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PROTECTING CHARITIABLE BENEFICIARIES FROM THEIR FOUNDERS: REINTERPRETING THE NORMATIVE BASIS OF CHARITY AND NONPROFIT ORGANISATIONS

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Abstract

The organisational vehicles used for legal charity—mainly charitable trusts, corporations, and incorporated societies—facilitate the preferencing of the values, character and vision of the organisations founder. Allowing founders to exercise perpetual control over the organisation conflicts with the notions of public benefit and altruism which provide the underlying rationale for encouraging charitable activity, and conferring on charitable organisations benefits, particularly in the form of tax exemptions. The protection of founder preferences can be traced to the contemporaneous evolution of trust law and the system for regulating charities which remains largely unchanged. It is argued that the perpetual proprietary control that founders exercise over charitable gifts and organisations is incompatible with the normative goals of having a charities sector; enhancing the welfare through altruistic action. Therefore, the system regulating charities must be rebalanced to ensure independent governance of charities, separate from both the state and their founders, and reflected in a categorisation of charitable purposes which reflect those normative goals.

Key Words: *"Charity", "Organisational Law", "Founder-Control", "Altruism", "Social Welfare".*

Table of Contents

I Introduction

It is necessary for the existence of charitable organisations, that a founder through their vision exercise powers to establish the organisation, whatever its form. It is not necessary, however, that their character, preferences and values, be impressed on the organisation, nor that it facilitate the maintenance of those values into the future. Yet, as the analysis conducted in this paper demonstrates, founders are given significant latitude to maintain perpetual control over charitable organisations.

The legal institution of charity is premised on the notion of public benefit, which comprises the main rationale for tax concessions that are generally available to charitable organisations. Some scholars have claimed that "charity law has achieved a long term functional equilibrium between the protection of the autonomy of benevolent property owners to control and direct their own wealth, and the furtherance of competing public interests or visions of the good."[1] However, it is unusual that the premise of this equilibrium has been maintained, when founders are able to retain such significant control over an organisation and its assets, advance their own values and character, and receive these tax concessions under the guise of public benefit.

The lack of attention to this in the literature is concerning, because it reflects a lack of clarity about the normative objectives of charity. It is argued that the degree of preference afforded to founders, the origins of which can be traced to the historical evolution of trust law, needs to be reconsidered in light of the welfare enhancing demands placed on charity by government.

This paper proceeds, firstly, with an overview of regulation of the charitable and nonprofit sector, focussing on the prescriptive and proscriptive rules governing their foundation and operation. Next, each of the main entity types will be assessed in light of these rules to demonstrate the scope for founder-control. The third section engages with the theoretical literature on the charities and nonprofit sector to elucidate their basic normative goals. This

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[1] Katherine Chan *The Public-Private Nature of Charity Law* (Oxford, Hart Publishing, 2016) at 126–127.

is then considered in the context of the historical development of the charities sector. In the final section, some of the critical scholarship is reviewed to consider what alterations are necessary to rebalance the system to align with these identified normative goals.

II Charities and Nonprofit Organisations in Overview

A Distinguishing Charities from Nonprofit Organisations

The definitive feature of charities and nonprofit organisations, is that they are barred from distributing any surplus income to members, employees or controllers.[2] This is termed the non-distribution constraint in Henry Hansmann's seminal work on nonprofit organisations.[3] This absolute requirement means charities are by definition nonprofit organisations, in the sense that any profit they do make must be to further organisation's purpose.[4]

Conversely, nonprofit organisations will not necessarily fall within the realm of charity, even though they may receive similar regulatory treatment in terms of registration, oversight and beneficial tax treatment.[5] The form of regulation, and any corresponding privileges vary between jurisdictions. In the United States, nonprofit organisations, including charities are regulated solely through the tax department.[6] In New Zealand charities are subject to the oversight of charity services,[7] but nonprofit organisations are

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[2] Myles McGregor-Lowndes "An Overview of the Not-for-profit Sector" in Matthew Harding (ed) *Research Handbook on Not-For-Profit Law* (Cheltenham, Edward Elgar, 2018) 131 at 132–133.

[3] Henry B Hansmann "The Role of Nonprofit Enterprise" (1980) 89 Yale Law Journal 835 at 838.

[4] At 838.

[5] Dr Donald Poirier *Charity Law in New Zealand* (Wellington, Department of Internal Affairs, 2013) at [1.2.1.3].

[6] Kerry O'Halloran *Charity Law and Social Inclusion: An International Study* (New York, Routledge, 2007) at 313.

[7] Charities Act 2005 (NZ), s 8.

only regulated insofar as they may be entitled to tax exemptions determined by the Inland Revenue Department.[8] In Australia, charities and nonprofit organisations are regulated jointly by the Charities and Not-for-Profit Commission.[9] The level of oversight over nonprofit organisations, may thus depend on the kind of benefits which the organisation is entitled to, particularly any fiscal concessions.

History is where charity and nonprofit organisations diverge, and the notion of public benefit becomes associated with charitable organisations.[10] In New Zealand it is estimated that only around a quarter of nonprofit organisations are registered charities.[11] These are the organisations that fall within the statutory categorisation of charitable purposes and are considered to generate a public benefit in accordance with tests that the courts have refined, imposing a series of additional rules governing the construction of charities, and rules disqualifying them from certain activities.[12]

Nonprofit organisations are much wider in scope, and are helpfully seen as encompassing all organisations that operate in the third sector—the sector of society that falls between government and the business sectors, encompassing civil society organisations, political groups, religious organisations, sports clubs and trade unions, to name a few.[13]

B Charitable Purpose and the Public Benefit Requirement

Charity, in its legal sense, has always be delineated through analogy to a series of historical classifications that remain influential in describing certain purposes and activity that are

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[8] Income Tax Act 2007 (NZ), ss CW38–CW40 and CW44–CW55.

[9] Australian Charities and Not-for-profits Commission Act 2012.

[10] Dr Donald Poirier, above n 5, at [1.2].

[11] At [1.1].

[12] Matthew Harding *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at 13.

[13] Myles McGregor-Lowndes, above n 2, at 135; Benjamin Gidron "Third Sector" in Helmut K Anheier and Stefan Topler (eds) *International Encyclopedia of Civil Society* (New York, Springer, 2010) vol 3 at 1550; and Jonathan Garton *The Regulation of Organised Civil Society* (Oxford, Hart Publishing, 2009) at 31.

deemed charitable; as a legal concept, charity has never been conclusively defined.[14] Put another way by Kerry O'Halloran these classifications have "always been treated as indicative rather than prescriptive and [their] extension within the common law has been guided by analogy rather than by principle."[15]

This classification of charitable purposes is derived from the preamble to the Statute of Charitable Uses 1601 (Statute of Elizabeth),[16] which was further articulated and consolidated by Lord Macnaghten in his judgment in *Commissioner for Special Purposes of Income Tax v Pemsel*.[17] Recognised charitable purposes include: the relief of poverty, advancement of education or religion, and any other purpose beneficial to the public.[18] While the fourth category—publicly beneficial purposes—appears to be a catch all that introduces some flexibility into the regulation of charity, public benefit has generally been accepted as a unifying feature of each of the categories of legal charity.[19]

Public benefit has thus, become the touchstone for defining charitable purposes. This is particularly important for the development of charity if it is considered that the first three categories are not necessarily exhaustive of changing social expectations of what ought to

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[14] Dr Donald Poirier, above n 5, at [3.1.2], citing *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 347, and *Re Wilkinson (deceased)* [1941] NZLR 1065 at 1075; Adam Parachin "Regulating Charitable Activities through the Requirement for Charitable Purposes" Square Peg Meets Round Hold" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (Oxford, Hart Publishing, 2020) 129 at 139.

[15] Kerry O'Halloran, above n 6, at 72.

[16] Statute of Charitable Uses (1601) 43 Eliz I, c 4 [Statute of Elizabeth].

[17] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 [*Pemsel's Case*]. This is the better known classification which was derived from the earlier decision in *Morice v The Bishop of Durham* (1804) 9 Ves 405.

[18] At 581 per Lord Macnaghten.

[19] *McGovern v Attorney-General* [1982] 1 Ch 321 at 333; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL); and Susan R Moody "Self-Giving in "Charity": The Role of Law" in Charles Mitchell and Susan R Moody (eds) *Foundations of Charity* (Oxford, Hart Publishing, 2000) at 79–80.

be charitable.[20] Therefore, even though charitable purpose is usually descriptive of what will be charitable, the public benefit requirement is in reality the constitutive element.[21]

Proving public benefit has become the main hurdle for obtaining charitable status.[22] This requirement has been developed by the courts, rather than through legislative intervention, refining the definition of charity.[23] The courts in this sense have been gatekeepers of legal charity, protecting the integrity of the institution, in terms of both the objects and beneficiaries of charity, and the available tax concessions.[24]

As Susan Moody describes, the public benefit requirement is the rationale for the benefits associated with charitable status:[25]

> This 'public benefit' requirement is in effect the *quid pro quo* for the particularly privileged place which charities enjoy in contemporary society. It recognises the financial benefits of tax concessions to charities as well as the more intangible but nonetheless advantageous position which charities occupy in the public mind, encouraging donations and personal involvement in the work of charitable bodies.

This is the generally accepted policy rationale for the existing status quo, whereby charities are able to access these potentially substantial benefits.

In most jurisdictions the first three categories of the classification in *Pemsel's* Case—relief of poverty, and advancement of religion and education—benefit from a presumption of charitability in the absence of evidence the purpose is "non-beneficial to the public".[26] Gino

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[20] Matthew Harding, above n 12, at 6–7.

[21] At 7; Jonathan Garton *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013) at [2.15]–[2.19].

[22] G E Dal Pont *The Law of Charity* (2nd ed, Chatswood (NSW), LexisNexis/Butterworths, 2017) at [1.7].

[23] At [1.7]–[1.8].

[24] Dr Donald Poirier, above n 5, at [4.0]; and *Perpetual Trustees Co (Ltd) v Ferguson* (1951) 51 SR NSW 256 at 263.

[25] Susan R Moody, above n 19, at 79–80.

[26] Dr Donald Poirier, above n 5, at [4.1.2.1]; *Coats v Gilmour* [1948] 1 Ch 340.

Dal Pont has suggested this presumption remains justified for two reasons.[27] Firstly, that to hold otherwise may result in the status of legal charities which have relied on this presumption being called into question.[28] And secondly, that the degree of altruism or public benefit in those purposes means the level of public interest outweighs any potential or ancillary private benefit contrary to the underlying principle of charity.[29]

That said, the Charities Act 2011 (UK) reversed this presumption requiring evidence of public benefit in all cases.[30] Still it is recognised that charitable purposes as described in the Elizabethan preamble will generally be of public benefit.[31] Gino Dal Pont's arguments could be questioned solely on the basis that, if we are going to have a coherent normative theory supporting the integrity of charity as a social institution, then it would be difficult to maintain that organisations which are inconsistent with such a theory should continue to benefit from charitable status.

1 The Test for Public Benefit

Courts have adopted a two stage test to assess public benefit, comprising a question of the public nature, and a question of the extent of the benefit.[32] The 'public' element of the test demands that a discernible benefit be conferred on the public or a sufficiently large class of members of the public.[33] This is not always applied rigidly in the sense that there will be some exceptions that validate charity conferred on a class of beneficiaries that may have

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[27] Gino Dal Pont *Law of Charity* (Chatswood (NSW), LexisNexis/Butterworths, 2010) at 176.

[28] At 176.

[29] At 176.

[30] Sections 3(2), 15(1) and 17.

[31] *Re Greenpeace of New Zealand* [2014] NZSC 105, [2015] 1 NZLR 169.

[32] Matthew Harding, above n 12, at 13.

