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DECOUPLING TAX EXEMPTION FOR CHARITABLE ORGANIZATIONS

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I. INTRODUCTION

Statistics regarding poverty in the United States seldom reveal good news.[1] Poverty has been, and likely will remain, an important social phenomenon, and, as such, has been confronted by the law in a variety of ways. It is also becoming increasingly clear that the way in which the law deals with concerns of the poor and relief of poverty greatly impacts the larger public debate over poverty

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1. *See* Maudlyne Ihejirika, *One-Third of Poor Kids Have Working Parent; Study: Children In Poverty Up 50% Since '74*, CHICAGO SUN-TIMES, June 3, 1996, at 15; Michelle Krupa, *Percentage of Poor Children in Maryland Jumped During 1990s*, THE DAILY RECORD (Baltimore), Mar. 8, 2002, at 8A; Lawrence M. O'Rourke, *Poverty Up As Income Drops; It's the Second Year of Bad News, Census Bureau Says*, STAR TRIBUNE (Minneapolis, MN) Sept. 27, 2003, at 1A; Mike Swift, *A Rise In Extreme Poverty; Connecticut Sees 38% Increase Between 1989 and 1999*, HARTFORD COURANT (Conn.), April 14, 2003, at A1.

policies. In a recently published book,[2] for example, Professor Michael B. Katz of the University of Pennsylvania argues that the legal separation of public assistance (i.e., welfare[3]) from social insurance (i.e., social security, unemployment benefits, etc.) has had the effect of focusing negative political attention on the former, resulting in a public policy agenda which generally disfavors relief of poverty through direct public assistance.

The growing dissatisfaction with government entitlement programs has been reflected in both political and legal change. Decades of tension over the proper role and structure of federal poverty relief culminated in the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) which, *inter alia*, abolished the Aid to Families with Dependent Children (AFDC) program.[4] This legislation not only crafted a new policy approach to poverty relief; its impact permeates judicial implementation by repudiating the concept of entitlement that had long been established in welfare jurisprudence.[5] This is but one example of how the law and public

2. MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE (Metropolitan Books 2001).

3. Professor Katz explains that the term "welfare" initially equated to "well-being," but has evolved to specifically refer to public assistance based on need alone, as opposed to social insurance, which is surrounded by "an aura of work and saving." KATZ, *supra* note 2, at 2-4; *see also* Grace v. Detroit, 760 F. Supp. 646, 650 (E.D. Mich. 1991) (defining public welfare as "providing one's family with the necessities of life"); People's Educ. Camp Soc'y, Inc. v. Comm'r, 39 T.C. 756, 768 (1963) (equating the term "welfare" with "community well being").

4. Pub. L. No. 104-93, 110 Stat. 2105, 42 U.S.C. 601-619 (Supp. 1997).

5. Lucy A. Williams, *Welfare and Legal Entitlements: the Social Roots of Poverty, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 570 (David Kairys ed., 1998). The welfare reform bill specifically repudiated the concept of welfare entitlement by mandating that Temporary Assistance for Needy Families (TANF) shall not be construed "to entitle any individual or family to assistance." 42 U.S.C. § 601(b) (2000). There are a multitude of ancillary consequences to the abolishment of the concept of welfare entitlement. Prior to welfare reform, the Supreme Court, for example, had established that entitlement programs implied due process rights. Goldberg v. Kelly, 397 U.S. 254, 261 (1970). By ending welfare as an entitlement, PRWORA has made due process rights for welfare recipients uncertain. *See* Melissa Kwaterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 BERKELEY WOMEN'S L.J. 153, 154 (1998). Under welfare reform, much more discretion is left to the states. *See* Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, 30 CLEARINGHOUSE REV. 97, 107 (1996) (noting that states might eliminate the entitlement status of public benefits by authorizing the disbursement of benefits only when resources are available).

policy, especially public policy dealing with the poor, are inextricably intertwined.

In addition to welfare and social security legislation, an important vehicle for effectuating public policy with respect to social programs is the Internal Revenue Code.[6] There can no longer be any doubt that the Code's traditional function of revenue raising has been eclipsed by its social engineering function.[7] In the eighty years since the enactment of the modern federal tax statute, Congress' focus has consistently moved in the direction of using the Code as a repository of expenditure provisions designed to implement federal social policies.[8]

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6. Scholars and the courts have widely accepted this view for decades. *See, e.g.*, Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 864-65 (1986) (holding that the Earned Income Tax Credit contained in I.R.C. § 32 (1985) was the functional equivalent of a welfare benefit); STANLEY S. SURREY & PAUL R. MCDANIELS, TAX EXPENDITURES 1 (1985) ("Most people probably regard the Internal Revenue Code as the revenue raising instrument of the U.S. government. Many are surprised to learn that it is also a vehicle by which the government spends hundreds of billions of dollars each year."); STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPTS OF TAX EXPENDITURES 35-39 (1973); Roberta S. Karmel, *Regulatory Implication Of Individual Management Of Pension Funds: The Challenge To Financial Regulators Posed By Social Security Privatization*, 64 BROOK. L. REV. 1043, 1065 (1998) (observing that there are a myriad ways in which the government imposes social policy on business through the tax code); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 930 (1993) (noting that "[a]lmost annually, Congress and the Administration use the tax system to encourage particular economic or social activities"); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993) (arguing that, in many instances, a subsidy through the tax code is preferred over direct government appropriations as a means of implementing federal policy); *see also* John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475 (1998). Unless otherwise indicated, all references and citations in this article to the Internal Revenue Code ("Code") refer to the Internal Revenue Code of 1986, as amended, currently located at 26 U.S.C.A. (West 2004). All references to "section" refer to a section of the Internal Revenue Code.

7. *See, e.g.*, Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 408 (1999) ("The tax law's traditional revenue-raising function is being eclipsed as it becomes a principal tool of federal policy."). The most obvious examples include the various tax credits designed to encourage specific activity. *See, e.g.*, I.R.C. §§ 29 (credit for producing fuel from a nonconventional source), 30 (credit for qualified electric vehicles), 40 (credit for alcohol used as fuel), 41 (credit for increasing research activities), 45A (credit for employing Native Americans), 45C (credit for clinical testing of drugs to treat certain rare diseases) (West 2004).

8. The move toward the use of tax expenditures, or tax incentives aimed at achieving non-tax objectives, has been well documented since Professor Surrey coined the term in 1970. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Expenditures*, 83 HARV. L.

It is not surprising, therefore, that provisions relevant to poverty policy are contained in abundance in the tax statute.[9] In the mid-1990s, prior to the enactment of PRWORA, the estimated cost of tax provisions designed to implement social welfare policies was more than double the amount spent by the government on the AFDC program.[10] The Earned Income Tax Credit (EITC) alone involved more recipients and greater expenditures than AFDC.[11] While the EITC and the tax credit for low-income housing have drawn the attention of legal scholars as a means for implementing poverty policy through the tax law,[12] less direct tax expenditure mechanisms, such as the deduction for charitable contributions[13] and the tax exemption for charitable organizations,[14] have not been adequately analyzed from this perspective.[15]

REV. 705 (1970). *See generally* Nancy J. Delacenserie, Comment, *The Leasing Safe-Haven of the Economic Recovery Tax Act of 1981: Another Tax Expenditure*, 1982 WIS. L. REV. 117 (1982); Yoseph Edrey & Howard Abrams, *Equitable Implementation of Tax Expenditures*, 9 VA. TAX REV. 109 (1989); Timothy J. Eifler, Comment, *The Earned Income Tax Credit as a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701 (1994); Sugin, *supra* note 7, at 407; Edward A. Zelinsky, *James Madison and the Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993).

9. *See* I.R.C. §§ 32 (the earned income tax credit, granting a refundable credit to the working poor), 42 (the low-income housing credit, encouraging the development of housing for the poor) (West 2004).

10. CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES 25-28 (Princeton University Press 1997).

11. *See* Anne L. Alstott, *Comments on Samansky, "Tax Policy and the Obligation to Support Children,"* 57 OHIO ST. L.J. 381, 391 n.49 (1996).

12. *See, e.g.*, Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537 (1998); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871 (1993); Florence Wagman Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997).

13. I.R.C. § 170.

14. I.R.C. § 501(c)(3).

15. KATZ, *supra* note 2, at 12 (quoting political scientist Christopher Howard describing the tax code as the "hidden welfare state"). Many scholars have probed the extent of public policy and the charitable tax exemption, primarily in the context of religious organizations and corporate charitable giving. *See* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001); Nancy J. Knauer, *The Paradox Of Corporate Giving: Tax Expenditures, The Nature Of The Corporation, And The Social Construction Of Charity*, 44 DEPAUL L. REV. 1 (1994). However, some do delve into the more generic public policy issues involved in the charitable contribution deduction. *See* Nancy C. Staudt, *Taxation*

It is axiomatic that a full and fair consideration of any public policy initiative can only be obtained when that policy is thrust into the clear light of day. An equally well-recognized principle of interpreting the words contained in a tax statute is that they are to be narrowly construed so as to exclude any implications beyond the language used.[16] The evolution of the law with respect to the term "charitable" has, however, served to obfuscate the underlying policy purpose that could be served by the use of that term in the Code. While the courts have long acknowledged that the "popular" meaning of the term is restricted to relief of the poor, the "legal" meaning has so stretched the term beyond its etymological boundaries as to render the concept vacant, unoccupied by any useful legal notion of what "charitable" means.

Although seemingly not guided by any specific policy agenda, a gradual diffusion and expansion of the term has occurred so as to effectively eviscerate the purpose generally served by explication of terms in the law. Because of the increasingly common use of the Code as a vehicle for social policy implementation, an exposition of the legal definition of charitable is of more than merely lexiconical consequence. The dilution of the term has thwarted the ability to discern any significant impact of these tax provisions on poverty policy, hence impeding any meaningful evaluation of the effectiveness of these tax expenditures and muffling any debate as to the merits of their use as a component of poverty policy in the United States.

In contradistinction to Professor Katz' illustration of the negative effect of *separating* the welfare concept into its component parts, the legal *fusion* of poverty relief on the one hand and

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Without Representation, 55 TAX L. REV. 555, 595 (2002) (observing "the charitable deduction and the exclusion of the interest earned on municipal bonds enable taxpayers to direct federal revenue to third parties - leaving it to private individuals to make the decision as to which entities should receive public revenue"); William J. Turnier, *Personal Deductions and Tax Reform: The High Road and the Low Road*, 31 VILL. L. REV. 1703, 1723 (1986) ("The charitable contribution deduction has long been defended on the ground that it enhances the diversity of our pluralistic society. In an indirect fashion, the charitable contribution deduction . . . ensures that there is substantial support for a great number of non-governmental institutions providing for education, supporting the arts, and furnishing a variety of social services, many of which the government would not support by direct grants.").

