, conflating the government and nonprofit sectors, and subjecting charitable assets and operations to the “good will and pleasure” of the persons and prevailing ideas that happen to hold political power at any particular time.¹¹⁵

At the same time, abuses within the charitable sector are dangerous to the general society and culture just as are abuses within the government or business sector, particularly when the abuse is rampant and pervasive. It is elemental that foundations’ and other charities’ purposes may not be private and that their assets may not be used for private benefit. Federal and state laws and regulations are in place to protect against such abuses. Moreover, it is in the interest of the sector, as well as society as a whole, that foundations and other charities devote sufficient internal resources to achieving compliance with these laws and regulations and to detecting, correcting, and imposing consequences for their violation.

Thus, as in other sectors, it can be appropriate to modify applicable laws, regulations, and enforcement priorities in the charitable sector to bring clarity and certainty to the law when vagueness causes compliance problems. It may even be necessary to effect large-scale, revolutionary reforms when insidious and wide-spread abuses infect the sector and enforcement of existing law cannot suffice to restore order and credibility.

However, the consequences of fundamental change in the relationship between foundations and other charities and government could be significant. Such organizations might face increased pressure to accede to strong feelings or prejudices on the part of prospective grantees, rejected

115 *Dartmouth College*, *supra* note 33, 17 U.S. at 660-61.

applicants, politicians, or the general public.¹¹⁶ To judge by the present operations of the governmental sector, charities might also be expected to place increased emphasis on their short-term metrics at the expense of long-term goals.¹¹⁷ Charities could find that they have fewer incentives to take reasonable, let alone controversial, programmatic risks that government and business may not responsibly take. If so, we may face the loss of innovative solutions to social problems.¹¹⁸

The most significant harm that could result from a wholesale change in the traditional relationships is that the philanthropic sector would no longer be the product of pluralistic choices, freely made, regarding the expenditure of monetary and human resources. Autonomy has been one of the defining characteristics of American foundations and other charities; such entities are free to support and pursue differing and even contrary programmatic visions, strategies, methods, and structures provided that they do not stray from their mandate to serve charitable purposes.¹¹⁹

- 116 See FLEISHMAN, *supra* note 74, at 61-62, 250; Schramm, *supra* note 31, at 30; Bittker, *supra* note 84, at 342; Lawrence M. Stone, *The Charitable Foundation: Its Governance*, 39 LAW & CONTEMP. PROBS. 57, 65 (1975); Homer C. Wordsworth, *Private Foundations and the Tax Reform Act of 1969*, 39 LAW & CONTEMP. PROBS. 255, 259 (1975); DAVID F. FREEMAN & COUNCIL ON FOUNDATIONS, *THE HANDBOOK ON PRIVATE FOUNDATIONS* 77 (1991). Some may view a lack of responsiveness to public demands as a weakness. However, the philanthropic sector has limited resources, especially when compared to those of the government or business sector. In addition, foundations—and other charities—are required to be faithful to donor intent. This responsibility will result in the rejection of applications by otherwise worthy applicants. More generally, foundations simply cannot responsibly fund every grant applicant; those that try to do so may find, more often than not, that they have either abdicated their decision-making responsibilities or impaired their obligations to their charitable purposes. Foundation autonomy helps protect against these inevitable pressures and their potentially harmful consequences.
- 117 See FLEISHMAN, *supra* note 74, at 245-48. Bittker, *supra* note 84, at 342.
- 118 See ADVISORY COMMITTEE, *supra* note 20, at ii (quoting John Gardner); FREEMAN, *supra* note 117, at 6; Bittker, *supra* note 84, at 299; Wordsworth, *supra* note 117, at 259; Stone, *supra* note 117, at 58, 61 n.9; 93 Cong. Rec. 33952, 33954 (1974). See also Colombo, *Marketing*, *supra* note 78, at 692; CURTIS W. MEADOWS JR., *PHILANTHROPIC CHOICE AND DONOR INTENT: FREEDOM, RESPONSIBILITY, AND PUBLIC INTEREST* 3 (Center for Public and Nonprofit Leadership, Georgetown University, 2002).
- 119 See ADVISORY COMMITTEE, *supra* note 20, at ii. See also Susan Berresford and Lorie Slutsky, *Foundations' Longevity Should be Valued*, CHRONICLE OF PHILANTHROPY, Sept. 2, 2008 (available at <http://philanthropy.com/premium/articles/v20/i22/22003101.htm>).

Observers have credited this pluralism with helping to preserve fundamental American values such as individual choice and initiative;¹²⁰ advancing civilization and promoting general welfare;¹²¹ multiplying, rather than concentrating, sources of power;¹²² representing society's preference for reasonable discretion rather than government-imposed uniformity;¹²³ enhancing the vibrancy of our democracy through their capacity to challenge conventional wisdom;¹²⁴ and allowing charities—particularly, but not only, religious organizations—freedom to choose their missions and to make their decisions without government involvement.¹²⁵

Clearly, impairing the independence, autonomy and fundamentally private nature of foundations and other charities could have serious consequences for them, the sector, and broader society, particularly if grounded on a theory that lacks meaningful support in law, history, or policy. Fortunately, such compromises are not necessary for constructive debate to proceed on such issues as the direction and role of the independent sec-