[33] G E Dal Pont, above n 22, at [3.37]; and Matthew Harding, above n 12 at 13–14.

pre-existing ties, perhaps through blood, or membership of certain clubs or societies.[34] This reflects the need to ensure that charities are not used as vehicles to confer a benefit on some private group without any corresponding public utility. Referred to as the *Compton-Oppenheim* test, the rule dictates that a charitable purpose will not be sufficiently public where the class of beneficiaries is distinguished by reference to a private group deemed to include those linked by blood, place of employment, contract or association membership.[35]

Matthew Harding refers to the two categories of public benefit that might be recognised: either excludable private goods or non-excludable public goods.[36] Excludable private goods like hospitals or education institutions will be considered public where they are available to a public class.[37] Non-excludable public goods being provided by nature will be sufficiently public (provided they are for a recognised charitable purpose).[38] Excludable private-goods have generated much more controversy and inconsistency in the case law, for example with the ongoing debate about whether a private schools should be charitable when although technically public, the fees are prohibitively high.[39] Non-excludable public goods tend to fall within the final head of the *Pemsel* classification and generate less controversy, as they will often be sufficiently public (provided they also meet the benefit requirement).[40]

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[34] Matthew Harding, above n 12, at 14. The Charities Act 2005 (NZ), s 5(2)(a) specifies that charitable status will not be denied on the basis that the objects are tied through blood relationships, referring specifically to Māori iwi or hapū groups.

[35] G E Dal Pont, above n 22, at [3.7]; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; and *Re Compton* [1945] 1 Ch 123.

[36] Matthew Harding, above n 12, at 14.

[37] At 15.

[38] At 15.

[39] At 18–20; and *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214.

[40] At 19.

Secondly, it is required that there is a discernible benefit, interpreted wide enough to include social, spiritual, mental or material benefits.[41] Judges have sought to constrain the inherently subjective element of this by using the presumption of charitability as an objective measure of benefit, and in the fourth *Pemsel* category by looking to the wider classification in the preamble to the Statute of Elizabeth.[42] The guise of objectivity often works to the contrary effect, since judges will often assess the benefit specified in the constituent documents from a removed objective standpoint, without conducting a deeper, subjective analysis of the organisations operations, and any actual benefit or harm flowing from that.[43]

C Rules Regulating the Activities of Charities

In addition to the exclusively charitable purposes, and the public benefit requirements, charities are also prohibited from certain activities as part of their charitable status. However the parameters of these prohibitions have become increasingly blurred, with many jurisdictions liberalising the rules on the prohibition of political purposes, and same with the prohibition against governmental purposes.

1 Rule Against Political Purposes

An organisation established for "political" purposes will generally not be regarded as charitable.[44] Political purposes are defined in a broad sense to include, advocating specific policy and law reform, supporting existing policy and law, or lobbying or engaging in party politics.[45] Political and charitable activities are considered mutually exclusive by nature:

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[41] G E Dal Pont, above n 22, at [3.37].

[42] At [3.37].

[43] Matthew Harding, above n 12, at 22–26.

[44] William Henderson, Jonathan Fowles and Julian Smith (eds) *Tudor on Charities* (10th ed, London, Sweet and Maxwell/Thomson Reuters, 2015) at 56 [Tudor on Charities]; and *Bowman v Secular Society Ltd* [1917] AC 406 (HL).

[45] At 56; and Matthew Harding, above n 12, at 36

the notion of charity being concerned with voluntariness and benevolence, and politics being largely concerned with advancing specific interests and agendas.[46] Furthermore, as the House of Lords recorded in their judgment in *Bowman v Secular Society Ltd*:[47]

> … the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

However, several jurisdictions have moved away from this seemingly absolute prohibition.

A charity acting within its permitted purpose may undertake ancillary political purposes if that is in furtherance of its main charitable purpose.[48] In Australia, the Charities Act 2013 specifically permits advocacy for law reform where that is in furtherance of another recognised charitable purpose.[49] Previously the High Court of Australia had held that the prohibition against political purposes was no longer a part of Australian law.[50] The New Zealand Supreme Court has similarly reduced the scope of this prohibition, finding that political purposes are not irreconcilable with charity, particularly through advocacy of certain purposes, but noting that a court was not in a position to assess the public benefit of the advocacy.[51]

2 Rule Against Governmental Purposes

The scope of the rule against governmental purposes, and even its application at all has been questioned by scholars.[52] Particularly, the growth in charitable "contract culture"

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[46] Michael Chesterman *Charities, Trusts and Social Welfare* (London, Weidenfeld and Nicolson, 1979) at 182.

[47] *Bowman v Secular Society Ltd*, above n 44, at 442.

[48] Tudor on Charities, above n 44, at 67.

[49] Section 12(l).

[50] *Aid/Watch Incorporated v Federal Commissioner of Taxation* [2010] HCA 42, (201) 272 ALR 417.

[51] *Re Greenpeace*, above n 31 at [47], [50], and [59].

[52] Matthew Harding, above n 12, at 35.

which has seen charitable organisations increasingly having governmental services contracted out to them, has led this change.[53]

One proposed rationalisation of the principle is that governmental purposes will not be charitable when an organisation is carrying out purposes that are constituted through the choice of elected officials on behalf of constituents that already benefits from the tax take.[54] But since government should in theory always act in the interests of the public, and thereby produce outcomes beneficial to the public, it remains difficult to delineate the publicly beneficial activities that the charities sector is permitted to engage in.

Kerry O'Halloran posits that the government action to constitute and develop the law of charity has been in response to contemporary social needs outgrowing the capacity for direct government provision.[55] This was the case in the 17th century when government in response to high levels of poverty and corruption in the church sought to impose constraints and clarification of the scope of charity.[56] As social-services are rolled back in western countries, the third sector has benefitted from broad interpretation of what constitutes charitable purposes, and government contracts to provide essential services.

The accepted view seems to be that just because a (social) service may be provided by government, it may equally be provided through a charitable organisation, provided it meets the additional requirements of public benefit and charitable purpose.[57] This supports

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[53] See Debra Morris "Paying the Piper: The "Contract Culture" as Dependency Culture for Charities?" in Alison Dunn (ed) *The Voluntary Sector, the State and the Law* (Oxford, Hart Publishing, 2000)

[54] Matthew Harding, above n 12, at 36; see also Matthew Harding "Distinguishing Government from Charity in Australian Law" (2009) 31 Sydney Law Review 559.

[55] Kerry O'Halloran "Government—Charity Boundaries" in Myles McGregor-Lowndes and Kerry O'Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham, Edward Elgar, 2010) 164 at 167

[56] At 165.

[57] Andrew S Butler (ed) "Charitable Trusts" in *Equity and Trusts in New Zealand* (Wellington, Thompson Reuters New Zealand Ltd, 2009).

the view taken in this paper that welfare enhancement must be at the core of charitable organisations and, thus, the entity type chosen.

III Identifying the Founder-Control Phenomenon in Charities and Nonprofit Organisations

The phenomenon of founder-control over charitable organisations is identifiable across the different vehicles through which charity is conducted, albeit to varying extents depending on the vehicle. It is argued that this phenomenon can be traced to the contemporaneous evolution of trust and charity law, through which the basic premises of trust law came to influence the way charitable organisations could be established and structured.

This is a problem which is inherent to the entities and legal relationships that constitute them. A particular ideology underlies the adoption and structuring of these entities which concerns private-property, control, power, and inequality.[58] Individual rights and freedoms are thought of as distinct from the property we own.[59] Thus the liberal concern with equality, is often seen as distinct and separate from the things that we own, facilitating the possibility of inequality.[60]

This point made by Roger Cotterrell frames the discussion of these different possible vehicles through which legal charity can be conducted. Specifically placing a critical lens over property and trust law, we can see how this separation of individual autonomy, from the property we own, justifies founders of charity retaining control through these vehicles, over property that they have parted with for benevolent purposes.

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[58] Roger Cotterrell "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship" (1987) 14 Journal of Law and Society 77 at 82.

[59] At 82.

[60] At 82.

The charitable trust is the main vehicle where this high level of control can be observed. But it is equally present in other entity types. As is widely recognised:[61]

> There is "no single structure in English law specifically designed for charities" and "charities have had to make do with a legal structure fashioned largely (in the case of trusts) for family property holding, or (in the case of a company) for commercial endeavour.

Additionally they may also take the form of an unincorporated society, an incorporated society, or a unique entity constituted by an Act of Parliament.[62] Indeed, over time it has become apparent that in many jurisdictions, trusts no longer play the role they once did at the beginning of charity in history.[63] Yet their influence remains in creating a system that facilitates retention of proprietary control over charitable purposes and activities.

A Charitable Trusts

The concept of charity evolved historically, from trusts that were established for public purposes, and thereby validated because of their public nature.[64] They otherwise would have failed for lack of certainty of objects, as is required to settle a private express trust.[65] Although drawing a line between them can sometimes be difficult, particularly in the case of purpose trusts for the relief of poor:[66]

> The intention of the donor (also termed 'settlor', 'founder' or, for a testamentary trust, 'testator), as appears from the terms of the gift construed in the context of the

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[61] Matthew Turnour "Modernising Charity Law: Steps to an Alternative Architecture for Common Law Charity Jurisprudence" in Myles McGregor-Lowndes and Kerry O'Halloran (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, Cheltenham, 2010), citing Peter Luxton *The Law of Charities* (Oxford, Oxford University Press, 2001) at 5.

[62] Juliet Chevalier-Watts *Law of Charity* (Wellington, Thomson Reuters, 2014) at 19.

[63] Gino Dal Pont "'Charity' and Trusts: Mutuality or Intersection" (2016) 10 Journal of Equity 25 at 28.

[64] G E Dal Pont, above n 22, at [17.3].

[65] At [17.3].

[66] At [17.4].

> dispositive document, is what determines whether a trust operates as a private or a public trust.

As with a private trust, a charitable trust is the creature of the settlor, and their intention for how property be dealt with.

Michael Chesterman has identified this phenomenon of settlor preferences and control being particularly evident in charitable trusts:[67]

> Because it may be employed to impose highly individualistic purposes upon the trustees and the trust property, a charitable trust may be strongly permeated with the specific wishes, ideals and personality of the individual who created it. In so far as charitable gifts and bequests owe their existence to self-publicizing or dynastic motivations on the part of the donor or testator, the availability of the trust form thus betrays responsiveness on the law's part to the sentiment that charity deserves to be encouraged.

This observation underpins much of this analysis of these organisational structures, but particularly charitable trusts.

1 Establishing a Charitable Trust

Like a private express trust, a charitable trust may be settled by a donor through a transfer of property during their lifetime or by will, to designated trustees.[68] Whereas the trustee would incur fiduciary obligations to the beneficiaries with a private express trust, a charitable trustee will incur fiduciary obligations to the charitable purpose.[69] Similarly a charitable trust must comply with the three certainties—certainty of intention, subject matter, and objects[70]—albeit modified to reflect the key difference of charitable trusts, that

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[67] Michael Chesterman, above n 46, at 192.

[68] G E Dal Pont, above n 22, at [17.5].

[69] At [17.6]–[17.7]; this has been affirmed by the UK Supreme Court in the recent decision of *Lehtimäki v Cooper* [2020] UKSC 33, [2020] 3 WLR 461.

[70] At [17.3] – [17.16].

they are settled for the benefit of a specified purpose rather than an identifiable group of beneficiaries.[71]

This acceptance of trusts for purposes is noteworthy, since gifts for purposes rather than persons would fail, there being no person with a sufficient proprietary interest to enforce the gift.[72] It was the publicly beneficial nature of charitable trusts that made them worthy of validation, despite purposes trusts being considered "perhaps impossible, to enforce, uncertain in their ambit and generally beyond the capacity of the court to control."[73]

Certainty of intention simply requires that the settlor intend to create a trust, which can be identified through the terms of the deed.[74] In practice this will require the gift to trustees for an identifiable purpose that is recognised by law as charitable in accordance with case law or any statutory regime that changes this. Certain of subject matter requires certainty of the property to be gifted or transferred on trust to the trustees.[75] Gifts without sufficient certainty may include those where, for example, the trustees are given a discretion whether appoint capital to charitable purposes.[76]

Certainty of objects in the case of a private express trust requires sufficient certainty of who the beneficiaries are. This is because they are the ones beneficially entitled to the property held on trust and, therefore, are able to enforce the trust by holding the trustees accountable for exercising the power and discretions conferred on them.[77] In the case of a

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[71] Kerry O'Halloran, above n 6, at 59–60.