16. Crooks v. Harrelson, 282 U.S. 55 (1930); Gould v. Gould, 245 U.S. 151, 153 (1917) (McReynolds, J., commenting that, in interpreting tax statutes, "it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. . . .").

unrelated tax objectives on the other has likewise had a negative impact on poverty policy by masking the underlying effects of the relevant tax provisions. In an attempt to unmask those effects and foster a meaningful debate on the underlying policy issues, this article proposes a new approach to defining the term "charitable" for tax purposes that both respects the essence of tax-exempt eleemosynary activity and injects an element of clarity that has eluded the use of the term in modern tax parlance. Part I traces the evolution of the legal concept of charity, with emphasis on the shift in focus from poverty relief to social action facilitated through the device of trust law. I argue that it is in this shift of emphasis that the concept of charity became entangled in property concepts and thereby transformed into something wholly unrelated to its original construction. Part II illustrates the often unprincipled and random manner in which the charitable concept has been applied in the context of federal income tax law. This anomalous situation has been perpetuated due to the lack of any satisfactorily articulated exegesis, resulting in uncertainty in the application of the law and rendering impotent any intelligent discussion of the underlying social policy issues surrounding the charitable tax provisions. In Part III, the parameters of reaching an acceptable reconciliation of social abstraction and legal terminology are explored. Finally, Part IV articulates an approach to the tax definition of charitable uses that replaces what has become a frail and muddled landscape with a new, sturdier foundation. This new foundation is not intended to end the need for discussion on the subject, but rather to provide a currently missing basis for discussing the real policy questions that have been allowed to escape scrutiny by the obfuscatory concealment of antiquated legal terminology that has been left too long unexamined.

II. EVOLUTION OF THE CHARITABLE CONCEPT IN AMERICAN LAW

The tax exemption for charitable organizations and the concomitant deduction for charitable contributions did not arise *ex nihil* out of the minds of the legislature. Rather, it is inextricably tied to the notion of charity itself, and more specifically to the principles outlining the proper role of government in subsidizing and regulating charitable activity. To intelligently draw conclusions regarding the proper role of the charitable provisions of the Code, therefore, it is important to understand something of the gestation of the concepts embodied in the statutory use of the term "charity"

and the heritage of law from whence it came.

Disproportionate ability and private ownership of property necessarily result in an unequal distribution of wealth due to disparities in fortune, physical limitations, or feebleness of mind.[17] At the margins, this produces the economic state of poverty, with which comes the associated societal instinct to redistribute wealth in some manner for the provision of basic needs of the poor. The concept of charity, therefore, is a byproduct of private ownership of property[18] and, like so many concepts imbedded in the American legal tradition, it is rooted in religion.[19]

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17. *See* HARRELL R. RODGERS, JR., POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS 41-58 (1979) (discussing five principle causes of poverty: capitalism, elite rule, racism, sexism, and geographic isolation); *see also* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 862 (2003) (tying the origins of poverty to the development of commerce); James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 541 (1999) (connecting poverty to race in America and observing that "[a]s race became redefined through pauperism and poverty, poverty began to be redefined through race"); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 581-85 (2001) (discussing the origins of poverty in America); Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 696 (1995) (discussing modern perceptions of poverty and stating that "poverty must be understood as a social phenomenon, as serving (successfully or not) a social function in regulating certain tensions within society and, consequently, as something which impacts all of society").

18. At least one treatise suggests that charity was unknown prior to the development of private property rights. EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS § 17 (1974). Not all commentators connect the origin of charity to property rights. Many see the foundations in spirituality or religion. Laura Brown Chisolm & Dennis R. Young, Symposium: *What is Charity? Implications for Law and Policy (Introduction)*, 39 CASE W. RES. L. REV. 653, 654 (1988-89) (observing that, in Western cultures, the term "charity" revolves around Judeo-Christian notions of "interpersonal activity through which one individual helps a less fortunate one, or more broadly a community rallies to the aid of those of its members in need"); Lars G. Gustafsson, *The Definition of "Charitable" For Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 589 (1996) ("Charitable organizations originate from the great command to love thy neighbor as thyself.") (citing Perin v. Carey, 65 U.S. (24 How.) 465, 498 (1860)).

19. Both the Old and New Testament exhort believers to show kindness and generosity to the poor. *See, e.g., Job* 31:16-22 (lamenting "If I have withheld anything that the poor desired . . . if I have seen anyone perish for lack of clothing, or a poor man without covering"); *Ezekiel* 18:5-9 ("If a man is righteous and does what is lawful and right – if he . . . gives his bread to the hungry and covers the naked with a garment . . . he shall surely live, says the Lord God"); 1 *John* 3:17 ("But if anyone has the world's goods and sees his brother in need, yet closes his heart against him, how does God's love abide in him?"). Furthermore, paying a *zakat* ("purification tax") to care for the poor is one of the Five Pillars of

The earliest western formalized system of economic relief of the poor was undoubtedly the administration of charitable programs by the church.[20] The church in the Middle Ages performed a public function,[21] and the tithes imposed by ecclesiastic authority may be likened to modern tax regimes. After the Reformation and the resulting attenuation of church dominion, non-canonical law played an increasingly important role in regulating the redistribution of wealth to the poor, and some have argued that church administration of charity provided the prototype for the subsequent involvement of the state in these matters.[22]

The first significant state regulation of private charity was the Statute of Laborers enacted by the British Parliament in 1351.[23] That statute, designed to ameliorate the adverse economic consequences of the Black Death, prohibited the distribution of

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Islam. *See also* Georgia A. Persons, *Race, Politics, And Community Development in U.S. Cities: National Politics and Charitable Choice as Urban Policy for Community Development*, 594 ANNALS 65, 73 (2004) (referring to the "theological nature of charitable acts").

20. This traditional tie between poverty relief and religion continued in the American colonies before the Revolution. Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 101-02 (2002) (describing the role of religion in early American poverty relief and stating that "[c]olonial poor laws inherited from the English legal background served as a backdrop for the Puritan theology"); *see* Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181, 183 (1994) (characterizing poverty relief as formerly being within the purview of the church).

21. *See* MAKING THE NONPROFIT SECTOR IN THE UNITED STATES 4 (David C. Hammack ed., 1998) ("It followed, in the mind of almost every European living in the 1600s who expressed an opinion on the subjects, that the religious institutions should be supported by taxes, and that the church should control education and social services.") [hereinafter MAKING THE NONPROFIT SECTOR]; WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 5 (6th ed. 1999) ("Most important in terms of administering poor relief was the aid dispensed by ecclesiastical or church authorities at the diocese or parish level.").

22. TRATTNER, *supra* note 21, at 3; William P. Quigley, *Five Hundred Years Of English Poor Laws, 1349-1834: Regulating The Working And Nonworking Poor*, 30 AKRON L. REV. 73, 80 (1996) (stating that the practices of charity by church institutions "preceded and shaped" later public approaches to poor relief, and quoting Sir Frederic Eden as stating, "The clergy, most assuredly, from the nature of their ecclesiastical establishment, and eleemosynary principles upon which every donation to religious bodies was conferred, were considered as the peculiar and official guardians of the Poor").

23. HENDERSON, ERNEST F., SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES (1896) (reproduced as part of the Avalon Project at Yale Law School), *available at* www.yale.edu/lawweb/avalon/medieval/statlab.htm (last visited Sept. 30, 2004).

charity to able bodied laborers.[24] The Statute of Laborers thus marks the first instance of governmental demarcation of the "worthy poor" from those considered to be less deserving.[25] This legislative inclination to inhibit private charity to unworthy recipients continued throughout the period. In 1531, for example, local officials were granted the authority to grant begging licenses to the elderly and disabled and imposed harsh punishment on unlicensed beggars.[26]

Direct government oversight of the redistribution of wealth to the poor began in 1536 when Parliament enacted the Act for the Punishment of Sturdy Vagabonds and Beggers, establishing procedures for collecting charitable donations and disbursing funds to the needy.[27] Taxation as a specific means to fund public poverty relief programs traces its beginnings to 1572, by which time the British government had determined that voluntary contributions were no longer sufficient for the proper care of the crown's indigent subjects. In that year, a tax known as the Parish Poor Rate was implemented to fill the void.[28] This evolution of government relief of poverty through taxation and public oversight of the disbursement of funds for social purposes culminated in the year 1601 with the enactment of the two Elizabethan statutes: the Poor Law[29] and the Statute of Charitable Uses.[30] Together, these two enactments firmly established dual principles that were to survive the subsequent four centuries and continue to influence the modern day law of charity. The first of these principles is that charity is a government, or at least quasi-government, function to be funded by some form of compulsory taxation.[31] The second is that the term "charitable" had taken on a meaning quite separate and apart from its commonly understood definition of economic relief for the poor.[32]

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24. *Id.*
25. *Id.*
26. ROBERT L. BARKER, THE SOCIAL WORK DICTIONARY (3d ed. 1995).
27. *Id.*
28. *Id.*
29. An Act for the Relief of the Poor, 1601, 43 Eliz., c. 2 (Eng.), *available at* http://users.ox.ac.uk/~peter/workhouse/poorlaws/poorlaws.html (last visited Sept. 30, 2004).
30. The Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.), *available at* http://ksghome.harvard.edu/~.phall.hauser.ksg/statute_of_charitable_uses.html (last visited Sept. 30, 2004).
31. *See* 43 Eliz., c. 2, c. 4.
32. *See id.*

The Elizabethan Poor Law consolidated and restated the previous legislation and provided for church oversight of social welfare for the poor.[33] This oversight was to be conducted on the local parish level, where "overseers" were to be elected each year at Easter.[34] As a successor to the Parish Poor Rate, the Elizabethan Poor Law delegated authority to the overseer to determine how much poor relief was needed and authorized the collection of that amount from the local property owners.[35]

The Statute of Charitable Uses, the full title of which is "An Acte to Redress the Mis-employment of Landes, Goodes, and Stockes of Money heretofore given to Charitable Uses,[36] was intended as a reform measure,[37] as Parliament had become convinced that charitable donations were frequently misdirected and that further government control was needed.[38] Although commonly misunderstood as a change in the law of charity,[39] the Statute of Charitable Uses was really nothing more than a codification of existing common law, as pointed out by Justice Joseph Story in *Vidal v. Girard's Executors*.[40] In that case, Justice Story carefully traced the development of the English law respecting charities, and concluded that the notion of charitable uses expressed in the English legislation was well established prior to its enactment.[41] As such, the 1601 statute does not mark the

33. 43 Eliz., c. 2.