- 120 MEADOWS, *supra* note 119, at 2 (“As a free people we want the right to live our lives with as much freedom and individual choice as possible, including the making and selection of philanthropic and charitable choices”); Colombo, *Harvard, supra* note 79, at 865 (quoting Bruce Hopkins’ view of exemptions as a “bulwark against overdomination by government and a hallmark of a free society” and of exempt organizations as “help[ing] nourish the voluntary sector of this nation and preserve individual initiative, and reflect[ing] the pluralistic philosophy that has been the guiding spirit of democratic America”); Belknap, *supra* note 9, at 2025, 2036-37 (quoting NATIONAL PLANNING ASS’N, THE MANUAL OF CORPORATE GIVING (Beardsley Ruml, in collaboration with Theodore Geiger, ed.), Ch. 1 (1952), as to the need for “preserving to the maximum extent possible the decentralized and private character of the decision-making process in all phases of our national life”); Belknap, *supra* note 9 at 2036-37 (quoting statement of M.M. Chambers, CHARTERS OF PHILANTHROPIES 2 (1948), that operation of the voluntary sector “accords with the historic idea of a wide sphere of individual liberties”).
- 121 Belknap, *supra* note 9, at 2034 (quoting *People ex rel. Seminary of Our Lady of Angels v. Barber*, 42 Hun. 27 (1886), *aff’d without opinion*, 13 N.E. 936 (N.Y. 1887)).
- 122 FLEISHMAN, *supra* note 74, at 33.
- 123 Brody, *Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1406-07 (1998) (society prefers reasonable discretion exercised by different participants under different conditions to the uniformity of government-directed action).
- 124 Lenkowsky, *supra* note 113 (“Philanthropy’s value goes far beyond its social and economic benefits”); FLEISHMAN, *supra* note 74, at 56, 250; FREMONT-SMITH, *supra* note 113, at 2; Stone, *supra* note 117, at 66.
- 125 Sugin, *supra* note 92, at 435 (“Regardless of whether individual choice is socially desirable, it is constitutionally significant because it can separate the government’s intent from the ultimate recipient of tax benefits”).

tor, donor intent, perpetuity, governing board composition, measuring effectiveness, mission-related investing, and governance best practices. Discussion of these and other issues informs donors, board members, and managers of foundations and other charities and can help these organizations make decisions that are best for them in their specific circumstances.

However, those debates and conversations deserve an appropriate framework within which to proceed. By debunking the idea that charities and their assets belong to the public at large and are subject to democratic control, we hope to better focus the current debates and conversations more appropriately on the merits of the underlying substantive issues without distractions associated with misapplication of the phrase “public money.”

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Evelyn served as a member of the Panel on the Nonprofit Sector's expert advisory group. In addition to academic workshops, she has made numerous invitational presentations to federal and state regulators, including the Senate Finance Committee staff, the National Association of Attorneys General/National Association of State Charity Officials, and the Conference on State Attorneys General Charity Law Project at Columbia Law School (for which she serves as an advisory board member). Evelyn is on the board of the BBB Wise Giving Alliance.

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ABOUT THE PHILANTHROPY ROUNDTABLE

The Philanthropy Roundtable is a national association of individual donors, corporate giving officers, and foundation trustees and staff. The Roundtable attracts philanthropists who benefit from being part of an organization dedicated to helping them achieve their charitable objectives. In addition to offering expert advice and counsel, the Roundtable puts donors in touch with peers who share similar concerns and interests. Members of the Roundtable gain access to a donor community interested in philanthropic strategies and programs that *actually work*.

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The mission of The Philanthropy Roundtable is to foster excellence in philanthropy, protect philanthropic freedom, help donors achieve their philanthropic intent, and assist donors in advancing liberty, opportunity, and personal responsibility in America and abroad.

Philanthropy Roundtable Principles

1. Philanthropic freedom is essential to a free society.
2. A vibrant private sector is critical for generating the wealth that makes philanthropy possible.
3. Voluntary private action offers solutions for many of society's most pressing challenges.
4. Excellence in philanthropy is measured by results, not good intentions.
5. A respect for donor intent is essential for philanthropic integrity.

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The Annual Meeting is The Philanthropy Roundtable's flagship event. Donors from across the country meet to share ideas, strategies, and best practices, and hear from America's leading experts in private innovation and forward-thinking policy.

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The Roundtable's programs and services for donors include regional meetings and dinners, held in different cities throughout the year, that bring donors together to discuss issues of common concern. Many donors find that these smaller, more intimate meetings enable them to better network with peers who share similar concerns and interests.

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The Roundtable's quarterly magazine is "must reading" among donors committed to promoting freedom, opportunity, and personal responsibility. Each issue offers donors insights on topics of significance in the philanthropic world, focuses on broad strategic questions in line with our principles, and provides real guidance and clear examples of effective philanthropy.

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The Roundtable's guidebooks are in-depth examinations of the principled and practical aspects of charitable giving. Our guidebooks connect donors with the best information available for achieving philanthropic excellence. The Roundtable publishes new guidebooks every year and maintains a library of past publications for members to access.

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The Roundtable works on Capitol Hill and around the country to protect the freedom and diversity of philanthropic organizations. Our Alliance for Charitable Reform has played a critical role in stopping the enactment of legislation harmful to grantmaking foundations.

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The Philanthropy Roundtable's three Breakthrough Groups focus on **K-12 Education, Conservation, Higher Education, National Security,** and **Helping People to Help Themselves**. These are all areas where we think philanthropy can achieve dramatic breakthroughs in the next decade.

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Members of the Roundtable benefit from the insights and experience of their peers. Many of our members have agreed to serve as informal advisors to their Roundtable colleagues. To fulfill donor interests outside of the scope of our mission and activities, the Roundtable collaborates with other philanthropic-service organizations or refers donors directly to other experts.

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Suggested annual contributions begin at a modest level in order to encourage broad participation. However, the Roundtable depends on larger donations or grants for its continuing operations and programming. While the amount of the annual contribution is left to the discretion of each donor, members are asked to be as generous as possible in supporting the Roundtable in furthering philanthropic excellence.

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