[72] Gino Dal Pont, above n 63, at 28.

[73] Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon *Charity Law and Social* Policy (Dordrecht, Springer, 2008) at 114, citing L A Sheridan and George W Keeton *The Law of Trusts* (12th ed, Barry Rose Law Publishers Ltd, 1992) at 3.

[74] G E Dal Pont, above n 22, at [17.6]–[17.7].

[75] At [17.2].

[76] At [17.12].

[77] At [17.13].

charitable trust, the object is a purpose which is legally recognised as being charity;[78] those identified in Lord Macnaghten's classification in *Pemsel's Case*, the Statute of Elizabeth, or the various statutory changes which have been made to them in different jurisdictions.[79]

This means that in the case of a charitable trust, the most distinctive aspect of trust law (beneficial ownership) is absent.[80] In place of beneficiaries who would usually have the power to hold trustees accountable, the Attorney-General steps in representing the Crown as *parens patriae*—the quasi-parental, protective prerogative jurisdiction of the Crown—to enforce the application of charitable property, and act on behalf of the objects or beneficiaries of charity.[81]

This demonstrates that establishing a charitable trust involves little more than the a private express trust, with the necessary modifications for the trust to be centred on a purpose rather than beneficiaries. Thus, it should be evident, very little is required for the settlor or founder to impress their character and preferences on the charitable trust.

2 Application of the Rule Against Perpetuities

Charities are not exempt from the rule against perpetuities, although the way the rule applies to charities is often misconstrued in this way.[82] This is partly the result of a misconceptions about the rule against perpetuities in trust law generally. That said, the way the rule against perpetuities applies, demonstrates another source of founder-control over the objects of charitable giving.

The principle—or perhaps the ideological conviction—that "property holders are able dispose of their property on such terms as they desire" is true to an extent but in many cases

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[78] At [17.13].

[79] For example Charities Act 2011 (UK); Charities Act 2005 (NZ);

[80] Gino Dal Pont, above n 63, at 29.

[81] Tudor on Charities, above n 44, at 575–580.

[82] Adam Parachin "Charities and the Rule Against Perpetuities" (2009) 21 The Philanthropist 256 at 256–257.

qualified.[83] The law facilitates these rights by allowing property to be gifted, transferred for appropriate consideration, or transferred with certain conditions attached.[84] Trust law allows the separation of legal and beneficial ownership by a settlor on terms defined by them (the settlor) ultimately to be managed on behalf of designated beneficiaries of that property.

The rule against perpetuities strikes a balance between the right of property holders to deal with property as they wish, with the countervailing policy objective to encourage the "free alienation of property."[85] Formulating such a rule requires the curtailment of the freedom of a generation of property holder to deal with property as they wish: this is either the ability of an *original* owner to transfer or alienate property in any way or with any condition they desire, or the ability of *future* owners to deal with property unconstrained by conditional transfers by previous generations.[86]

The law strikes this balance by imposing a perpetuity period; the period of time within which "contingent interests must vest—if at all".[87] An interest in property must, therefore, vest in the objects of the trust, before the conclusion of the perpetuity period, which at equity was generally 21 years following the death of a living person designated at the settlement of the trust.[88] To give a settlor unfettered control over how property is dealt with after their death in perpetuity, interests in property will inevitably be reduced for all successive generations. The value of property will be diminished if contingent interests that may or may not vest exist over all property. A perpetuity period prevents these constraints existing in perpetuity, and restores property to its former status, by reunifying legal and beneficial title.

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[83] At 257.

[84] At 257.

[85] G E Dal Pont, above n 22, at [6.6].

[86] Adam Parachin, above n 82, at 264.

[87] At 258.

[88] At 259.

In the case of charitable trusts the public benefit of charity results in a more "generous bargain" for donors, allowing the trust to exist in perpetuity, and therefore, allowing control over a pool of resources indefinitely.[89] Charitable trusts are prohibited from accumulating income without distributing it, however, there is nothing to prevent the trust from retaining initial capital, income, and capital gains, and only distributing the income generated by the fund.[90] This is particularly problematic since the property becomes forever inalienable other than in accordance with the founders intentions.[91] As explained next, even if the trustees were to apply to have the trust altered under the cy-pres doctrine for reason of impossibility or impracticability, the ability to do so is highly constrained and still defers to the "general charitable objectives" of the founder.

3 The Cy-Pres Doctrine

The cy-pres doctrine, is a mechanism through which a donors' intentions may be given effect "as near as possible", in circumstances where the charitable trust cannot be effectuated in its original form because of impossibility, or impracticability.[92] In such circumstances "the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."[93]

From this description, it can immediately be inferred that founder-control may be retained over assets settled on trust, even beyond their lifetime, if the gift fails. That is not to say there is a problem with the laws response in such situations, but rather, it demonstrates the deference to founder-preferences to guide management of property.

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[89] Gino Dal Pont, above n 63, at 31–32, citing Rob Atkinson "Reforming Cy Pres Reform" (1993) 44 Hastings Law Journal 1111 at 1114.

[90] Adam Parachin, above n 82, at 271–272.

[91] At 272.

[92] Rachael P Mulheron *The Modern Cy-Pres Doctrine: Applications & Implications* (London, UCL Press, 2006) at 1.

[93] American Law Institute *Restatement of the Law, Trusts* (2nd ed, St Paul, Minnesota, 1959) Vol II, §399.

The court's cy-pres jurisdiction[94] will arise in circumstances where there has ben a gift towards a charitable object, that is impossible or impracticable to carry out, and where some general charitable intention can be proved.[95] In such a case, the court must devise a scheme for the appointment of that gift as near as possible to the original intention.[96]

Whether the doctrine will apply in a given case is often highly uncertain, and the concepts of impossibility, impracticability, and general charitable intent are open to interpretation depending on the extent to which the preferences of the donor are being protected.[97] The often cited decision in *Re Buck* where a wealthy donor left a charitable bequest for the development of an already wealthy community,[98] demonstrates the rigidity of some courts in giving effect to "inefficient gifts" where they could be carried out but with low overall social utility.[99]

One argument raised in response to sceptical and narrow application of the cy pres doctrine is that:[100]

> … if a trustor was reasonable and truly motivated by philanthropic concerns he would presumably have no objection to bringing his trust into line with new circumstances that he did not anticipate when he formulated his expression of intent.

However, rigid application such as that in *Re Buck* demonstrates that altruism, or philanthropic goals will in many cases be distinctly absent from gifts made on charitable trust. Thus, we again see the proprietary control trust law facilitates over charitable gifts.

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[94] Distinct from what is termed the prerogative cy-pres jurisdiction of the Crown which will arise in cases of gifts *not* made on trust that have failed: see Rachael P Mulheron, above n 92, at 21–24.

[95] Roger G Sisson "Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres (1988) 74 Virginia Law Review 635 at 642.

[96] Rachael P Mulheron, above n 92, at 86.

[97] Roger G Sisson, above n 95, at 642.

[98] *Re Buck* No 23259 (Cal Super Ct, Marin Cty, Aug 15, 1986).

[99] Roger G Sisson, above n 95, at 642–643.

[100] At 649 – 650, citing Austin W Scott *The Law of Trusts* (3rd ed, Boston, Little Brown & Co, 1967) at 3124.

4 Ideological Critiques of Trust and Property

Consistent with the thesis advanced in this paper, scholars have attacked the use of trust and the underlying ideologies of power and proprietary rights, in the context of charitable organisations. This has been on the basis of the control which remains with the settlor and the trade-off that takes place between this control, public benefit and tax treatment of charitable organisations generally.

As Roger Cotterrell has observed, trust law allows the owner of property to simultaneously benefit from, and relinquish the burdens of property ownership.[101] In the case of a charitable trust, the tax obligations which trusts incur in many jurisdictions, are relaxed because of the publicly beneficial component. Yet property owners have the flexibility to impose their own preferences, character and values on that pool of theoretically public goods. Furthermore, a charitable trust by nature fails to confer on an identifiable group of beneficiaries the right to enforce the trust.[102]

However, Cotterrell makes the insightful observation that: [103]

> … property settled on charitable trust is given for the 'public benefit'. Its ultimate beneficial owner is 'the public' or, we might say, 'society'. Charitable trusts provide a rare, perhaps unique, instance of the construction of society as a collective subject – a property owner – within private law. Small wonder the property once dedicated to charity remains perpetually so dedicated. Society as beneficial owner can never die.

This notion that society collectively is the beneficiary is reflected in some of the structures that characterise charity law, like the tax treatment, and the *parens patriae* jurisdiction of the Attorney-General as the enforcer of charity. But it might be construed as inconsistent with the level of control founders can retain over a trust. Therefore, placing emphasis on society as a beneficiary may be significant for theoretical approaches to explaining and critiquing the charity and the nonprofit sector.

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[101] Roger Cotterrell, above n 58, at 82

[102] At 88–89.

[103] At 89.

Michael Chesterman provides some further insight into the way the trust form accommodates the settlement of trusts by individuals with eccentric, egoistic and idiosyncratic preferences as to the management of settled property.[104] This will not happen in every case; trustees are often given considerable leeway and discretion to employ assets to commonly recognised publicly beneficial objects.[105] However, given the potential for this form to be exploited for such purposes, where the public benefit requirement has proven inadequate to ameliorated any exploitation, it is neither clear that the trust form is appropriate for charitable activity, nor that its specificities should be given unqualified preference other than through the courts cy-pres jurisdiction.[106]

B The Charitable Corporation

Comically referred to as *A Bastard Legal Form*, the charitable corporation has become the preferred vehicle for organising charity in several jurisdictions like the United States and Australia.[107] Only around seven per cent of registered charities in New Zealand are incorporated as companies.[108] Whether or not this is more desirable than charities being structured as purpose trusts is open for debate.

As one Canadian appellate court judge has remarked:[109]

> … the genetic source of the law governing charitable corporations are not in dispute: they are to be found in the law of trusts, the law of corporations and the prerogative interest and jurisdiction over charities which has found its way into the inherent equitable jurisdiction of the court.

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[104] Michael Chesterman, above n 46, at 196–197.

[105] At 196.

[106] At 197.

[107] Maurice C Cullity "The Charitable Corporation: A 'Bastard' Legal Form Revisited" (2002) 17 The Philanthropist 17; and Kerry O'Halloran, above n 6, at 262 and 323.

[108] Charity Services "Quarterly Snapshot" <www.charities.govt.nz>.

[109] Maurice C Cullity, above n 107, at 17.

Yet the charitable corporation has been characterised as a creature deeply influenced by, and more analogous to the charitable trust than the business corporation:[110]

> The rationale of a charitable company is far more akin to that of a charitable trust than to that of a commercial company. Charities have adopted the company structure because of the advantages of limited liability. This does not mean that they have adopted the whole ethos of companies in general. Charitable companies have a different purpose from commercial companies. They exist to carry out a particular charitable purpose and not to make profit for their members.

In itself this statement perhaps explains the proliferation of charitable corporations in the United States, Canada and Australia, and the relative absence of charitable corporations in New Zealand's charities landscape. New Zealand's Charitable Trusts Act 1957 has long provided for the incorporation of charitable organisations as trust boards, giving them perpetual existence and legal personality.[111]

Even more importantly, Maurice Cullity observes that charitable corporations, may indeed suffer from the same problem inherent in charitable trusts—donor control over the organisation and its publicly beneficial assets—and, therefore, we must question "the extent to which the interests of donors are to continue to receive the recognition, deference and protection that has been a characteristic of charity law in the past".[112]

1 Incorporation and Governance of Charitable Corporations

The necessary components for charitable status of a charitable corporation, must be incorporated into the corporations constituent instrument—the company constitution.[113] This document "is important in that it allows the procedural rules of the company to be

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[110] Jean Warburton "Charitable Companies and the Ultra Vires Rule" [1988] Conveyancer and Property Lawyer 275 at 282–283, cited in Gino Dal Pont, above n 63, at 43.

[111] Section 13.