34. *Id.*

35. *Id.* It should be noted that An Act for the Relief of the Poor continued to be refined with subsequent legislative enactments, such as: the Settlement Laws, 1662, 14 Car. 2, c. 12 (Eng.); Gilbert's Act, 1786, 26 Geo. 3, c. 58 (Eng.); and the Poor Law Amendment Act, 1834, 4 & 5 Will. 4, c. 76 (Eng.).

36. 43 Eliz., c. 4.

37. *See, e.g.,* Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 309-10 (1877) (observing that the Statute of Charitable Uses was "[p]urely remedial . . . [t]he object of the statute was to create a cheaper and a speedier remedy for existing abuses.").

38. *See* Comm'rs for Special Purposes of Income Tax v. Pemsel, 1891 A.C. 531, 543 (H.L.) (characterizing the Statute of Uses as a reform measure by noting that the previous statutes resulted in the "[m]isapplication of donations" and the "dishonest appropriation of gifts intended for . . . charitable purposes.").

39. *See, e.g.,* Philadelphia Baptist Ass'n v. Hart, 17 U.S. (4 Wheat.) 1 (1819) (stating Chief Justice Marshall believed the Statute of Charitable Uses validated charitable gifts that would have previously been void); Griffin v. Graham, 8 N.C. (1 Hawks) 96, 134-35 (1822) (Hall, J., dissenting) (noting that "[t]he charity cannot therefore be carried into effect and established independent of the [S]tatute of [Charitable Uses], for want of an equitable devisee").

40. 43 U.S. (2 How.) 127 (1844) (repudiating Chief Justice Marshall's characterization in *Philadelphia Baptist Ass'n*, 17 U.S. at 1).

41. *See id.*

beginning of a new phase in charitable law, but rather provides a window through which we can ascertain what had become thought of as "charitable" in the years since the enactment of the original poor laws in the 1530s. What the Statute of Charitable Uses clearly demonstrates is that the concept of "charity" had quickly evolved to encompass a vast topography stretching well beyond mere relief of the poor.[42] An analysis of the reasons for this change reveals that it had more to do with property concepts than with social value.

The Preamble of the statute illustrates how the term "charitable" had ballooned to encompass virtually anything deemed to be in the public interest, naming twenty-one distinct charitable activities, only the first of which is consistent with the subjects of prior charitable legislation.[43] The activities enumerated include not only relief of aged, impotent, and poor people, but also maintenance of schools of learning and houses of correction, the repair of bridges and churches, and the "marriage of poor maids."[44] This expansive list belies the fact that the statute had more to do with *uses* than with that which is *charitable.* While including an illustrative list of what had come to be considered charitable endeavors, the Statute of Charitable Uses is more concerned with the abuses that had been occurring with respect to the management of property set aside for such purposes. The English crown in the sixteenth century was facing growing dissatisfaction with, and ineffectiveness of, the traditional institutions of charity and social welfare maintained by the church. The break with the Church of Rome and the devolution of the feudal land system resulted in a social welfare system afflicted with chaos. As one commentator describes it:

> The ideal of charity had been degraded. A self-regarding system of relief had superceded charity, and it was productive of nothing but alms, large or small, isolated and unmethodic, given with a wrong bias, and thus almost inevitably with evil results. . . . Then the property of the

42. The Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.).

43. *Id.*

44. 43 Eliz., c. 4. The Preamble also lists maintenance of sick and maimed soldiers, free schools, scholars in universities; the repair of ports and havens, causeways, sea-banks, and highways; the education and preferment of orphans; support and help of young tradesmen; support and help of handicraftsmen; aid to persons decayed; redemption or relief of prisoners or captives; ease and aid of poor inhabitants concerning payment of fifteens [a tax]; and the setting out of soldiers and other taxes. *Id.*

> hospitals and the gilds [sic] was wantonly confiscated, though the poor had already lost that share in the revenues of the church to which at one time they were admitted to have a just claim. A new beginning had to be made. The obligations of charity had to be revived. A new organization of charitable relief had to be created, and that with an empty exchequer and after a vast waste of charitable resources.[45]

Consistent with this background description is the explanation of Sir Francis Moore, the drafter of the Statute of Charitable Uses. Moore identified four considerations in evaluating the validity of a gift of property for a charitable use: the financial ability of the donor; the capacity of the donee; the structure of the instrument through which the gift is effectuated, and the nature of the property to be transferred.[46] Thus it is with the proper transfer and management of property for social purposes which the Elizabethan statute is concerned, not with an explication of what is and is not properly charitable. The law of charitable trusts did not develop in response to any need to expand the definition of "charitable," but rather to overcome the traditional restrictions with respect property held in trust. More specifically, traditional trust law did not allow for trusts of indefinite duration and with indeterminate beneficiaries,[47] and charitable trust law developed to ensure that a deviation from these general requirements would only apply in cases in which the public benefit outweighed the need to apply the general rule.[48] The doctrine of charitable uses applied in the trust context is rooted in the concept of indefinite control of property through the trust device. Traditionally, trusts have been used to furnish financial benefits to specified individuals or corporate

45. Charles S. Loch, *Charity and Charities*, ENCYCLOPEDIA BRITANNICA 860 (11th ed. 1910).

46. Perin v. Carey, 65 U.S. (24 How.) 465, 494 (1860).

47. United States v. Geissler, 1993 U.S. Dist. LEXIS 16692 (D. Id. 1993) (holding that a trust was invalid for lack of ascertainable beneficiaries); May v. Comm'r, 3 T.C.M. (CCH) 733 (1944) ("The absence of any vested rights in any beneficiary and the failure of the trust agreement to designate any definite or definitely ascertainable beneficiary leave doubt as to whether there was ever a valid enforceable trust."); RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. j (1959) (stating that, generally, if there is no definite or definitely ascertainable beneficiaries, no trust is created).

48. *See* Green v. Connally, 330 F. Supp. 1150, 1157 (D.D.C. 1971) ("It is because society is 'the real beneficiary of every charitable trust' that it is enforceable even though there are no ascertainable beneficiaries to bring an issue or controversy to the chancellor."); Gustafsson, *supra* note 18, at 593.

persons.[49] With a charitable trust, however, it is not a specified beneficiary that is to be favored, but rather society as a whole.[50]

As the preeminent English exposition on the law of charity, the Statute of Charitable Uses became the principal source of such law in the United States after the American Revolution.[51] As such, American jurisprudence in regard to the law of charity inherited not only the substance, but also the perspective of the Elizabethan statute. Imbedded in this perspective was the assumption that the government bore at least some responsibility to provide for the economic needs of the poor, and that the definition of "needy" was a function of public policy. The Statute of Charitable Uses divided the poor into three major categories: children, the impotent, and the able-bodied. By the seventeenth century, it had become well established in English law that the able-bodied poor were to be viewed as an impermissible drain on charitable resources and that at least one task of the law was to ensure that charity was not diverted to this category of poor. In this respect, the statute is reflective of a heritage differentiating the poor and categorizing them for purposes of public policy.

As pointed out above, however, the most important perspective inherited from the English law was its expansive view of what was "charitable." Evidence of this perspective manifest in American jurisprudence is legion. One Pennsylvania court went so far as to conclude that an "anti-ism society" was charitable in that it was devoted to combating the evil of "isms."[52] A somewhat less ridiculous example was the mid-nineteenth century case of *Perin v.*

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49. GEORGE T. BOGERT, TRUSTS 202 (6th ed. 1987).

50. *See, e.g., In re* Estate of Freshour, 345 P.2d 689, 695 (Kan. 1959) ("[W]hile human beings who are to obtain advantages from charitable trusts may be referred to as beneficiaries, the real beneficiary is the public and the human beings involved are merely the instrumentalities from whom the benefits flow."); *In re* Estate of McKee, 108 A.2d 214, 232 (Pa. 1954) (stating that "[p]roperty given to charity becomes in a measure public property").

51. *See* Joseph Story, *On Charitable Bequests*, 17 U.S. (4 Wheat.) app. 5 (1819) (characterizing the Statute of Uses as "the principal source of the law of charities); *see also* Drury v. Inhabitants of Natick, 92 Mass. (10 Allen) 169, 177 (1865) (stating that "the Statute of Charitable Uses in principle and substance . . . is part of our common law); Appeal of Cresson, 30 Pa. 437, 450-51 (1858) (stating that, while the Elizabethan statute was not adopted legislatively in Pennsylvania, "its principles are a part of our common law.").

52. *In re* Knight, 10 Pa. C. Ct. Rep. 225 (1891) (cited by Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 n.171 (1995)).

Carey.[53] That case involved the testamentary wishes of Charles McMicken, who included in his will a devise in trust for the foundation and maintenance of three colleges in Cincinnati, Ohio.[54] The first two institutions were to be private schools for men and women, respectively, while the third was to be founded with surplus funds left after the establishment of the first two schools and was to be devoted to the education of poor orphans.[55] Other potential beneficiaries of McMicken's estate objected, claiming, among other grounds, that the bequest must fail in that, at least in regard to the first two schools, it was not a charitable bequest and thus not protected by the common law charitable doctrines.[56] In response to this objection, the Court stated:

> Charity, in a legal sense, is rather a matter of description than of definition. . . . It seems to us, now, that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, c. 4, but to a charity under the common law. The answer is, that a charity is a gift to a general public use, *which extends to the rich, as well as to the poor*. . . . Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses.[57]

Thus, for the first time, an American court explicitly rejected an understanding of charity that was in any way tied to the economic status of the recipients.