[112] Maurice C Cullity, above n 107, at 24.

[113] Tudor on Charities, above n 44, at 340–341.

tailored to reflect the requirements of the stakeholders within a company."[114] The constitution will be binding between the shareholders and the company, and between all of the shareholders.[115] Those components that must be incorporated into the constitution will be a provision facilitating the non-distribution constraint,[116] the charitable purpose that the company is being incorporated to advance,[117] and provisions dealing with the winding up of the company.[118]

For example, it will be inappropriate that a board retain powers to make distributions or issue dividends.[119] In New Zealand, it is required by Charities Services that companies incorporate a provision into their constitution that prevents payment of dividends to shareholders, or, where a company is wholly owned by a charitable trust, that any dividends are paid wholly to the trustees of the trust.[120]

Furthermore, any property or income of the company, is restricted to application to the charitable objects of the company, since, of course, charity must be carried out for exclusively charitable purposes.[121] Should a charitable corporation seek to wind up its operations, any assets must be appointed to other charitable purposes, consistent with its charitable purposes.[122] Any provisions in the constitution specifying on liquidation how the assets should be dealt with take precedent over liquidation rules contained in companies

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[114] Susan Watson (ed) "Division of Powers in the Company" in *The Law of Business Organisations* (5th ed, Auckland, Palatine Press, 2009) at [10.03].

[115] Companies Act 1993, s 31.

[116] Henry Hansmann, above n 3.

[117] G E Dal Pont, above n 22, at [17.56].

[118] At [17.56].

[119] See for example Companies Act, ss 52 and 53.

[120] Dr Donald Poirier, above n 5, at [8.1.2].

[121] G E Dal Pont, above n 22, at [17.56].

[122] At [17.56].

legislation.[123] Since the assets are being reapplied for similar charitable purposes, the court's cy-pres jurisdiction has been held to apply equally as it would in the case of a charitable trust.[124]

2 The Source of Founder-Control in the Charitable Corporation

Demonstrably, the corporate form is capable of being adapted to make is a suitable vehicle for nonprofit enterprise. Like the trust, there is still ways in which the founders of a charitable corporations are capable of exercising substantial control over the purpose of the organisation.

The purpose of a charitable corporation will be incorporated into its constitutive instrument.[125] A charitable company, has the advantage that if trustees wish to change the direction or adjust charitable purposes, the constitution may be amended to reflect such changes.[126] The purpose of the company as reflected in the constitution may no longer meet the needs of society, or its practice may have already changed in response to those needs.[127] Trust may only do so on application to the court to exercise is cy pres jurisdiction to alter the trust or create a new scheme for the appointment of its assets.

Companies legislation will provide for the process that needs to be adopted in order to amend the constitution. This usually requires a 'special resolution' by the companies members or shareholders; a resolution that must be passed by 75 per cent or more of voting members.[128] However, any such changes to charitable corporations will normally be subject to additional regulation governing charitable organisations such as obtaining

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[123] Tudor on Charities, above n 44, at 349, citing *Liverpool Hospital v Attorney-General* [1981] 1 Ch 193 at 209; and Dr Donald Poirier, above n 5, at [8.1.2].

[124] Dr Donald Poirier, above n 5, at [8.1.2]; and *Liverpool Hospital v Attorney-General* , above n 123.

[125] Con Alexander and Jos Moule (eds) *Charity Governance* (Bristol, Jordans Publishing Ltd, 2007) at [2.15].

[126] At [15.3].

[127] At [15.3].

[128] Companies Act, s 32(1) (NZ); and Companies Act 2006, s 21(1) (UK).

approval from the regulatory body,[129] or, notifying the regulatory body that such changes have been made.[130] Even so, it is not apparent a company will be bound by the founders "dead hands" in the way a trust is.

3 Corporate Governance of Charitable Organisations in Reality

This then raises the question about the corporate governance structure of charitable corporations. The preceding explanation of how the organisation may be founded and its purpose be amended, does not explain what happens in practice. The level of influence which a founder can in theory exercise over a charitable corporation, will depend on the size of the organisation, the size of the board, the number of employees, the level of oversight and the level of regulation.

For many nonprofit organisations board members often fill a part time role, are less likely to be technically skilled in corporate governance matters in comparison to the corporations management, and may also be acting voluntarily.[131] One of the boards functions will be to monitor the implementation of charitable purposes and adjust them if necessary in accordance with the processes previously identified.[132]

The composition and independence of the board is likely to be a significant factor in identifying the level of control which may be exercised over the organisation. Many jurisdictions only require a minimum of one director that may act alone. New Zealand is

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[129] Charities Act, s 198 (UK).

[130] Charities Act s 40(1) (NZ).

[131] Evelyn Brody "The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice – a View from the United States" in Klaus J Hopt and Thomas Von Hippel (eds) *Comparative Corporation Governance of Non-Profit Organisations* (Cambridge, Cambridge University Press, 2010) 481 at 496

[132] At 500.

one such jurisdiction.[133] Delaware is another, which is notably the jurisdiction in the US where a large number of US corporations choose to incorporate.[134]

As Evelyn Brody has noted "[a] charity may condition board membership on such ideological characteristics as membership in the organization or adherence to a certain philosophy" provided they meet the basic requirements in the jurisdiction to be a company director.[135] This limitation would indicate in certain corporations a substantial level of control being retained by the founders, reflected in the constitution of the company. Whether or not such a restrictions is placed on directorship, directors are elected by the shareholders by ordinary resolution,[136] unless the company constitution provides otherwise.[137]

The company constitution may provide for members to hold the board accountable by giving them control over election. This may be desirable in terms of accountability. Having independent directors that are not sympathetic to the charitable purpose may be problematic for confidence in the organisation.[138] But equally, in many cases the kind of charitable organisation may attract constituents that place their trust in the founder and directors.

A charitable corporation may be structured by operating for profit, and returning that profit to a charitable trust which owns 100 per cent of the corporation's shares.[139] Structured this way, the trustees may retain full control of the corporation, including the appointment of directors, and therefore exercising full oversight of the corporations operations and

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[133] Companies Act 1993 (NZ), ss 127–128;

[134] Del C, title 8 § 141(a)

[135] Evelyn Brody, above n 131, at 509; and Evelyn Brody "Charity Governance: What's Trust Law Got to do With it?" (2005) 80 Chicago-Kent Law Review 641 at 662.

[136] Companies Act 1993 (NZ), s 105.

[137] Section 153(2).

[138] Evelyn Brody, above n 135, at 668–669.

[139] Susan Barker, Michael Gousmett and Ken Lord *The Law and Practice of Charities in New Zealand* (Wellington, LexisNexis, 2013) at 484.

performance, ensuring that the preference of the founders as reflected in the trust and the corporations instrument are carried out in accordance with their preferences.

C Incorporated Societies

The final vehicle structuring charities worthy of discussion is the incorporated society. The basic premise of the incorporated society, is to facilitate the organisation of individuals that associate together for some mutual interest other than the pursuit of profit.[140] The ability for nonprofit groups to incorporate is available under New Zealand's Incorporated Societies Act 1908. Naturally, this characteristic makes the incorporated society an appropriate vehicle for the carrying out of charitable purposes, since charities are prevented from distributing any profit to their members. This is what makes incorporated societies unique and distinct from companies or other business organisations that are carried out for the purpose of making profit.

It is worth noting that this differs from the kind of structures adopted overseas, where it is common for unincorporated societies to be a vehicle for charity; organisations without separate legal personality, where contract, agency and fiduciary law provide a framework for group governance.[141] The focus on incorporated societies is thus, New Zealand focussed. However, the premise remains similar and relevant to the unincorporated models, albeit with the added advantage of separate legal persoanlity.

1 Establishing an Incorporated Society

One of the most notable feature of incorporated societies, is the prescribed method of incorporation. Under the Incorporated Societies Act 1908 there must be a minimum of 15 members to make an application for registration to the Registrar of Incorporated Societies.[142] Under the recently introduced Incorporated Societies Bill, this has been

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[140] Mark Von Dadelszen *Law of Societies* (3rd ed, Wellington, LexisNexis, 2013) at [1.1.1].

[141] At 9–13.

[142] Incorporated Societies Act 1908, s 4(1).

reduced to 10 members.[143] The Law Society made this recommendation, suggesting 10 would strike a better balance between maintaining a group large enough to justify their incorporation, whilst allowing smaller hobby or sports groups to incorporate particularly where retaining a membership of 10 is challenging.[144] They have recommended maintaining the rule that an incorporated member counts as 3 members for the purpose of the minimum membership requirement.[145]

For registration, a society is required to provide a set of rules to the Registrar, and these rules will govern the operation of the Society, most importantly specifying the objects of the organisation which they are required to act in accordance with.[146] Additional rules include those governing membership, meetings, control over finances, and processes for amending rules or when winding down the organisation.[147]

2 Identifying Founder-Control in Incorporated Societies

The rules and constitution of an incorporated society—specifically their formulation and amendment—will be a source for founders to exercise control over the purpose and activities of the society.

An incorporated society, to be registered, must file with the Registrar of Incorporated Societies a copy of the society's rules that cover each of the requirements set out in s 6(1) of the Incorporated Societies Act. Those rules must be signed by the minimum 15 members required for incorporated,[148] and must be accompanied by certification of "an officer of the

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[143] Incorporated Societies Bill 2021 (15-1), cl 8(1).

[144] Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at [4.16]–[4.19].

[145] At [4.16].

[146] Susan Barker, Michael Gousmett and Ken Lord, above n 139, at [6.22]–[6.26].

[147] At [6.17]; Incorporated Societies Act, s 6(1).

[148] Incorporated Societies Act, s 7(1)(a)(ii),

society or a solicitor" that the rules have been consented to by a *majority* of the members.[149] One of those rules must be the mode for rules to be altered, added to or rescinded.[150]

Authority is divided on the scope for amendment of the charitable purpose, of an incorporated society. The wording of the statute appears wide enough for the rules to be changed to a completely different nature to what they were previously.[151] However, later authority has taken the different view that "a society cannot amend its rules in a way which would conflict with its own fundamental objects."[152] That said, in New Zealand under the Charities Act, a registered charity must notify the regulator of changes to rules or purposes of the organisation,[153] and any such change may result in deregistration should that take the purposes of the society beyond recognised charitable purposes.[154]

Based on this overview of the rules governing incorporated society it might appear that there is less concentration of power and control over the purpose of an organisation where it is an incorporated society. There must be 15 members minimum and a majority that accept the rules and therefore the purpose of the society. However, this does not ameliorate the possibility of individuals exercising a substantial level of control over the purpose of the organisation. Although formally all members are equal, a founder could very well establish an incorporated society with the support of 14 other sympathetic individuals, that falls within the scope of a recognised charitable purpose.

The current act requires that rules specify how officers will be appointed, therefore, creating an assumption that some kind of officers—likely a chairperson, or president, and

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[149] Section 7(1)(b).

[150] Section 6(1)(e).

[151] Mark Von Dadelszen, above n 140, at [4.5.1]; and *Public Service Investment Society v Phillips* [1960] NZLR 930 (HC).

[152] *Waitakere City Council v Waitemata Electricity Shareholders Society Inc* [1996] 2 NZLR 735 (HC) at 743.

[153] Charities Act 2005 (NZ), s 40.

[154] Section 32.

any other necessary positions such as a secretary and treasurer—will be necessary for the functioning of the entity, but without any clear structure mandated.[155] Any officers appointed in accordance with these rules will thereby constitute an executive committee of sorts, responsible for any decisions and the governance of the organisation.[156] The Law Commission has recommended a committee of at least three members be required, as well as requiring the rules set out the requirements for their appointment and the scope of their roles, functions, qualifications.[157]

In practice, there is considerable scope for one persons preferences to be reflected in the organisations constitutive documents. Those preferences are able to be protected as a result of the considerable flexibility in formulating rules governing the society's methods of amending rules, which may reside with a small executive committee. The Act is similarly flexible in that there are no prescribed rules about electing the officers. This flexibility may be desirable and entirely appropriate for many societies, however, it is not so clear when that society is constituted for a charitable purpose.

IV Positive and Normative Theories: The Nonprofit Sector, Altruism and Social Welfare

Scholars began to engage with the nonprofit and charitable sector towards the end of the twentieth century, beginning to recognise it as a distinct sector of society on the level of government and for profit business. These accounts have variously focussed on micro-economic behaviour, organisational theories of the sector as a whole, and also philosophical virtue based and moral theories.

The previous section identified the potential for founders to use charitable organisations to maintain significant control over its functions and assets to impress their own values,

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[155] Incorporated Societies Act, s 6(1)(g).

[156] Law Commission, above n 144, at [6.5].

[157] At [6.12]–[6.14]; and Incorporated Societies Bill, cl 26(1)(f).

preferences and perception of public benefit on the organisation. It is interesting that so few scholars have paid attention to this phenomenon.

This may be the result of a lack of attention from the critical theory school, which could be expected to have developed a stronger body of literature that pays close attention to the power dynamics inherent in the structuring of the charities sector, and the political and economic interests that can be maintained through the tax treatment of charitable organisations, and deference to the preferences of donors.[158] This section seeks to advance this papers thesis about donor control with reference to the existing orthodox theories, and other more critical approaches.

A Economic Theory of the Nonprofit Sector

Henry Hansmann's seminal work on the role of nonprofit enterprise, sought to explain the phenomenon of nonprofit organisations with reference to its basic conditions and economic function.[159] He argues they are a device for the supply of goods or services in a market, where a particular set of circumstances results in contract failure, which can be corrected through nonprofit organisations supplying those goods and services.[160] Hansmann identifies three main situations where such a contract failure will occur (discussed below) the make their supply through a nonprofit preferable to a for-profit organisation.[161]

The defining characteristic of nonprofit organisations, operating in one of these industries is being:[162]

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[158] A reassertion of this approach to legal scholarship is summarised well by Jedediah Britton-Purdy et al "Building a Law-and-Political Economic Framework: Beyond the Twentieth-Century Synthesis" (2020) 129 Yale Law Journal 1784.

[159] Henry Hansmann, above n 3.

[160] At 844–846.

[161] At 845.

[162] At 838.

> … barred from distributing its net earnings if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. … Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organisation was formed to provide.

This legal constraint distinguishes nonprofit organisations from for-profit enterprise, obviously in the sense that they are prevented from distributing any surplus earnings, and also from government in the sense that they are voluntary rather than public organisations.[163] This constraint is enshrined in the organisations corporate charter or founding documents.[164]

Hansmann suggests that nonprofit organisations will be better suited to provide goods and services than for-profit organisations where the conditions for for-profit firms to operate at maximum social efficiency are not met.[165] Maximum social efficiency requires consumers be able to:[166]

> (a) make a reasonably accurate comparison of the products and prices of different firms before any purchase is made, (b) reach a clear agreement with the chosen firm concerning the goods or services that the firm is to provide and the price to be paid, and (c) determine subsequently whether the firm complied with the resulting agreement and obtain redress if it did not.

By having a nondistribution constraint on certain firms, they are disincentivised from charging excessive prices or supplying inferior goods or services.[167] It is theorised that this

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[163] At 837; and Myles McGregor-Lowndes, above n 2, at 133.

[164] At 845.

[165] At 843.

[166] Rob Atkinson "Altruism in Nonprofit Organisations" (1990) 31 Boston College Law Review 501 at 514, citing Henry Hansmann, above n 3, at 843–845.

[167] Henry Hansmann, above n 3, at 844.

is what for-profit firms will do where consumers are unable to assess the quality of the goods or services being supplied.[168]

The nondistribution constraint comprises three main features or targets: inurement, private benefit, and excess benefit.[169] Inurement rules specifically prevent the retention of profits by organisation insiders, private benefit rules bar any substantial benefits accruing to any private individuals not related to the charitable mission, and excess benefit rules bar any deviation from the mission or excess preferential treatment to influential individuals.[170]

Hansmann categorises the industries nonprofits operate in, and the services they provide, to demonstrates where this asymmetry of information or contract failure creates a need for a nondistribution constraint. Firstly, this may occur where the purchaser (donor) and recipient of services are different people.[171] For example, a donor to an organisation that delivers food to people in famine stricken countries cannot adequately assess whether that service is in fact being provided, and nor can the recipient of those services either assess the adequacy for the price paid, nor have any standing to enforce such a service. Whereas a firm that is required to return a profit to shareholder may be motivated to provide lower quality services or charge excessive prices, a nonprofit firm has no such motivation.[172]

A second situation where a nondistribution constraint is necessary is with public goods; goods where the cost of provision for one person is the same as provision for the public at large, and where there is no way of preventing others from consuming the good once it has been provided to others.[173] Where non-governmental public services are being provided, there is no way for consumers to adequately assess whether their contributions are a

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[168] At 847.

[169] Dana Brakman Reiser "Charity Law's Essentials" (2011) 86 Notre Dame Law Review 1 at 10.

[170] At 10.

[171] Henry Hansmann, above n 3, at 846.

[172] At 846–847.

[173] At 848.

reasonable reflection of the cost to provide a service. Consumers can assess the quality, but not the costs of providing that quality.

Finally, where there are complex personal services, such as healthcare and aged-care being supplied.[174] As with most commercial industries, here individuals are engaged in a "straightforward commercial transaction" where they are paying for their personal consumption of a service.[175] The distinguishing feature of complex personal services from say, industrial or agricultural goods, is that the consumer is likely to be unable to assess the quality of the services being provided, perhaps for reason of the services inherent complexity, or the incapacity of individuals consuming those services, such as people with mental illnesses, disabilities, or mental incapacity.[176] The power imbalance makes nondistribution desirable to ameliorate any motivation to lower the quality of services, or charge prices higher than necessary.[177]

Additionally, Hansmann categorised nonprofit firms under four headings that correspond to the way they are structured, based on the source of their financing and whether the identity of the purchaser and consumer of goods or services is the same.[178] The categories of financing are donative and commercial; donative nonprofits operate for the most part through grants and donations, whereas commercial nonprofits are those that are financed through charging consumers of their services.[179] It is recognised that many organisations many receive funding from both.[180] Hansmann then categorises organisations as subject to

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[174] At 862.

[175] At 862.

[176] At 863–866.

[177] At 863.

[178] At 840.

[179] At 840.

[180] At 841.

mutual or entrepreneurial control. Mutual organisations will be controlled by their members whereas entrepreneurial are controlled by a "self-perpetuating" board.[181]

Hansmann's theory goes wider that the notion of charity which incorporates as well as the non-distribution constraint, the additional requirements for charitable purposes, public benefit, other proscriptive rules. But his theory incorporates the notion of charity which is still premised on contract failure.

From this explanation, it should be evident that Hansmann's theory is narrowly construed, and based on the idea of nonprofit organisations, or charitable activities being analogous to goods or services, being purchased in a market. The purchaser is the donor who may or may not be the ultimate recipient or consumer of what the nonprofit organisation is supplying.

Hansmann's paper is title *The Role of the Nonprofit Sector*, and in a sense, his account of the nondistribution constraint, contract failure in certain sectors of the economy and the corresponding advantages of supply through a nonprofit organisation, explains this well. It is remarkably simple, logical and has been influential in explaining the nonprofit sector in the United States.[182] But in another sense it is a grossly inadequate explanation, in that it omits any reference to microeconomic analysis of donative economics, or motivations for individuals to engage in nonprofit activities.[183] Furthermore it fails to provide any normative guidance about nonprofit organisations beyond correcting the market for consumers or donors to certain existing organisations.[184] Nonprofit organisations merely

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[181] At 841.

[182] Rob Atkinson, above n 166, at 519.

[183] Hansmann acknowledges this point at 896–897.

[184] A useful overview of some of the normative goals of charity law can be found in Matthew Harding "What is the Point of Charity Law?" in Kit Barker and Darryn Jensen (eds) *Private Law: Key Encounters with Public Law* (Cambridge, Cambridge University Press, 2013) 147 where Harding discusses the facilitative, promotive, and creative functions of charity law.

arise in response to market forces, and rational consumers chose to deal with them to correct for the identified market-failure.

The nondistribution constraint is part of the irreducible core of charitable organisations and nonprofit organisations. But both appear to have something more that is definitive of organisations operating in this area, which fall short of explaining the normative objectives of charities.

B Altruistic and Egoistic Theories

1 "Weak" Altruism

Rob Atkinson recognises the utility of Hansmann's theory as a positive account of the sector but it fails in the sense that the normative aspect of the theory—that attempts to explain the tax treatment of charity through market and government failure—is incomplete.[185] He suggests that altruism is the constituent element of nonprofit organisations that Hansmann omits to take into account.[186] He contends altruism is identifiable in all kinds of nonprofit organisations—including those structured as commercial membership organisations to an extent.[187]

The kind of altruism which Atkinson posits—a kind which Hansmann paid at least some attention to in his paper[188]—is a "'weak' form of altruism", that is unconcerned with the subjective intention of donors, and any gain they receive, is not, and cannot be, in the form of any material quid pro quo.[189] There remains an element of giving without attention to subjective motivations.[190] This is of course consistent with the law of charity generally,

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[185] Rob Atkinson, above n 166, at 511 and 519.

[186] At 511–512.

[187] At 510–511.

[188] Henry Hansmann, above n 3, at 875 and 897.

[189] Rob Atkinson, above n 166, at 526.

[190] At 536.

which is ambivalent towards the donor or founder's subjective intentions, provided the purpose is one deemed charitable.[191] Donor intention is only relevant to the extent that it is incorporated into the purpose.[192]

By introducing the further categorisation of altruistic versus mutual benefit organisations, Atkinson is able to further breakdown the classification Hansmann presented, yet also demonstrate in each of these cases that there is an element of soft-altruism present. If altruism is identifiable, as Atkinson suggests in all such nonprofit organisations, this provides a clearer rationale for the preferential tax treatment.[193]

However, his categorisation is so broad, and takes such a liberal view of altruism that it is not entirely clear whether it can accurately be considered a unifying or characteristic feature of the nonprofit sector. Particularly, in using this weak altruism, the entire concept of altruism begins to lose form and make it difficulty to accept as a constituent characteristic of nonprofit organisations or charitable giving.

2 Egoism

This weak concept of altruism which Atkinson advances does not then provide a full picture of the reasons for encouraging charitable giving and philanthropic activity. His conception of altruism does not align with understandings of altruism in much of the theoretical economic literature,[194] or accounts based on virtue theory.[195] The notion of weak altruism that appears to be deeply entrenched in the way that charitable organisations are regulated,

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[191] G E Dal Pont, above n 22, at [2.8].

[192] At [2.8].

[193] Rob Atkinson, above n 166, at 616–620.

[194] Amartya K Sen "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory" (1977) 6 Philosophy & Public Affairs 317.

[195] John Gardner "The Virtue of Charity and its Foils" in Charles Mitchell and Susan R Moody (eds) *Foundations of Charity* (Oxford, Hart Publishing, 2000).

is blind to the motivations of donors, and assumes that the requirement of charitable purpose is a sufficient way to balance this.

In response, some scholars have further penetrated this weak altruism, and characterised it as what it really is: egoism—which could fairly be characterised as the antithesis of altruism.[196] Although intuitively it seems that altruism must be the primary motivation where individuals transfer their own resources to either an existing organisation, or to establish a new organisation, for no material return.[197] But particularly for wealthy donors, that are able to establish foundations in their own names and confer substantial resources on communities or groups without any clear corresponding need, it becomes evident that a level of self-benefit, albeit intangible is in play.[198]

As John Picton advances, egoistic motivation—where self-benefit is the motivating characteristic—can be observed through donors' ability to project their character and values beyond their death in perpetuity.[199] The presence of this kind of egoistic motivation has been advanced in the literature on donative economics, for example in the work of James Andreoni which posits that if giving were purely altruistic we would see much lower level of giving generally due to free-riding by individuals "where someone else is prepared to provide them."[200] The empirical psychological and economic literature is divided as to whether philanthropic behaviour can be explained as altruistic, egotistic, or egocentric.[201]

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[196] John Picton "Regulating Egoism in Perpetuity" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (Oxford, Hart Publishing, 2020) at 54–55.