A subsequent case confirming the expansive view articulated in *Perin v. Carey* deals with the estate of Joshua Pierce, a resident of the District of Columbia who died on April 11, 1869.[58] Pierce's will left a large tract of real estate in the District for use as "a site for the erection of a hospital for [abandoned children]."[59] Other potential takers of the estate objected, arguing, in part, that a hospital for the care of abandoned children was not "charitable" and implicitly advocating a definition of the word that emphasized, though perhaps did not restrict, its meaning as being founded in the

53. 65 U.S. (24 How.) 465 (1860).
54. *Id.* at 491.
55. *Id.* at 493.
56. *Id.* at 466-68.
57. *Id.* at 494, 506 (emphasis added).
58. Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 304 (1877).
59. *Id.* at 305.

notion of relief of the poor:

> A foundling hospital is not a charity. Since the first foundation at Milan, in 787, such institutions have rapidly multiplied in every part of Europe. The waste of human life which they have occasioned, and the injury they have done to public morals, render it probable that they will at no distant period be everywhere suppressed. The statistics of France show that they have produced frightful immorality and mortality, and that it is "*not poverty, but luxury*, which produces exposures."[60]

The Court noted that the more restrictive sense of the term "charity" had long since been abandoned by the law, and rejected the plaintiff's characterization of the use as non-charitable, stating, "[t]here are no beneficiaries more needing protection, care, and kindness, none more blameless, and there are none who have stronger claims than these waifs, helpless and abandoned upon the sea of life."[61] Consistent with the historical trend, the Court observed that "[a] charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."[62] This expansive definition of the term is directly traceable to the Statute of Charitable Uses.[63]

But American charity jurisprudence would not be restrained even by the permissive Statute of Charitable Uses approach. Among the authoritative definitions of charitable trusts relied upon by American courts are those found in a variety of treatises, including the Restatement of the Law of Trusts,[64] each of which are

60. *Id.* at 306 (emphasis added).

61. *Id.* at 311-12.

62. *Id.* at 311 (citing PERRY ON TRUSTS § 687 (1929)); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) (stating that the common law concept of charity embraces all public benefits).

63. *See, e.g.*, Harrington v. Pier, 82 N.W. 345, 357 (Wis. 1900) (stating that the term encompasses "everything that is within the letter and spirit of the [Statute of Charitable Uses]").

64. *See, e.g.*, Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E. 2d 786, 789 (Va. 1951) (citing, with approval, 4 POMEROY'S EQUITY JURISPRUDENCE § 1020 (5th ed.) and RESTATEMENT OF THE LAW OF TRUSTS § 368 (1935)); Allaun v. First and Merchs. Nat'l Bank of Richmond, 56 S.E.2d 83, 85 (Va. 1949) (citing 3 M. J., CHARITABLE TRUSTS § 2 (stating charity "in a legal sense, may be described as . . . a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.")).

at least as inclusive, and in most cases more expansive, than the Statute of Charitable Uses definition. Today, the Restatement (Second) of Trusts is explicitly modeled after the Statute of Charitable Uses, and as such merely lists general categories of charitable purposes.[65] Most instructive are the comments, which observe that "[t]he common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community,"[66] and that "[t]here is no fixed standard to determine what purposes are of such social interest to the community; the interests of the community vary with time and place."[67]

The outlines of the American legal concept of charity were developed by the courts during the nineteenth and early twentieth centuries. One particularly expansive description used by a Virginia court in the middle of the last century provides as follows:

> 'A charity,' in a legal sense, may be described as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public building or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable. Generally speaking, any gift not inconsistent with existing laws which is promotive of science or tends to the education, enlightening, benefit or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience is a charity. It is essential that a charity be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity.[68]

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65. The Second Restatement of Trusts states that: "Charitable purposes include: (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community." RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

66. *Id.* cmt. a.

67. *Id.* cmt. b.

68. *Allaun*, 56 S.E.2d at 83.

Perhaps the most influential judicial statement of the law was articulated by Justice Gray of the Supreme Court of Massachusetts in 1867.[69] Before Justice Gray and his colleagues were bequests in aid of the end of slavery, for the benefit of fugitive slaves, and in support of suffrage and property rights for women.[70] After observing that the Elizabethan law was "the principal test and evidence of what are in law charitable uses,"[71] Justice Gray indicated that it was not merely the letter of the English statute that was controlling, but its penumbric spirit that was to guide the court.[72] In support of his assertion that any purpose is "charitable," in the legal sense of the word, if it is within the principle and reason of the English statute, Justice Gray began with cases in which the term was applied to relief of poverty in one context or another, but also noted that the term had been applied to purposes for the promotion of science and learning, municipal improvement, and even for the reduction of the national debt.[73]

Most striking, however, was the court's assertion that the American law of charities was not restricted merely to the letter and spirit of the Statute of Charitable Uses, but had in fact evolved well beyond its aura.[74] This necessitated a grappling with the precise outlines of the definition, for which there was little satisfying precedent. In the words of the court:

> A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in *Morice* v. *Bishop of Durham*, 9 Ves. 405, and 10 Ves. 541—that those purposes are considered charitable which are enumerated in the [Statute of Charitable Uses] or which by analogies are deemed within its spirit and intendment—leaves something to be desired in point of

69. Jackson v. Phillips, 96 Mass. 539 (1867). This case has been cited as recently as 2002 by the United States District Court for the District of Massachusetts in *Cotter v. City of Boston*, 193 F. Supp. 2d 323, 356 (D. Mass. 2002), and has been cited by the United States Supreme Court on at least four occasions, including in the seminal tax exemption case of *Bob Jones University v. United States*, 461 U.S. 574, 589 (1983).

70. *Jackson*, 96 Mass. at 540.

71. *Id.* at 550-51.

72. *See id.* at 551.

73. *Id.* at 551-52.

74. *Id.* at 554 ("Charities are not confined at the present day to those which were permitted by law in England in the reign of Elizabeth.").

> certainty, and suggests no principle. Mr. Binney, in his great argument in the Girard Will Case, 41, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." And this definition has been approved by the supreme court of Pennsylvania. *Price* v. *Maxwell*, 28 Penn. State R. 35. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the [S]upreme [C]ourt of the United States—"A gift to a general public use, which extends to the poor as well as the rich." *Jones* v. *Williams*, Ambl. 652. *Coggeshall* v. *Pelton*, 7 Johns. Ch. 294. *Mitford* v. *Reynolds*, 1 Phil. Ch. 191, 192. *Perin* v. *Carey*, 24 How. 506.[75]

In the face of this nebulous state of affairs, Justice Gray articulated his no less amorphous formulation of what should be considered charitable:

> A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.[76]

Interestingly, the *Jackson v. Phillips* court held that, while the bequests in aid of the end of slavery and for the benefit of fugitive slaves fell within this expansive definition, the bequest of money to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men," could not be sustained as a charitable purpose.[77] Although the court asserted that this bequest was different from the others in that its aim could be accomplished only through a

75. *Id.* at 555-56.
76. *Id.* at 556.
77. *Id. at* 571.

change in the law, it may be argued that the other bequests, particularly the bequest respecting the abolition of slavery, required no less a change in the law, and that it was in reality the unpopularity of the women's rights movement at the time that explains the result.[78] The real import of *Jackson v. Phillips* may not reside solely in its oft-quoted definition, but in the fact that an American court for the first time sets forth a precedent for anointing a purpose as being charitable or not dependent upon its attractiveness to the court as being in aid of sound public policy. If a link between the Statute of Charitable Uses and its ecclesiastical antecedents is accepted, perhaps no less compelling is the link between the modern day usage of charitable tax policy and the setting of a precedent for this approach by the nineteenth century Massachusetts Supreme Court.

III. APPLICATION OF THE CHARITABLE CONCEPT IN THE CONTEXT OF TAX LAW

The Code now exempts a ballooning list of organizations from income taxation.[79] Currently, the Code lists twenty-eight categories of exempt organizations,[80] a list which can be further segmented into at least sixty-three different types of tax-exempt entities.[81] The exempt organizations range from the nebulously described (organizations operated for the promotion of social welfare)[82] to the excruciatingly detailed ("association[s] organized before 1880 more than [seventy-five] percent of the members of which are present or past members of the Armed Forces and a principal purpose of which is to provide insurance or other benefits to veterans or their dependents").[83]

Of special note is the third category in the statutory list, which identifies eight different types of organizations, namely, those organized for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or

78. Lundwall, *supra* note 52, at 1363.
79. I.R.C. § 501(a).
80. *Id.* § 501(c).
81. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS app. C (John Wiley & Sons, Inc., 7th ed. 1998).
82. I.R.C. § 501(c)(4). It is estimated that, in the mid 1990s, over 140,000 exempt organizations were classified as social welfare organizations. *See* HOPKINS, *supra* note 81, at 30.
83. I.R.C. § 501(c)(23). There are exactly two such organizations. HOPKINS, *supra* note 81, at 30.

international amateur sports competition, or for the prevention of cruelty to children or animals.[84] The organizations that fall into one or more of the types catalogued in this laundry list are commonly referred to as "charitable" organizations (despite the fact that "charitable" is just one of the types of organizations listed), and they account for over one-third of all tax-exempt entities.[85] The girth of this category, however, is not what accounts for its special significance for federal income tax purposes. Rather, it is the fact that taxpayers may make tax-deductible contributions to these entities—and *only* these entities—among the list of tax-exempt organizations.[86]

No distinct concept of "charity" for the purpose of tax law has ever been developed in the United States. The concept of charity as used in the Code was inherited from charitable trust jurisprudence, the evolution of which was outlined in the preceding section. As noted, a precursor to the development of the legal definition of charity was the notion that the ultimate responsibility for charitable endeavors rested with the state. It was not inevitable, however, that the marriage of charity and the public fisc was to continue in the newly independent American colonies. As in Europe, and particularly in England, colonial charitable activities were primarily carried out through the church, and there was much colonial opposition to supporting the church through taxation. For example, prior to the Revolution, colonial Massachusetts law targeted a tax on property owners to the support of the church.[87] Isaac Backus, a prominent New England minister, strongly protested the imposition of such a tax, despite his advocacy of government involvement with religion,[88] and Thomas Jefferson railed against compulsory contributions to the church.[89]

By separating church and state, the new American system

84. I.R.C. § 501(c)(3). There are nine types of organizations listed, unless one counts organizations for the prevention of cruelty to animals or children as one type. The author is not aware of any organizations that combined these last two categories.

85. HOPKINS, *supra* note 81, at 30 (stating that there are 599,745 organizations falling into the "charitable" category of Code § 501(c)(3), while "there undoubtedly are at least 1.5 million tax exempt organizations in the United States").

86. I.R.C. § 170 (c).

87. *See* MAKING THE NONPROFIT SECTOR, *supra* note 21, at 97.