[197] At 55.

[198] At 55; see for example *Re Buck* No 23259 (Cal Super Ct, Marin Cty, Aug 15, 1986).

[199] At 56.

[200] At 57; James Andreoni "Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving" (1990) 100 The Economic Journal 464; and Bruce Kingma "Public Goods Theories of the Non-Profit Sector: Weisbrod Revisited" (1997) 8 International Journal of Voluntary and Nonprofit Research 135 at 139.

[201] An overview of some of the behavioural economics and the neuroscience backing these theories, as well as a critique of Andreoni's theories can be found in John Elster "The Valmont Effect: The Warm-Glow

A general theory of the rationale for giving in not necessary though, if it is accepted that charitable organisational structures provide a mechanism for altruistic, egotistic or egocentric giving. There will always be cases where egoism indisputably motivates donors and therefore it would not necessarily be helpful to try and construct a theory that explains giving as a whole.

Problematically, research suggests this kind of giving which is limited by "egoistic encumbrances such as … [a] locality restriction or idiosyncratic methods of welfare delivery" is both inefficient and of low social utility in comparison to giving that it motivated what might be regarded as altruism in its true form.[202] This raises difficult normative questions about the way charity and philanthropy are regulated, and encouraged, since egoistic behaviour "might be though to jar with the spirit of the wider legal project as it relates to charity", which is centred on conceptions of public benefit, and corresponding tax exemptions.[203] But equally, insofar as an altruistic theory of charity is concerned, it should be acknowledged that this is a normative goal of the state which seeks to encourage giving in this form as part of the ongoing project that has devolved the provision of social services in large parts to the voluntary and nonprofit sector.[204]

John Picton—concerned to find a more effective method of understanding the sector and the different stakeholders—best articulates the interests of donors in their philanthropic activity:[205]

> Theorising the perpetual foundation as an egoistically shaped legal form, a legal entity which provides donors with pleasure in self-benefit, begs regulatory questions.

Theory of Philanthropy" in Patricia Illingworth, Thomas Pogge and Leif Wenar (eds) *Giving Well: The Ethics of Philanthropy* (Oxford, Oxford University Press, 2011) at 67.

[202] John Picton, above n 196, at 56; see for example Peter Singer *The Most Good You Can Do: How Effective Altruism is Changing Ideas About Living Ethically* (London, Yale University Press, 2015) at 117.

[203] At 58.

[204] At 59.

[205] At 59.

> Acknowledgement of egoism in perpetuity opens up a space in which is becomes possible to interrogate the terms on which donors should be permitted their self-regarding enjoyment in the creation of a charity in the first place.

The regulatory question engages these basic components that constitute charity law: public benefit, tax incentives, charitable purposes, social security and classical liberalism conceptions of property rights.

He suggests that in reality, the egoistic desire to establish foundations in perpetuity, capable of projecting the character and values of the donor into the future, is so strong that regulators are able to impose significant regulatory demands on them in exchange.[206] Giving can be understood as a socially significant act, and research has demonstrated that the social aspect is particularly strong, for example with one study that demonstrated the visibility of donations were likely to strongly affect the size of the donation.[207] Founders are concerned leave a legacy by their projection of their character and values,[208] beyond their death, through the funding of certain causes and advancement of particular values.[209] This sits perhaps uncomfortably with much of the economically reductive theory of Hansmann.

However, not all individuals will be motivated by egoism. Some will be motivated by a mixture of egoistic and altruistic motives, egoism dressed up as altruism, or egoism with altruistic consequences being merely a vehicle or collateral. Thus, charity law needs to be clear about its normative underpinnings, in order to be responsive to the motives of donors,

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[206] At 59.

[207] At 62, citing James Anderoni and Regan Petrie "Public Goods Experiments Without Confidentiality: A Glimpse into Fund-Raising" (2004) 88 Journal of Public Economics 1605 at 1620.

[208] Elizabeth Hunter and Graham Rowles "Leaving a Legacy: Toward a Typology" (2005) 19 Journal of Aging Studies 327.

[209] John Picton, above n 196, at 62.

so that there are adequate checks and limitations on the exercise of donative powers within the parameters of those normative goals.[210] As Matthew Harding has similarly opined:[211]

> …the motivations underlying a complex and diverse practice like gift-giving are multiple: some other-regarding, some self-interested, some bound up with duties and attachments and some reflected a detached posture towards others.

John Picton reaches the conclusion that plan-protection for foundations backed by the state is not the product of an obligation on the state in exchange for the public benefit from foundations, but rather is an incentive to encourage this kind of charitable giving.[212] The concept of plan-protection and donor preferences are not constitutive of charity, but work in favour of regulators as something which can be employed but appropriately limited in order to encourage philanthropic activity.[213]

Even in cases of so called "low-utility" charities, it has been argued that plan-protection needs to be guaranteed equally to protect the integrity of the whole system of incentivising charitable giving through plan-protection.[214] If Peter Singer's concept of effective altruism is to be accept though, then John Picton recognises that egoistic giving by nature, in projecting the values of founders into the charitable mission, will always present a purpose with greater social utility, and therefore, waste is "not an incident of plan-protection, it is instead inherent to it."[215] The question then becomes whether accepting plan-protection, and its generation of wasted resources should be accepted.

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[210] At 65.

[211] Matthew Harding, above n 12, at 91.

[212] John Picton, above n 196, at 66–67.

[213] For an anthropological study of private philanthropy in American culture see Teresa Odendahl *Charity Begins at Home: Generosity and Self-Interest Among the Philanthropic Elite* (New York, Basic Books Inc, 1990).

[214] Eric Pearson "Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent" (2006) 90 Marquette Law Review 127 at 149.

[215] John Picton, above n 196, at 72.

We have thus identified a theoretical explanation of the nonprofit sector and egoistic motivations of donors as inherent to the way charity is regulated. As has already been identified in detail, this is not only inherent to plan-protection, but equally inherent to the organisational vehicles for conducting legal charity.

C Charities and Social Welfare

We have now begun to develop something of a picture of the conditions which charitable organisations operate in, and the kind of behaviour which needs to be regulated. Hansmann provides some insight using the non-distribution constraint, the market, and contract failure, which generate a space in the market for non-profit organisations. Similarly, Rob Atkinson draws on altruism as a normative goal of nonprofit or charitable organisations that justifies taxation concessions. John Picton then provides a convincing account of the behaviour of founders and donors to charitable organisations, and their underlying motivations.

Distinctly absent, is an account of the needs in society, or perhaps the demand, that charitable organisations are responding to. These may indeed be traceable to the recognised charitable purposes that govern the sector, since they will be the objects of the organisation, however, beyond the notion of public benefit, it is not clear what the normative goals or unifying principle is. Welfare provision, both historically and at present, may provide some further insight.

The welfare state evolved "as a consequence of the unregulated private market's failure to attain social goals in social welfare" particularly because "there is no certainty that in a private market economy the distribution of goods and services to individuals will be socially acceptable."[216] In New Zealand, the Royal Commission on Social Security back in 1972 suggested that welfare should not merely allow people to live at a subsistence level

[216] Brian Easton *Social Policy and the Welfare State in New Zealand* (Auckland, George Allen & Unwin, 1980) at 7.

but ensure "a standard of living consistent with human dignity" and "like that of the rest of the community."[217]

But as neoliberal political ideology became pervasive in the jurisdictions which have been under consideration—England, the United States, New Zealand and Australia—social service provision was heavily rolled back by governments and devolved to the community and voluntary sector.[218] As a result of the state looking to "voluntary and nongovernmental efforts as the means for addressing all types of collective problems in society" this may indeed explain the widening of categories of charitable purpose, not only as being in the interests of founder of these organisations, but for government to further reduce its own role in social welfare provision.[219]

Understanding the relationship between charity and social welfare by default should provide some insight into the relationship between charity and government. The data is not regularly collated, but a 2007 report by the Department of Internal Affairs indicates that government expenditure on charitable organisations through grants and contracts for services was around $1.25 billion of total government expenditure of $54.2 billion that year.[220]

This changing relationship between government and the charities sector has been characterised as a shift towards a "contract culture", where no longer are charitable organisations operating through grants and donations, but under increasingly complex and

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[217] Royal Commission on Social Security *Social Security in New Zealand* (Wellington, Government Printer, 1972) at 55.

[218] Kerry O'Halloran, above n 6, at 120.

[219] Angela M Eikenberry and Roseanne Marie Mirabella "Extreme Philanthropy: Philanthrocapitalism, Effective Altruism, and the Discourse of Neoliberalism" (2018) 51 Political Science and Politics 43 at 43.

[220] Carolyn J Cordery, Dalice Sim and Tony Van Zijl "Differentiated Regulation: The Case of Charities" (2017) 57 Accounting and Finance 131 at 146, citing Department of Internal Affairs *A Survey of Government Funding of Non-Profit Organisations* (2007).

onerous contracts or service delivery agreements.[221] This has been a useful and important development in many respects, yet charities as a result risk losing independence and control over their mission as a result of such contracts,[222] which introduce into these organisations pressure to provide services with maximum efficiency, public accountability, and tying their funding stream to performance targets .[223]

Debra Morris notes some extreme views that charities cannot be independent at all if they are reliant on government funding and instead should be dependent entirely on private philanthropy.[224] It is interesting that scholars have expressed concern about the potential influence of government through contract culture, when as this paper argues, the establishment of charities by funder-founders creates a risk that their purposes are subject entirely to the will of their founders as a result of the structuring of the organisational vehicles for charity.

Charitable organisations in this context are seen as more flexible institutions, capable of mobilising volunteers and able to direct funds, goods or services faster than centralised government departments that are more removed from communities are able to.[225] The risk for charities of becoming dependent on government funding varies based on their size, the size of their operations, and other sources of funding.[226] It is inevitably tempting for charities to accept government funding, but in doing so there is risk of the contractual terms clashing with the public benefit requirement, the charities designated purpose, or the

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[221] Debra Morris, above n 53, at 123; see also Debra Morris "Charities in Contract Culture: Survival of the Largest?" (2000) 20 Legal Studies 409.

[222] At 125.

[223] At 124–125.

[224] At 126, citing Robert Whelan *The Corrosion of Charity: From Moral Renewal to Contract Culture* (London, Institute of Economic Affairs, 1996); consider also Robert Nozick "An Entitlement Theory" in Matthew Clayton and Andrew Williams (eds) *Social Justice* (Malden (MA), Blackwell Publishing, 2004).

[225] Debra Morris, above n 53, at 128.

[226] At 128.

charity being incapable of carrying out the contract with its designated powers and authority.[227]

But while social services have certainly been devolved by government to the voluntary sector it is not immediately clear that this provides an explanation for the widening of charitable purposes that are available. If the basis for provision of social services is need in areas of healthcare, social support or welfare, it is not immediately clear either that donors should retain substantial control of the organisation in exchange for their provision.

Michael Chesterman in response to the inherent ambiguity in the normative goals of charitable purpose and public benefit requirements, suggests the altruism remains a core justification for charitable giving.[228] However, the public benefit requirement, employed particularly in provision of private-excludable goods like fee paying schools, has comprised sufficient justification for charitable giving, causing the widening of charitable purposes.[229] Thus, it may be said that altruism, and poverty relief which are intuitively part of common understandings of charity have been subsumed by the public benefit requirement, which goes beyond the welfare enhancing origins of charity.

V Founder-Control and Charities Normative Goals Explained Historically

A The Evolution of Trusts in Context

Charity law is often approached beginning with the historical foundations in trust law and the courts of equity, as an explanation for its interesting position in contemporary law and government—at the intersection of public and private law.[230] Having identified the present-day phenomena of founder-control, it seems appropriate to look in retrospect to elucidate

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[227] At 129.

[228] Michael Chesterman, above n 46, at 347.

[229] At 347.

[230] Katherine Chan, above n 1.

the early normative goals of charity, and how founder-control was entrenched as part of the solution to the problems charity sought to address.

The trust concept—specifically the private express trust—is traced back to the 'use', a legal device which was developed in response to the rigours of feudal tenure, governing rights in real property.[231] Ultimately, the system developed in tandem with the decline of the 'incidents' of feudal tenure as a way:[232]

> … to aggregate and safeguard privately held wealth for the benefit of members of a family and to ensure the smooth transition of wealth from one generation of family to the next.

It was not until around the twelfth and thirteenth centuries that land could be passed on to the tenants heir, or alienated during their lifetime, moving land and, therefore, wealth to resemble today's individualised system of proprietary rights.[233]

A tenant was able to convey land to a group of trustees, designating themselves as beneficiary.[234] Doing so provided a range of options available to tenants, including avoidance of incidents, either monetary or in kind, since land could pass between trustees as joint-tenants, and still allow beneficial ownership to pass on to any heirs, therefore, avoiding succession taxation.[235] Similarly the tenant was able to avoid strict rules of primogeniture succession at death.[236] Here we see in practice Roger Cotterrell's observation of trust law providing for the benefits of property ownership to be retained,

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[231] Jonathan Garton *Moffat's Trust Law: Text and Materials* (Cambridge, Cambridge University Press, 2020) at 34–36.

[232] At 36.

[233] At 36.

[234] At 36–37.

[235] At 37.

[236] At 37.

while relinquishing the less advantageous burdens, albeit burdens that facilitated the oppressive feudal system. [237]

From the beginning it is evident trust law at its historical inception was concerned to protect wealth within family groups. That was to be achieved on terms dictated by the original tenant to the trustees. Furthermore this arrangement as a result of the identified benefits and flexibility was appealing as a mechanism through which to carry out charitable objects. As Gareth Jones noted, it was advantageous:[238]

> … that property could be conveyed to feofees to hold to the use of persons who were incapable of holding property at common law, a particularly valuable advantage when it is remembered that many objects of charity were not legal persons.

Even towards the end of the medieval period, the incorporated form was a rarity, and so the ability to transfer assets and impose corresponding obligations on trustees provided an effective way to carry out such objects.[239] The chancery would enforce these undertakings by trustees to reduce the complexity of property interests they were creating, failure of which to comply with was "punishable by a fine or imprisonment."[240]

The Statute of Uses 1535 passed during the reign of Henry VIII was an attempt by the monarch to reclaim the taxes, which could be avoided through a use which kept ownership in the hands of trustees, rather than passing between heirs.[241] It made uses not just effectual

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[237] Roger Cotterrell "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship" (1987) 14 Journal of Law and Society 77 at 82

[238] Gareth Jones *History of the Law of Charity 1532–1827* (Cambridge, Cambridge University Press, 1969) at 7.

[239] Jonathan Garton, above n 231, at 66.

[240] Andrew S Butler (ed) "The Trust Concept, Classification and Interpretation" in *Equity and Trusts in New Zealand* (Wellington, Thompson Reuters New Zealand Ltd, 2009) at 46.

[241] At 46–47.

to give the beneficiary rights against the trustee; they would operate so as to confer legal title on the beneficiary.[242]

Charitable uses evolved contemporaneously and were also enforced by the Chancery. Both forms were responsive to the social context and the location of wealth. Charity prior to the English reformation was almost exclusively administered by the Catholic church, through the provision of education for the poor, maintenance of hospitals, and the maintenance of homes for the aged, sick and disabled.[243] Parish priests were legally required to apply a portion of their income to such purposes and so wealthy private donors would channel philanthropic contributions through ecclesiastical institutions, notably as a result of spiritual coercion, and evidently in the belief of being rewarded in heaven.[244] The ecclesiastical courts through their jurisdiction over the estate of the deceased would apply a third of their estate to pious purposes from around the thirteenth until the early fifteenth century.[245]

Similarly we see at this time the introduction of social welfare provision. Previously there was little provision for impoverished people; tax revenue was not redistributed to parishes for application to charitable purposes.[246] Any provision by the church was made through the informal bequests of private donors and the more formal provisions made by feudal lords and guilds.[247] Bequests by private individuals would not fail for uncertainty, and the ecclesiastical courts would appoint this legacy to the church, or for the benefit of the poor of the testator's parish in accordance with the cy-pres doctrine.[248] Private legacies did not

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[242] At 46.

[243] Dr Donald Poirier, above n 5, at [2.1.1].

[244] Michael Chesterman, above n 46, at 11–13.

[245] At 12; and Gareth Jones, above n 238, at 4.

[246] At 13

[247] At 13.

[248] At 12; and Gareth Jones, above n 238, at 5.

have this same advantage.[249] It is of course through this jurisdiction, that the church came into substantial landholdings and wealth until the English reformation in the sixteenth century.[250] The law prevented testators conveying land in their wills, however, the adoption of the use allowed land to be conveyed to trustees during the testators lifetime, with directions for how the land be dealt with contained in the testators will.[251]

The connection between charitable bequests and the evolving notion of trusteeship are evident in this history. The use, as a device for dealing with property grew, which was enforced by the Chancery and later the subject of reforms under Henry VIII to capture land for taxation purposes. At the same time, a change can be observed in the way bequests for charitable purposes to the Catholic church are dealt with, and the intervention of the Crown.

The English Reformation sought to curtail to power of the Catholic church, in response to corruption in the church and the ecclesiastical courts, and an increased stratification of social classes towards the end of the medieval period.[252] Corruption in the sense that philanthropic bequests were spent on the lifestyle of monks rather than the poor, and privileging classes of donors over the poor and sick who such bequests should have been intended for.[253] Bequests of land to the church through uses were outlawed by Henry VIII in 1532, and the lands of chantries were confiscated first under Henry VIII and again later under Edward VI.[254]

Simultaneously, there was a marked increase in poverty as a result of changes in farming methods from the more labour intensive agriculture to the less intensive grazing, combined

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[249] Gareth Jones, above n 238, at 5.

[250] Dr Donald Poirier, above n 5, at [2.1.2].

[251] Gareth Jones, above n 238, at 7.

[252] Michael Chesterman, above n 46, at 14.

[253] At 14–15.

[254] At 15.

with the breakdown in feudal tenurial relationships, and the closing of monasteries.[255] The Crown having confiscated substantial tracts of land then sold it off to finance foreign wars, which lead to a growing market for land.[256] There was also a growth in urbanisation, creating a growing class of urban, landless poor.[257] Such was the context that created the need for a more organised and regulated system of welfare and charity provision.

B Formalisation of Charity and Trust Law

The Statute of Elizabeth (Statute of Charitable Uses) 1601 must be understood in response to that social context, and the concomitant changes to how philanthropic giving was organised. The result of the English reformation was the secularisation of the state, and the curtailment of the church's power over peoples lives and property. Modes of giving had been developed during this period, but there was evidently a change in the normative objectives of the state in changing the method of facilitating philanthropic giving.

The secularisation of private philanthropy was the natural result of corruption and inefficiency in the ecclesiastical courts.[258] Donors amongst a wealthier urbanised merchant class favoured making gifts for specified charitable purposes, rather than the giving the church discretion to appoint bequests to charitable and pious purposes.[259] Notably, the growth of this merchant class meant wealth used for philanthropic purposes was increasingly contained in cash or shares, rather than land—an important development for the form and contents of charitable trusts.[260]

Despite the state having stripped the church's wealth, and attempts to constrain bequests by individuals to the church, the Chancery saw no reduction in petitions before it faced

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[255] At 16.

[256] At 16.

[257] At 16.

[258] At 15.

[259] At 20.

[260] At 20.

with the same problem as before: the failure of executors and legatees to carry out charitable purposes, and requesting the Chancellor enforce the charitable trust.[261] The Statute of Charitable Uses, was the culmination of this wave of petitions since the Chancery had subsumed full jurisdiction over the enforcement of charitable uses, and the social context of a growing urban poor population, and a series of disastrous harvests.[262]

The Statute of Charitable Uses 1601 (Statute of Elizabeth), created a mechanism for the administration and supervision of charitable trusts, and particularly, encouraged private philanthropy by ensuring that donations would be "appropriately spent and managed, encouraging an ethos of greater giving to charity".[263] The Lord Chancellor was empowered to appoint a body of commissioners to investigate claims of misuse and misappropriation of gifts for charitable uses.[264]

The commissioners were empowered to award certain remedies, including the rescission of gifts, orders for the sale of land and directions like that of specific performance for the use of charitable gifts insofar as they remained consistent with the donors intention.[265] These powers the commissioners had available to them, can be understood as the State affording substantial protection to charitable gifts. Commissioners were unable to rewrite the trust or appoint a gift in any way inconsistent with the donor's intention.[266] Sir Francis Moore, a chancery lawyer of the time said:[267]

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[261] Gareth Jones, above n 238 at 16–17.

[262] At 22.

[263] Juliet Chevalier-Watts, above n 62, at 7.

[264] Michael Chesterman, above n 46, at 24.

[265] At 25.

[266] At 25.

[267] Sir Francis Moore "Reading on the Statute of Charitable Uses" reprinted in George Duke (ed) *Law of Charitable Uses* (London, 1676).

> … if the donor limit the imployment of the profits to persons of one sex, quality, nation, trade, or profession, the commissioners can degree the imployment to persons of another sex quality, nation, trade, or profession.

Donor preferences are an integral part of the enforcement and protection of charitable gifts from the beginning.

The Act did not constitute charity, in the legalistic form that it is known today. As Matthew Harding has commented:[268]

> … the preamble did not constitute legal charity as a mode of action; rather, it captured in a description of legal charity the contours of a mode of action already constituted by changing donor behaviour.

The response of the Chancery to enforce these charitable gifts, and the eventual introduction of the Statute of Elizabeth, can be treated as both acceptance of the existing secular philanthropic activity, as well as a policy judgment that determined the way social welfare could be provided to the poor and needy. Gareth Jones has identified this same concern underlying the policy:[269]

> … it recognised that private philanthropy could materially contribute to the relief of poverty and that the conduct of feofees to charitable uses had hitherto been inadequately supervised, so that existing charitable funds were being diverted into uncharitable pockets.

Evidently, altruistic concern played a role in philanthropy from its inception, but those objectives could not be realised without legal backing.

But the real legacy remains in the preamble which continues to be used as a touchstone for assessing public benefit. As Gareth Jones again records of the preamble:[270]

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[268] Matthew Harding "Charity Law: Past, Present and Future" (2020) Singapore Journal of Legal Studies 564 at 565.

[269] Gareth Jones, above n 238, at 22.

[270] At 27.

> Here is an elaborate catalogue of uses the support of which would relieve poverty and at the same time reduce the parish's financial responsibility to succour the vagrant. This catalogue was never regarded as exclusive, but as typical of the kind of charity which the State wished to encourage.

From the beginning, the public benefit of charities was always thought to have a more general nature than addressing poverty. Historical accounts draw attention to the opinions of Francis More, who opined that all such uses that benefit the poor as within the equity of the preamble even if incidentally they benefit the rich.[271] The Statute was there to address need.[272]

C Conclusion

We have thus further developed the picture in identifying the source of founder-control in trust law, and the historical context in which charitable purposes were advanced through trust law. Similarly we can see the social needs which evolved and became the mainstays of the definition or categorisation of charity in the Statute of Elizabeth.

VI Responding to Perpetual Founder-Influence in Charity

Thus far, we have identified the source of founder-control over charitable organisations, as well as gained some insight from theories of the voluntary sector and charitable giving. This can be traced substantially to the influence of trust law on modes of giving historically.

The regulatory framework for charities, based in public benefit and charitable purposes, as well as theories based in altruism or egoism, are focused on regulating donor behaviour. Consider some of the rationales for the tax subsidies: they compensate private organisations for providing services and benefits that would otherwise fall on government; they are

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[271] At 29.