88. *Id.* For example, Backus advocated for legislated fast days and for statutes that would protect the purity of Christianity. *Id.*

89. *See* VA. CODE ANN. § 57-1 (Michie 2004).

created an eleemosynary void that had to be filled by some secular means.[90] Early on in the American republic, citizens did just that by creating a variety of civic associations and mutual benefit societies, and many of these organizations gained formalization and permanency through the use of state-authorized nonprofit corporation laws.[91] From virtually the outset of their emergence, these organizations enjoyed a reprieve from property taxation, the predominant form of tax revenue (outside of tariffs) until the twentieth century.[92]

Congress's first foray into the marriage of charity and taxation reflected the legacy that found articulation in the Elizabethan statutes and their progeny. The federal legislature initiated the charitable contribution deduction by way of the War Income Tax Revenue Act of 1917.[93] Like the Statute of Charitable Uses, the federal tax deduction was not limited to contributions in relief of the poor, but rather encompassed a vast array of purposes.[94] Specifically, the 1917 tax statute allowed a contribution deduction for funds contributed to "corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual."[95] Thus, from the very beginning, the statute set "charitable" apart as something other than religious, scientific, or educational.[96]

The general trend of charitable tax legislation in the years that followed was to expand both the permissible amount of deductible contributions and the list of eligible recipients. In 1917, an individual's charitable contribution deduction was limited to 15% of "taxable net income."[97] In 1944, Congress implicitly expanded the deduction by changing the basis of the limitation from "taxable net income" to "adjusted gross income."[98] Since taxable net

90. *See* MAKING THE NONPROFIT SECTOR, *supra* note 21, at 116.
91. *See id.* at 116-17.
92. *See* GLENN W. FISHER, THE WORST TAX? A HISTORY OF PROPERTY TAX IN AMERICA 88-89 (1996) (describing the general charitable exemption from property tax in Kansas during the last half of the nineteenth century).
93. War Income Tax Revenue Act of 1917, *reprinted in* J.S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1861-1938, 944 (1938).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Individual Income Tax Act of 1944, 1 Stand. Fed. Tax Serv. (CCH) ¶ 323,

income is determined after other deductions are subtracted from adjusted gross income, the latter number is necessarily larger whenever there are other deductions, thus yielding a larger allowable charitable contribution amount.[99] The percentage limitation was raised from 15% to 20% in 1952,[100] and two years later, the limit on charitable deductions was raised from 20% to 30% of adjusted gross income.[101] Beginning in 1958, corporate taxpayers were allowed to carry over any contribution in excess of these expanded limits to subsequent tax years,[102] and this right was granted to individuals in 1964.[103]

In 1969, Congress again raised the charitable deduction limitation, this time from 30% to 50% of adjusted gross income.[104] Contributions to private non-operating foundations were limited to 20% of adjusted gross income, but that limit was increased to 30% in 1984.[105] As early as 1924, Congress had considered the desirability of encouraging large-scale philanthropy by allowing certain taxpayers to completely eliminate their tax liability through an unlimited charitable deduction amount.[106] Although the early proposals were not adopted, forty years later Congress did in fact eliminate the limitation on charitable contribution deductions for taxpayers who made charitable contributions equal or greater to 90% of their taxable income for any given tax year and eight of the preceding ten tax years.[107]

As part of the "Reagan Revolution," Congress and the administration began seeking ways to encourage the private sector to shoulder a greater proportion of burdens that would otherwise

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at 2055.

99. *See* Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1062 (2003).

100. 2 Stand. Fed. Tax Rep. (CCH) ¶ 328, at 6005 (1952).

101. I.R.C. § 170(b)(1)(A) (1954) (citing H.R. Rep. No. 83-1337 (1954)).

102. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 11, 72 Stat. 1606, 1609 (1958).

103. Revenue Act of 1964, Pub. L. No. 88-272, § 209, 78 Stat. 19, 43 (1958).

104. Tax Reform Act of 1969, Pub. L. No. 91-172, § 804, 83 Stat. 487, 958 (1969).

105. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 301(a)(1), 98 Stat 494, 777 (1984).

106. SEIDMAN, *supra* note 93, at 733 (describing a Senate Finance Committee proposal to eliminate the contribution limitation in cases where a taxpayer contributed more than 90% of the taxpayer's net income for a ten-year period).

107. Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19 (1958). The unlimited deduction was curtailed in 1969. Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(g)(1), 83 Stat. 487 (1969).

fall on the government. In order to stimulate charitable giving to organizations providing services that would otherwise have to be provided by the federal government,[108] the charitable contribution deduction was made available in 1981 to individuals who did not itemize their deductions.[109]

Thus, while there is a consistent trend of legislatively encouraging private support of charitable organizations, Congress has also felt compelled to tighten the reigns on the charitable contributions deduction on several occasions. Just like the seventeenth-century English Parliament, Congress did so to combat perceived abuses, not as a means of implementing a change in basic public policy. For example, there were several changes in 1969 restricting the deductibility of charitable contributions. In that year, the amount allowed as a deduction for a contribution of property was reduced by the amount of short-term gain or ordinary income the taxpayer would have had if the property had been sold for its fair market value.[110] Also, in 1984 the Code was amended to require substantiation of the value of certain donated property and to impose penalties for the overvaluation of such property.[111] Despite these isolated remedial measures, Congress has, virtually from the inception of the modern federal income tax, embraced a policy favoring private contribution to charity through a system of increasingly lucrative tax deductions.

This gradual, but consistent, increase in the level of allowable charitable deductions is paralleled by a concomitant broadening of the spectrum of eligible recipients of these contributions. The

108. STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY AND TAX ACT OF 1981, at 49 (Comm. Print 1981).

109. Economic Recovery and Tax Act of 1981. Pub. L. No. 97-34, § 121, 95 Stat. 172 (1981) (amending I.R.C. §§ 63 and 170 to allow a deduction for adjusted gross income for charitable contributions made by taxpayers who do not itemize deductions). It should be noted that this enactment contained a five year sunset provision and was not re-enacted in 1986.

110. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487. Consistent with these provisions, the Tax Reform Act of 1969 also imposed several restrictions on certain charitable organizations to combat perceived abuses. *See* H. Fort Flowers Found., Inc. v. Comm'r, 72 T.C. 399, 404 (1979) (observing that the legislation was "designed to combat the abuses which Congress felt existed in the formation and operation of exempt organizations"). *See also* Estate of Brock v. Comm'r, 71 T.C. 901, 908 (1979) (stating that § 2055(e)(2) was added to the Code by the Tax Reform Act of 1969 "to correct abuses in the charitable deduction area regarding transfers of an income interest in property to a private person followed by a remainder to charity").

111. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

relatively simple, albeit broad, list of eligible recipients of charitable largess identified in the original 1917 law was soon extensively augmented by a series of statutory expansions. These expansions have distended the parameters of the deduction so as to effectively mask any specific policy goals embodied within the provision.

Congress made no differentiation among the vague list of organizations delineated as eligible contribution recipients until 1954. In that year, it expanded the deduction limitation by ten percent,[112] and in doing so, chose to restrict the additional allowance to contributions made to churches, religious orders, educational institutions, or hospitals.[113] Apparently, Congress was concerned about the financial viability of such organizations and was seeking to encourage private support of these specific endeavors.[114] The significance of this modification is that it represents an acknowledgment that not all eleemosynary enterprises should be lumped together for purposes of the federal tax subsidy accomplished by way of the contribution deduction. In differentiating these organizations, Congress for the first time made an explicit public policy choice to distinguish between the elements of what had become an amorphous and somewhat nebulous category of charitable organizations.

The marginal policy clarification achieved in 1954 was soon to be undone. Congress has since allowed whatever policy focus may have been feigned by the 1954 legislation to lapse into a quagmire of charitable uses so diffuse as to eliminate any ability to discern or evaluate a cogent policy approach. First, the federal expenditure represented by the additional ten percent deduction was gradually expanded. In 1962 foundations established to support state colleges and universities were added to the list of favored recipients.[115] Two years later, what once had been a somewhat narrow differentiation reflecting specific policy goals reverted to its prior indeterminate state. In 1964 Congress modified the charitable contribution deduction, subject to the thirty percent limitation, so as to include all public charities–in other words, the list now included any charitable organizations (as broadly defined)

112. *See supra* note 101 and accompanying text.
113. I.R.C. § 170(b)(1)(A)(i-iii) (1954).
114. Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1063 (2003) (citing H.R. Rep. No. 83-1337 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4050).
115. Charitable Contribution Amendments of 1962, Pub. L. No. 87-858, 76 Stat. 1134, 1134 (1962).

that received a "substantial part" of their income from the general public or from the government.[116] The list of eligible recipients was expanded again in 1969 to include certain private foundations.[117] More recently, the Tax Equity and Fiscal Responsibility Act of 1982 added amateur athletic organizations to the list of charities eligible to receive tax-deductible donations.[118]

That the tax law of charity grew out of the concepts of charitable trust law is not surprising, but it is troubling, especially in light of the recognition that tax advantages equate to public expenditures. Fiscal and political accountability are best achieved when the resources allocated to the implementation of policy are easily identified. These criteria are met, for example, with respect to direct government subsidy programs and with the Earned Income Tax Credit.[119] In both cases, the amount of the government subsidy is readily ascertained, and an intelligent policy debate may be initiated as to whether the amount of resources being expended is justified.

The expansive definition of "charitable," as incorporated into U.S. tax law, was conceived and intended for use in evaluating the validity of certain trusts, not for implementing the funding of social programs designed to help remedy specific social evils. With the degradation of direct grants in aid, the American poor are more and more reliant on the indirect subsidies provided through tax expenditures reflected in the charitable deduction and tax exemption for charitable entities. This circumstance renders the current amalgamation of relief of the poor with other social programs untenable in that it allows our elected officials to ignore the hard issues and avoid accountability.

IV. RECONCILING SOCIAL ABSTRACTION AND LEGAL TERMINOLOGY

To some degree, the law owes its legitimacy to the fact that it accurately reflects social norms.[120] To the extent that the law

116. Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19, 43.

117. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 550-53.

118. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 596.

119. I.R.C. § 32.

120. *See* Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390 (1994); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2001) (investigating social norms and their role for improving tax compliance). One function of law may be to inform the populace of what the social norms

diverges from embedded social norms, its authoritative nature may erode. As such, the law is a system of social ideas conveyed by and based upon specific uses of language.[121] As described above, the use of the words "charity" and "charitable" have developed a legal meaning separate and distinct from their ordinary, social meaning.[122] When the average person thinks of "charity," they think

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actually are. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (describing law's ability to inform people of dominant social norms). Different approaches to the concept of social norms have been advanced by a variety of scholars. *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1656-57 (1996) (defining norms as obligations); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255 (1999) (defining norms as "all rules and regularities concerning human conduct, other than legal rules and organizational rules"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both"); Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 364 n.24 (2003) (defining norms as "behavioral regularities that arise when humans are interacting with each other"); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (using a rough definition of norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done").