[272] Michael Chesterman, above n 46, at 26.

encouraged to conduct activities for the public benefit; it is a reward for voluntarism and virtue.[273]

It is unusual that, comparatively, such little attention is paid to the social needs of the objects or beneficiaries of charitable giving in analysing or critiquing the overall regulatory framework. This seems to be important where donors are able to retain significant control over the organisation in accordance with their preferences. Michael Chesterman characterises this situation as private philanthropists exerting a level of control over the recipients of relief; and the continuance of the social structure that generated existing inequalities, protection and preference for strict private property rights and a minimal level of state welfare.[274]

Some scholars maintain that charity law involves a delicate "hybrid equilibrium between private and public goals.[275] The scholar which has advanced this claim in great detail suggests that this delicate equilibrium risks being destabilised by the increasing co-optation by government of charitable resources.[276]

However, the argument advanced in this paper, is that in reality, no such equilibrium has ever existed. The nature of the organisational structures has always maintained significant preference towards the founder and their "benevolent" decisions in relation to their own private property.[277] It is idealistic to contend that the legal framework for charity, that is still heavily dependent on these categorisations from the early 17th onwards, have been a satisfactory counterweight to founder preferences. If this was the case, one might argue

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[273] Lorne Sossin "Regulating Virtue: a Purposive Approach to the Administration of Charities" in Jim Phillips, Bruce Chapman and David Stevens (eds) *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal, McGill-Queen's University Press, 2001) 373 at 374.

[274] Michael Chesterman, above n 46, 354.

[275] Kathryn Chan, above n 1, at 126.

[276] At 127; see also Matthew Harding "Independence and Accountability in the Charity Sector" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (London, Hart Publishing, 2020) 13.

[277] At 127.

charitable purposes would have been more responsive to social values, for example by doing away with preference still given to religious purposes.

The same scholar has recognised that long before the welfare state "[c]harities provided health care, education, and other 'core welfare services'… in return for some form of government payment."[278] They do however recognise the trend towards government co-optation of charitable resources, through the growing contract-culture of charitable service provision, whereas in the past, charitable organisations would tend to pick up on provision of these services independently of government where changes to the welfare state take place.[279]

But this notion of contract culture is not the only mechanism government uses to control charity in accordance with its policy agenda—the historically challenging task of defining what are charitable purposes sets the parameters of the whole sector in a way that will inevitably align with government policy.[280] Doing so is of course a political exercise capable of having electoral consequences. Government is controlling how wealthy donors may deal with their property, expectations of the community about the size and services from the voluntary sector, and the role of the welfare state.

Charities have thus always played a central role in meeting social needs, even though contract culture has created increasing concern about charitable independence. This need is at the heart of charity which needs to be rediscovered. It is consonant with the notion of altruism that has been discussed, but was difficult to reconcile with the current structuring of the charities and nonprofit sector.[281]

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[278] At 128–129.

[279] At 129.

[280] At 133–136.

[281] See discussion above of Rob Atkinson, above n 166.

A Reasserting Altruism and Independence in Charity

The definition of charitable purposes should theoretically demonstrates the normative goals of charity. The status quo goes far beyond any notion of welfare or need, inherent in the concept of charity in its lay sense, or altruism. Therefore, we should ask what the solution is to reigning in the power dynamic inherent in organisational structures of charity, and consolidating the normative goals of charity to align with these expectations.

Normative arguments about charities regulation tend to be directed towards the main sources of regulation, both internal and external to the organisation. These include, the governance and structuring of charitable organisations, the demand for charitable independence from both government and private interests and the way charity is defined.

1 Group Governance in Charitable Organisations

We have identified that charitable organisations may be governed in a variety of ways depending on the size of the organisation, the nature of its activities and constituents, and the level of influence of the founder. Trusts provide the most acute source of founder influence, but as was demonstrated companies and incorporated societies are susceptible to this influence also.

Group governance structures may be inherent to the form of entity that a charitable organisation choses to adopt. However, Dana Brakman Reiser reasserts strong group governance as being an indispensable requirement to maintaining the integrity of charity. Particularly, she highlights that: [282]

> … while a business can be formed and govern individuals, a charity fundamentally requires more than one person's desire to pursue some view of the good. A charity must be governed by a group.

Similarly:[283]

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[282] Dana Brakman Reiser "Charity Law's Essentials" (2011) 86 Notre Dame Law Review 1 at 13.

[283] At 15–16.

> … the group governance concept maps onto concerns that charity not be enabled and ennobled to create a personal fiefdom, but rather to pursue some mission for the benefit of society.

In addition to this, some US states require a certain percentage of directors of nonprofit organisations be independent. For example, Maine requires no more than 49 per cent of directors be a "financially interested person"; a person who receives compensations or a close family relationship to someone who does.[284] These disqualifying rules could perhaps be expanded since a persons independence could quite easily be compromised beyond receiving payment, or being closely related to someone else being paid.

2 Asserting Charitable Independence

Arguments come from both sides about the extent to which founders should retain substantial influence over the organisation. Focussing particularly on the cy pres doctrine, some claim this is an unjustified attack on donor intentions reflected in the constitutive document.[285] Others claim that the limited scope of the doctrine prevents charities from change to reflect social values and maximise utility.[286] Rob Atkinson proposes that these two diametrically opposed views ignore a third potential position: the independence of charities to make decisions protected from both state interference and donor control.[287]

The problem the doctrine seeks to address is to "balance the public benefits of charitable against again the donors' desires for perpetual control of donated property."[288] Again, as was mentioned above, it is argued that the vehicles for legal charity retain this power without constraint beyond the need to meet the basic requirements of public benefit and

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[284] At 16; Me Rev Stat, title 13-B, § 713-A(2).

[285] Rob Atkinson "Reforming Cy Pres Reform" (1993) 44 Hastings Law journal 1111 at 1113; also see generally Eric G Pearson "Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent (2006) 90 Marquette Law Review 127.

[286] At 1114.

[287] At 1114.

[288] At 1114.

charitable purpose. The balance many scholars argue is inherently being struck in charity law, is not in reality evenly balanced.

Atkinson considers that charitable purpose that must be built into the organisation will comprise the independent standard for the charity to make decisions about how to manage property.[289] Dead hand control by founders should be relaxed, and the courts jurisdiction to decide on those changes curtailed.[290] Instead of seeing the trustees or directors of charitable organisations as a proxy for maintaining the public benefit, or the founder-intent, they should properly be seen as independent decision-makers, exercising control over assets in accordance with their perception of public benefit, societal values and the donors wishes.[291]

The states role then becomes limited to adjudicating the boundaries of charity and public benefit, and monitoring the trustees exercise of fiduciary powers.[292] However, this demands the categories of charitable purpose be narrowed, rather than widened as some jurisdictions have done moving away from the classification in *Pemsel*.[293] That is not to say the broader set of categories should not be facilitated by the state beyond charity, with some corresponding tax advantages. But charity should be narrowed in scope to correspond with altruism and welfare enhancement.

An alternative approach to the same problem is identified by John Picton in the works of John Stuart Mill, who proposes that if donor's are given an assurance of plan-protection, then a period be imposed for immunity from reform, following which the trust may become destructible or under the control of the state.[294] The proposal strikes a balance between the

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[289] At 1116.

[290] At 1116.

[291] At 1143.

[292] At 1143.

[293] Charities Act 2011 (UK), s 3(1); and Charities Act 2013 (AU), s 12.

[294] John Picton "Regulating Egoism in Perpetuity" in John Picton and Jennifer Sigafoos (eds) *Debates in Charity Law* (Oxford, Hart Publishing, 2020) 53–80 at 75–76; and John Stuart Mill "Endowments" in John

"liberty of innovation" for donors and founders, and the needs of the organisation to continue to reflect acceptable public values.

The proposal is problematic for a two main reasons. Firstly, if it is accepted as Picton notes, that egoistic giving is less efficient or of lower utility than altruistic giving, then such a period would effectively lock in for a period, charitable activity of demonstrably low utility.[295] Secondly, there is a risk that such a ring-fence would protect endowments for "socially harmful" causes, even if this would result in them falling short of the public benefit requirement.[296] However, neither of these objections appear to be insurmountable if they are complemented by stronger guidance and regulatory oversight of the public benefit requirement, instead of approaches of regulators that tend to accept charitability of the purpose without attention to the organisations activities.

3 Reasserting Charitable Purposes

If group governance requirements and charitable independence are to be reasserted in charity law, then they have to be supported by clear normative guidance about charitable purposes. The core function of charity law can be observed by looking back in history: "[t]he role of charities has traditionally been associated most strongly with activities that addressed the effects of poverty".[297] This appears to be the most principled basis on which to define charity and conceive their unique position as a subset of the nonprofit sector.

However, as much as the state has an interest in encouraging altruism through charity, it has an interest in facilitating the activity of the nonprofit sector as a whole. Under this definition of charity, there will be an even smaller subset of organisations of the nonprofit sector that will meet the definition of charity. But as we see in the United States, charities

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Robson (ed) *The Collected Works of John Stuart Mill Volume IV: Essays on Economics and Society Part II* (Toronto, Liberty Fund, 1824) at 615.

[295] At 76.

[296] At 77.

[297] Kerry O'Halloran, above n 6, at 112.

and nonprofit organisations are regulated differently. Nonprofit organisations are exempt from tax on business income,[298] whereas organisations that specifically fall within the charitable subset benefit from donors being able to offset donations against their income tax.[299] Consolidating the public benefit requirement, and reigning in founder control over charitable organisations does not mean the state should not take an interest in encouraging charitable activity and non-profit association. Rather, these tools can be employed and adjusted to give more proportionate tax concessions for nonprofit activity as distinct from charities.

Drawing on the liberal theory of charity that Matthew Harding attempts to evolve, he considers that Joseph Raz's three conditions of autonomy will almost certainly demand a level of redistribution from the wealth to the poor.[300] These conditions of autonomy are inner capacities such as health, education and beliefs; freedom from coercion and manipulation by others or the state; and options to select from in choosing a path of self-determination.[301] Enhancing the autonomy of people living in poverty demands redistribution of resources.[302] Because of the latitude for charity that does not necessarily enhance welfare for people living in poverty, it is not clear that charity as a virtue in the non-legal sense aligns with charity in the legal sense.[303]

Michael Chesterman remains the strongest advocate for a redistributive and welfare enhancing function of charity law, which without achieving this, will have a difficult time being considered charitable (morally) at all.[304] If the core of charity is maintained to be altruism, Chesterman argues that a focus on public benefit has drawn attention away from

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[298] Internal Revenue Code 26 USC § 501(c)(3)

[299] § 170(c).

[300] Matthew Harding, above n 12, at 113.

[301] Joseph Raz *The Morality of Freedom* (Clarendon Press, Oxford, 1986) at 148–157, 372–373, and 378.

[302] Matthew Harding, above n 12, at 114.

[303] At 118; and John Gardner, above n 195, at 11–12.

[304] Michael Chesterman at 349–350.

the welfare enhancing advantages that a focus on altruism entails.[305] To reassert this, he suggests disinterested governance is necessary which has been further developed above by Dana Brakman Reiser.

If the public benefit requirement as the touchstone of defining charity has resulted in charity's expansion then the solution perhaps requires a different unifying characteristic of charitable purposes. Altruistic welfare enhancement should be this touchstone.

VII Conclusion

Few people would dispute the value of charitable organisations in society. Especially the indispensable social services that many of them provide to communities. What people are more likely to question, is whether all charities all equal in the benefits that they provide, and therefore whether they should be entitled to the associated benefits, particular tax exemptions. As long as charitable organisations, remain capable of serving as the alter ego of their founders, it is difficult to justify the benefits these organisations are entitled to. As this paper has demonstrated, the entities which charitable organisations may choose to adopt, are capable of serving this function. Guidance from various economic and philosophical accounts of charitable giving suggest that founder control is difficult to reconcile with the normative goals of charity, and this can be traced to the influence of trust law. Whether these vehicle remain suitable for legal charity is a question worth addressing in greater detail, but if the status quo is to be maintained, then there needs to be a significant adjustment in how charities are regulated. This adjustment needs to ensure more effective internal accountability, governance, and independence of charitable organisations. This governance must be in furtherance of charitable purposes, grounded in clearer normative goals of altruism and welfare enhancement.

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[305] At 350.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 14,818 words.

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