121. Jane B. Baron & Julia Epstein, *Language and the Law: Literature, Narrative, and Legal Theory*, *in* THE POLITICS OF LAW 673 (David Kairys ed., 1998) (explaining that legal usage may transform the vocabulary of ordinary speech). It would appear, however, to seldom go the other way. As in the case of the words "charity" and "charitable," the law sometimes usurps the "ordinary" meaning of words.

122. *See* St. Louis Union Trust Co. v. Comm'r, 59 F.2d 922, 928 (8th Cir. 1932) ("'Benevolence,' in its popular sense and use, is synonymous with charity."). Prior to 1959, Treasury Regulations, consistent with the popular meaning of these terms, generally defined charitable organizations as those operated for the relief of the poor. By 1959, however, a comprehensive set of regulations interpreting § 501(c)(3) was issued, and these regulations provided a "legal" (and broader) concept of "charitable." The current regulation provides as follows:

> (2) Charitable defined. The term charitable is used in § 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in § 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

of relief of the poor.[123] The fact that tax law defines this term differently has important consequences, especially in an age where public policy related to poverty relief is increasingly shifted to the confines of the tax statute. The purpose of this section is to flesh out the problems that arise from this dichotomy. That those problems are founded in our fundamental understanding of what charity is makes it all the more important that we align the legal and popular uses of this term.

American jurisprudence dealing with tax exemption or deductibility based on the concept of charity is founded on the notions of charitable uses developed in regard to trust law. Those notions, as demonstrated in the previous sections, can directly trace their lineage to the Statute of Charitable Uses. The goal of defining charity for charitable trust purposes and the aim of defining the term for tax purposes, however, are fundamentally different. Tax deductions, other than those that are clearly necessary to properly reflect income, represent attempts by Congress to influence behavior and, as such, constitute the principle social engineering function of the Code.[124] Tax law is designed to influence behavior in ways which are perceived to be beneficial to society, and in that sense share objectives with the law of charitable trusts. Tax law is fundamentally distinct from charitable trust law, however, in that the former's social incentives are achieved through government expenditures, whereas the latter

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Treas. Reg. §§ 1.501(c)(3)-1(d)(2) (as amended 1990). Internal Revenue Service pronouncements regarding the expansive use of the term followed the Supreme Court's decision in *Commissioner v. Bliss* in which the Court held that the provisions of law granting exemption of income devoted to charity are "liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed." 293 U. S. 144, 151 (1934). Thus, the Internal Revenue Service takes the position that the term "charitable" takes a special "legal" meaning as it is used in § 501(c)(3) of the Code. Rev. Rul. 56-185, 1956-1 C.B. 202.

123. Gustafsson, *supra* note 18, at 592. The term has had this ordinary connotation for centuries. In the nineteenth century, a British jurist remarked "It appears to me that 'charity' and 'charitable' have one sense, and one only, in ordinary familiar and popular use. Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty. . . ." *Id.* at 621 (citing Baird's Trustees v. Lord Advocate, 15 Sess. Cas. 682, 688 (1888)). Courts in the United States have reiterated this point repeatedly. *See* Paschal v. Acklin, 27 Tex. 173, 199 (1863) ("[T]he relief of the poor, or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity. . . ."); *see also* Nina J. Crimm, *Why All is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M. L. REV. 1, 21 (1999) (referring to relief of the poor as the "traditional perception" of charity).

124. *See* Sugin, *supra* note 7, at 408-09.

deals with the validity of privately funded benevolent activities. This distinction amounts to a social abstraction[125] which has been ignored by the consistent use of an unjustifiably uniform legal terminology. A continued disparity in the norms associated with charitable giving and the public policy evidenced in the tax statute is tenable only when the purposes are distinct. As the underlying function of private benevolence becomes merged with that of government welfare subsidy, it is increasingly important that the social and legal terminology coalesce. Ad hoc legal definitions that do not comport with social expectations lead to confusion and unpredictability, antitheses of both good law and sound public policy. On a more practical level, definitional anomie[126] diminishes the possibility of effective oversight and invites abuses of discretion.[127]

The English judiciary recognized this problem as early as 1891. In the venerable case of *Commissioners for Special Purposes of the Income Tax v. Pemsel*,[128] Lord Halsbury, in support of his assertion that the definition of the term "charitable" for trust law purposes bore no relationship to its use for tax purposes, summarized the dilemma as follows:

> In these and many like cases it appears to me that the distinction between what is charitable in any reasonable sense, and that to which trustees for any lawful and public purpose may be compelled to apply funds committed to their care, has been—I will not say confused—but so mixed that where it becomes necessary to define what is in its ordinary and natural sense "charitable" versus what is merely public or useful is lost sight of. And, indeed, for the purposes for which the Court was then enforcing the performance of the trusts it is intelligible that such

125. A social abstraction may be defined as a basic building block of social categorization and entitlement that is necessary for a community to create social norms. Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 429 (2003). Here, the norms involved are government funding and private philanthropy.

126. "Anomie" is a sociological term indicating an absence, breakdown, confusion, or conflict in the norms of society. GORDON MARSHALL, OXFORD DICTIONARY OF SOCIOLOGY 21 (1998). The term is generally used to indicate a normless state of affairs. *See, e.g.*, Federick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303 (1989).

127. Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 400 (1997).

128. 1891 A.C. 531.

distinctions should be disregarded.[129]

The exemption provision under consideration by the English tribunal was remarkably similar to that found in the current Code.

As with all aspects of human endeavor, words are important.[130] They help define who we are as a society. As human beings, we act toward things on the basis of the meanings that those things have for us. Such meanings are derived from our social interactions and are modified through an interpretive process we all use in dealing with each other in society.[131] The word "charity" has been embellished with a variety of meanings over the past few centuries, and this multiplicity of meanings creates the danger of a loss of meaning altogether.[132] A word that comes to mean everything in effect means nothing.[133] Because charitable giving and the relief of poverty are policy issues of central importance facing modern society, any weakness in meaning may open the door to policy manipulation beyond the perception of most Americans. This is a particularly sensitive issue for the charitable giving arena, as the more general nonprofit sector has been the subject of increasing

129. *Id.* at 544.

130. Cases in which the court emphasizes the importance of the specific words in a statute or in other contexts are legion. *See, e.g.*, United States v. Aguirre, 108 F.3d 1284, 1289 (10th Cir. 1997) (discussing a jury's use of dictionary definitions in deliberations); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1037 (W.D. Ky. 1998) (stating that "[t]he words [of a statute] are important because they have purpose").

131. HERBERT BLUMER, SYMBOLIC INTERACTIONISM 2 (1969).

132. *See* Koehler v. Lewellyn, 44 F.2d 654, 654-55 (W.D. Pa. 1930) (delineating the judicial definition of the term as used by U.S. courts); Andras Kosaras, *Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums Be Tax Exempt?*, 35 NEW ENG. L. REV. 115, 126-27 (2000) (tracing the historical background of charitable trusts); *see also* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 16-17 (2000) (stating, in regard to the term "welfare," that "[a] commitment to a process of ongoing reexamination of core concepts recognizes that, even if we are absolutely confident (which we are not) that we know the historical meaning, the demands of justice, as well as perceptions of legitimacy, require that our implementation of foundational principles resonate in the current realities of our lives").

133. State v. Post, 541 N.W.2d 115, 142 (Wis. 1995) (Abrahamson, J., dissenting), *cert. denied*, 521 U.S. 1118 (1997) ("If the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing."); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 761 (1998) ("If marriage means everything, and includes anything, it means nothing."); Christopher Brown, Comment, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 410 (1996) ("It is a trite, yet pertinent, truism that a term which means everything ultimately means nothing.").

attack by government regulators and the press.[134]

Recently, Mark Everson, the Commissioner of the Internal Revenue Service, testified before the Finance Committee of the United States Senate. The subject matter of his testimony was the perceived abuse of the tax advantages allowed to charitable organizations.[135] The day before the Commissioner's testimony, the Washington Post reported a story dealing with the "long-running series of scandals and controversies involving charities and nonprofits."[136] Senate Finance Committee Chairman Charles E. Grassley commented that "It's obvious from the abuses we see that there's been no check on charities. Big money, tax free, and no oversight have created a cesspool in too many cases."[137] The Committee's ranking democrat echoed, "It's time for Congress to send a message. The examples of abuse surrounding charitable organizations are growing at an alarming rate . . . . These actions are immoral and inexcusable—and threaten to taint the reputation of all charitable organizations."[138]

These indictments of charitable organizations highlight the potentially adverse consequences of combining disparate programs under one definitional umbrella.[139] It is impossible to say with certainty exactly what types of charitable organizations are being referred to in the preceding quotations. Unfortunately, exempt organizations for the relief of the poor are included within the ambit of the criticisms regardless of whether or not they are deserving of such charges. One possible result may be unnecessary and inefficient regulation of such entities. More troubling,

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134. *See infra* notes 135-138 and accompanying text.

135. *Written Statement of Mark W. Everson, Commissioner of Internal Revenue, before the Committee on Finance, U.S. Senate: Hearing on Charitable Giving Problems and Best Practices*, IR-2004-81 (June 22, 2004), *available at* http://www.irs.gov/newsroom/article/0,,id=124186,00.html (last visited Sept. 30, 2004).

136. Albert B. Crenshaw, *Charities' Tax Breaks Scrutinized; Widespread Abuses Prompt Congress to Rethink Laws*, WASH. POST, June 21, 2004, at A1.

137. *Id.*

138. *Id.*

139. The concept that aggregating separate and distinct legal concepts under one definitional term may cause troubling consequences is neither new nor particular to the law of charity. *See* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 100 (2000) (arguing that grouping multiple processes under the alternative dispute resolution umbrella causes difficulties). *Contra* David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL. & L. 220, 236 (1995) (describing the advantages of collecting disparate concepts under a single term).

however, is the negative public perception created by such comments. Since the government has shifted emphasis in poverty relief from direct government subsidy to private funding encouraged by tax advantages, any change in public perception of the integrity of the organizations providing such relief could have a dramatic impact on their available resources.

It is clear from the comments recited above that political leaders do not make distinctions between types of exempt organizations when they speak of abuses. As a result, the public is also unlikely to make such distinctions. There are, however, significant precedent and sound reasons for doing so. As early as the Elizabethan Poor Law, the needy were classified into various categories for public policy purposes.[140] The courts have long ago accepted the notion of using the tax laws to implement social policies.[141] Congress itself has demonstrated a willingness to draw distinctions among charitable groups when necessary to pursue policy objectives.[142]

Exemption theories themselves often rest on the specific meanings of words we used to describe categories of things. As Professor Atkinson points out, we tend to desire a monolithic conception of charity, what he refers to as "the temptation of the one true way."[143] As such, we denote what is "charitable" by a range of disparate factors, a sort of "gestalt," or "family resemblance" approach.[144] Previous attempts to distill the term to its essence for tax purposes have generally focused on the tax policy theory justifying the deduction or exemption. The most common justification for tax exemption, for example, is the public benefit theory, which states that charities are those organizations that provide goods or services that are deemed to be inherently good for the public, or deliver ordinary goods or services to those who are especially needy.[145] Thus, the public benefit theory is an *ex post*

140. *See supra* note 51 and the text following.

141. *See supra* notes 3-8 and accompanying text.

142. *See supra* notes 113-114 and accompanying text.

143. Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 399 (1997).

144. *Id.* at 399-400. Wittgenstein suggests more generally using the term "family resemblance" to denote that certain concepts draw from a common pool of similar characteristics. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32 (G.E.M. Anscombe trans., The Macmillan Company 1953).

145. Atkinson, *supra* note 143, at 402; *see* Bob Jones Univ. v. United States, 461 U.S. 574, 593 n.20 (1983) ("[C]ontemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to

facto attempt to imbue the term with a meaning consistent with its legal use rather than a realistic attempt to clarify the underlying policy.

Other approaches yield similar results. Professors Bittker and Rahdert have posited that tax exemption is intrinsic to the concept of taxing only net income, and exempt organizations share the characteristic of not having any inflows of resources that can justifiably be regarded as income.[146] As with the public benefit theory, this approach merely serves as a means to justify the meaning of the term "charitable" as it has been used, not as a normative analysis for assessing its proper use. In both cases the task has been to justify the exemption itself, not to properly classify activities as charitable on the one hand and socially beneficial, but not charitable, on the other.

Some commentators have observed the conundrum of combining unrelated deduction and exemption concepts and stretching the meaning of the term "charitable" beyond any recognizable boundary, recognizing the need for further policy inquiry:

> From the perspective of efficiency or equity, gifts to many charities that now are deductible should not be. The definition of charity under § 170 is surely flawed at its margins: it is ludicrous that sports museums, jazz festivals, and singing groups are treated as charities. Alternative methods of ensuring that beneficiaries of these services support them at desired levels are readily available, and it is implausible that gifts to these charities are altruistic in motive. There are strong arguments on both efficiency and equity grounds that a deduction is appropriate in the case of social welfare charities. In regard to religious contributions, the two rationales may lead to different policies. Although the efficiency argument is rather weak, there is at least a colorable equity argument given the information now available. The fact that the equity

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the charitable tax exemption."); IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1195 (10th Cir. 2003) ("The public-benefit requirement highlights the *quid pro quo* nature of tax exemptions: the public is willing to relieve an organization from the burden of taxation in exchange for the public benefit it provides."); Church of Scientology v. Comm'r, 83 T.C. 381, 457 (1984) ("The justification for the grant of tax exemption to charitable organizations, as a group, is that such entities confer a public benefit.").

146. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 305 (1976).

> rationale may support a deduction for a substantial class of charitable deductions for which efficiency justifications do not should stimulate further examination of its psychological and normative premises.[147]

Professor Colombo also directly addresses the underlying meaning of the concepts, arguing that the charitable contribution deduction is an economic transfer that should relate to the underlying goals of tax exemption.[148] In tying together the concepts of deduction and exemption, Professor Colombo posits that the theory behind the deduction and the exemption ought to be integrated, and in so doing, suggests that a more proper meaning of the term "charitable" emerges:

> Adopting an integrated theory of the deduction and exemption, moreover, will help place correctly the analytical spotlight with respect to policy decisions on subsidizing charitable organizations. The contributions deduction should be viewed only as a piece of that overall subsidization policy, not a separate end in itself . . . . The [present] policy stems, however, less from the deduction per se and more from the initial decision to classify these organizations as "charitable" for tax purposes. A more appropriate way to attack such ludicrous policy is to quit labeling these organizations as "charitable"; under an integrated approach, this would eliminate exemption and deductibility and also eliminate the associated other tax benefits such as tax-exempt bonds under I.R.C. § 145. If we ever hope to have coherent tax policy toward charitable organizations, integrating the rationale for the deduction and exemption would be a good place to start.[149]

Although Professors Gergen and Colombo have both tackled the issue head-on, no discernable consensus has emerged that in any meaningful way narrows the concept sufficiently to isolate its policy ramifications with respect to poverty relief. To do so, the term "charitable" must return to its ordinary meaning, and the special legal meaning justified by concerns unrelated to either tax or welfare policy must be jettisoned. Doing so involves

147. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1450 (1988).

148. John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 661 (2001).

149. *Id.* at 702-03.

"decoupling" the common, popular meaning of the term from the unrelated baggage that has come to accompany it.

It is by decoupling that the norms founded in the social abstraction referred to at the beginning of this section may become aligned with the legal usage of the term. Once this happens, not only will we have improved the law by breaking down the unintended distinction between popular meaning and legal usage, we will also have made strides in more clearly identifying the policy parameters of the tax statute. The next section will focus more specifically on these public policy implications.

V. A NEW APPROACH TO THE DEFINITION OF CHARITABLE FOR TAX PURPOSES

Public policy may be defined as an overall plan embracing the general goals and procedures of any governmental body and pending or proposed statutes, rules, and regulations.[150] Although there are a variety of approaches to public policy,[151] the policies themselves are embodied in the actions of Congress. This section will examine how federal policies with respect to poverty relief have been pursued through the tax code. The purpose of this analysis is to demonstrate that decoupling makes more public policy sense than the current muddled state of affairs.

Federal subsidies to charitable organizations for the fiscal years 2005 through 2009 are estimated to be over $213 billion, more than the amount of tax expenditures estimated for all other training, employment, and social services programs combined.[152] Implicit in every federal expenditure, whether it is by way of a direct payment or through a tax expenditure, is a policy choice. The method with which those budgetary items are framed dictates the nature of the analysis and debate to which such items are subject. As one commentator puts it:

> The politics of expenditures is not an open competition of all against all, with the best strategist winning; it is a bargaining among unequals, within a changing environment that shifts the goals and the

150. 45 C.F.R. 1612.2(c)(1977).

151. *See infra* note 166 and accompanying text.

152. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 297-98, *available at*, http://www.whitehouse.gov/omb/budget/fy2005/pdf/spec.pdf (last visited Sept. 30, 2004).

> level of discretion; it is also bargaining within a process that structures the level of competition and gives some interests a better chance than others.[153]

Until recently, the principle means for effectuating federal policy in general, and welfare policy in particular, was the annual budget. The budget has been characterized as "the nearest thing available to an agenda for [the] struggle over [the] scope and shape of government,"[154] and as the record of the outcome of the "conflict over whose preferences shall prevail in the determination of national policy."[155] In a very real sense, the government may be defined by what it spends,[156] a concept that has understandably resulted in a great deal of attention to the budgetary process.

The creation of tax legislation has now replaced the traditional budgetary process and federal tax law has become the preferred method for disbursing government funds.[157] Congress now spends more money through the Code than through the discretionary appropriations process.[158] Because tax provisions are now performing the function previously ascribed to the budgetary process, the former should be susceptible to no less scrutiny than the latter in the pursuit of public accountability for policy choices. A variety of circumstances, however, make this a difficult task.

In contrast to direct expenditures, tax expenditures in the form of deductions for discretionary contributions juxtapose the roles of the payer and the decision maker. In traditional direct expenditures, the taxpayers provide resources to the federal treasury (through taxation) and Congress decides how to allocate the money. The traditional structure fosters two fundamental characteristics of politically feasible budgetary activities: accountability and acceptability. Accountability means "transparency to the taxpayers about what budget decisions have been made,"[159] while acceptability means that the decisions made

153. IRENE S. RUBIN, THE POLITICS OF PUBLIC BUDGETING 99 (1990).

154. *See* Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699 (1986) (citing RICHARD E. NEUSTADT, PRESIDENTIAL POWER 83 (rev. ed. 1980)).

155. *Id.* (citing AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 14 (1964)).

156. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 2 (rev. ed. 2000).

157. Sugin, *supra* note 7, at 408 ("The tax law's traditional revenue-raising function is being eclipsed as it becomes a principal tool of federal policy.").

158. *Id.*

159. RUBIN, *supra* note 153, at 116.

are with the range of what the public expects.[160] Allowing for the fact that the single largest tax expenditures for social welfare are likely embedded within the charitable contribution deduction,[161] it is untenable that such expenditures are not transparent as to the amount used for the relief of poverty. Given this lack of transparency, acceptability is impossible to assess, except in the most broad, general sense. Without knowing the level of resources being devoted to poverty relief in this manner, any reasonable assessment of the efficiency of other, more direct poverty relief programs is also suspect, in that it is impossible to determine the full extent of the relief being provided, much less to isolate the various sources.

Although Professor Sugin has asserted that the funding of government programs through the tax expenditure budget has "given a fuller accounting of how the government spends money, potentially improving government's accountability to the people,"[162] this can only be the case where the Code is sufficiently clear in its objects. A legislative proposal to provide direct funding for education combined with direct funding for relief of animal cruelty in a manner such that the amount of resources allocated to each activity was not discernable would rightfully be deemed preposterous as an unabashed skirting of legislative accountability. Congress no less avoids accountability for the adequate funding of social welfare programs for poverty relief when such programs are masked under the general guise of "charitable" activities for which a tax deduction is allowed. As Professor Sugin herself admits, "the breadth of § 501(c)(3) may be sufficient to remove the government's imprimatur of support from any particular organization claiming the exemption."[163] Likewise, the expansive scope of that provision sufficiently removes any ability to discern a specific legislative policy regarding relief for the poor.

This lack of accountability and absence of any basis for assessing acceptability of tax spending to relieve the poor also

160. *Id.*

161. The estimated tax expenditure for the earned income credit for the fiscal years 2005-2009 is $27.3 billion, compared to $172.9 billion for charitable contributions other than for education and health organizations. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 297-98, *available at*, http://www.whitehouse.gov/omb/budget/fy2005/pdf/spec.pdf (last visited Sept. 30, 2004).

162. Sugin, *supra* note 7, at 416.

163. *Id.* at 440.

hampers evaluation of proposals directly affecting the charitable contribution deduction. There is once again interest in expanding federal tax expenditures for charitable purposes. For example, on May 7, 2003 Congressman Roy Blunt of Missouri introduced H.R. 7, which would again encourage greater private support of charities by allowing non-itemizers to make deductible contributions and by allowing for tax-free distributions from Individual Retirement Accounts for charitable giving.[164] This proposal for expansion of the federal resources diverted to charitable purposes is coupled with an enormous expansion of the nonprofit sector which makes careful evaluation and analysis of the underlying policies all the more crucial. Some have warned that the nonprofit sector has already expanded so rapidly that any legislative policy oversight may soon become futile. This dramatic expansion has been referred to as an "associational revolution" as significant as the rise of the nation state.[165] At a symposium on philanthropy conducted at the New York University Law School in 1997, Professor Ann F. Thompson remarked:

> I believe this growing sector has put an enormous amount of pressure on our traditional ideas about what philanthropy is and what role tax law plays in it. Whether you want to think about the tax benefits conferred upon the not-for-profit sector as an indirect subsidy - a tax expenditure arising from the tax exemptions for organizations and tax deductions for donors - or if you just want to think about the tax benefits in terms of the lost revenue; it's there, it's big, and it's pressing. In this context of growth and change and associational revolutions, it is entirely appropriate to go back and re-examine the tax policies that underlie and support philanthropy and the not-for-profit sector.[166]

In light of the growing predominance of the tax-exempt sector, the increasing importance of non-direct subsidies as a means of relieving poverty, and the social ramifications of associating legislative words with suspect conduct, it is imperative that Congress thoughtfully consider decoupling the concept of

164. H.R. 7, 108th Cong. (2003).

165. Lester M. Salamon, *The Rise of the Not-for-Profit Sector*, 73 FOREIGN. AFF. 109, 109 (1994).

166. Ann F. Thomas, *Symposium: Corporate Philanthropy: Law, Culture, Education, and Politics: Panel Two: Exempt Organizations and the Corporate Charitable Deduction: Law, Policy, Theory*, 41 N.Y.L. SCH. L. REV. 831, 834 (1997).

charitable exemptions and deductions from other tax favored activities. It is nonsensical that, for legislative, budgetary, and policy evaluation purposes, private funding for the relief of poverty is lumped together with fostering amateur sports competition and the prevention of cruelty to animals, among other things. This is not to suggest that any currently tax-exempt activities should not be so, but merely that it makes no sense from a policy evaluation standpoint to associate as important a public function as relief of the poor with such disparate "non-charitable" (at least in the popular, non-legal sense) endeavors.

Policy inquiry involves the investigation of and reflection upon the premises of policy arguments.[167] Policy analysts will assume, and courts are compelled to accept the notion, that legislative purpose is expressed by the ordinary meaning of the words used in a statute.[168] Furthermore, it has long been the mantra of statutory interpretation that in construing any statute, including a statute authorizing the imposition of a tax, the words employed are to be given their plain and ordinary meaning and that the words of a statute, if of common use, are to be construed in their natural, plain, obvious, and ordinary meaning.[169] There is ample reason,

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167. DAVID C. PARIS & JAMES F. REYNOLDS, THE LOGIC OF POLICY INQUIRY 3 (1983); *see* Fidelity Fin. Corp. v. Fed. Home Loan Bank, 589 F. Supp. 885, 892 (N.D. Cal. 1983) (observing that the Supreme Court has restricted policy inquiry to the words expressed in a statute, and has rejected "softer" policy analysis); *see also* THOMAS BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS (2001); JOHN KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984) (identifying the methods by which public policy is created). Policy inquiry usually begins from either a philosophical or social science perspective. On the philosophical side, Wittgenstein is a prominent source of "conceptual" or "linguistic" policy analysis. *See* LUDWIG WITTGENSTEIN, *supra* note 144. For a survey of the linguistic movement and its investigation of public policy, *see* RICHARD BERNSTEIN, PRAXIS AND ACTION (1971). Bernstein contends that so-called "critical theory" can provide an objective basis for normative claims about public policy. *See id.* Other policy approaches include cost-benefit analysis based in economic theory, E.J. MISHAN, ECONOMICS FOR SOCIAL DECISIONS (1972), and ideologically-based approaches, such as those of Rawls and Dworkin.

168. Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99 (1991) (rejecting argument that "the congressional purpose in enacting [a statute] must prevail over the ordinary meaning of statutory terms"); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

169. Edison Elec. Illuminating Co. v. United States, 38 Ct. Cl. 208 (1903); Carter v. Carter Coal Co., 298 U.S. 238, 289 (1936) ("While the lawmaker is

therefore, for taking seriously the English jurists who over a century ago foretold that the intellectual and jurisprudential illegitimacy of combining disparate concepts in one legally cognizable term would lead to policy confusion.[170] In confusing the meaning of terms, we have altered not only perception, but also the political use (and misuse) of important policy concepts.

That politics and perception have a direct impact on budget policies can hardly be denied. When he came into office, President Bush proposed a package of charitable-giving tax incentives worth $90 billion over ten years. When he proposed the 2004 budget, however, huge new income tax-reduction programs were favored, representing a windfall for high-income taxpayers worked out as a compromise with Congress. In the process, the charitable-giving component was cut to $20 billion.[171] Charitable giving incentives may be popular targets for the chopping block because Americans have a habit of contributing to charities regardless of the availability of tax incentives.

Charitable giving has always been an important part of American culture. Despite the general trends in civic disenfranchisement felt by minorities, charitable giving among all ethnic groups remains comparable. For example, in both the 1996 and 2000 elections, whites made up over 80% of the total electorate, while African-Americans and Hispanics comprised only 10% and 6%, respectively.[172] The percentage of African-Americans who reported household contributions in 1998, however, was 52%.[173] The percentage of Hispanics reporting contributions

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entirely free to ignore the ordinary meanings of words and make definitions of his own, . . . that device may not be employed so as to change the nature of the acts or things to which the words are applied.").

170. *See supra* notes 128-29 and accompanying text.

171. Jonathan Weisman, *In 2003, It's Reagan Revolution Redux: Embracing Big Tax Cuts and Deficits, Bush Moves Away From Compassionate Conservatism*, WASH. POST, Feb. 4, 2003, at A6.

172. National Coalition on Black Civic Participation, Inc., *The Black National Electorate By Demographic Group: 1996 v. 2000*, N.Y. TIMES, Nov. 12, 2000, *available at* www.bigvote.org/stats.htm (last visited Sept. 30, 2004).

173. Independent Sector, *Giving and Volunteering in the United States: a National Survey* (1999), *available at* http://www.independentsector.org/gandv/s_demo.htm. The survey also reported that:

> Over 80% of households with an income of $50,000 or more per year reported contributions. While a lower percentage of low-income households reported household contributions when compared to more affluent households, they gave a higher percentage of household income. In 1998, this gap appeared to

increased from 57% in 1995 to almost 63% in 1998.[174] Both African-Americans and Hispanics had only a slightly lower participation rate in household giving than white respondents, 75% of whom reported contributions.[175] Among all households reporting contributions, the average amount was $658 for African-Americans, $504 for Hispanics, and $1,174 for whites.[176]

It may be, therefore, that poverty relief based on tax incentives is economically inefficient. This would be the case, for example, if it turned out that an increased availability of tax advantages had little or no effect on the level of private contributions. If this is so, it would compel a return to an emphasis on direct benefit entitlement programs. Without any basis for analysis, however, the policy pursuits aimed at ameliorating poverty are likely to stagnate.

For these reasons, it is time to decouple tax exemption for charitable organizations. By doing so, the amorphous label of "charitable" may be broken down into its component parts so that the policies underlying each may be identified, isolated, and analyzed. "Charitable" should no longer be a catch-all category of exempt activities not otherwise delineated. Instead, this category should be reserved for organizations the primary purpose of which is to benefit the poor. In other words, we should return the statutory terminology to its ordinary meaning and dismantle the broader "legal meaning" that has arisen more from accident than design. Those organizations that have heretofore found exemption under the charitable umbrella would have to justify their exemption independently or lose it. If Congress believes that there are other organizations too numerous to warrant a separate exemption category, perhaps a new "public benefit organization" category can be established to serve the nebulous backstop function that "charitable" has been forced to bear for so long.

By decoupling the exemption in this manner, both taxpayers and the government will be better able to assess the effectiveness of

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> be widening. Contributing households with incomes under $10,000 (26% of this group reported being retired) gave an average of 5.25% of their household income in 1998 (4.3% in 1995). The average percentage of household income given declined from 3.4% among households with $100,000 or more in 1995 to 2.2% in 1998.

Id.

174. *Id.*
175. *Id.*
176. *Id.*

private aid to the poor, and determine when and if direct subsidies are advisable. It is true that decoupling would not entirely isolate private funding of aid to the poor. Other non-charitable enterprises, such as those principally organized for religious, educational, or health related purposes, may, and in fact do, assist the poor with economic transfers and services. It would be administratively unfeasible to distill the charitable functions from the primary endeavors of these entities. Thus, the decoupling solution is not perfect, but represents a vast improvement on the indefinite and ad hoc categorization with which we currently grapple.

This does not necessarily mean that the present statutory scheme must be jettisoned in its entirety. A little rearranging is all that is necessary. A basic tenet of statutory drafting is that the statute should allow the public, the administrative agency, and the courts to easily understand the rationale for the rule.[177] One way to achieve this with respect to Code § 501(c)(3) would be to eliminate the term "charitable." A new paragraph should be inserted at the end of § 501(c) (currently, it would be paragraph 29) to read as follows: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for the purpose of relieving poverty."

Thus, tax-exempt organizations devoted to relief of poverty would be referred to as "501(c)(29)" organizations. From a policy standpoint, it may be wiser to remove the poverty relief provision to a new section all of its own, but this would require substantial revision of Subchapter F. In order to fully implement the objectives of decoupling, however, one would also need to decouple Code § 170 by making similar changes there. It may also be wise to require separate tax reporting of contributions to poverty relief organizations. Theoretically, however, this should not be necessary because once poverty relief organizations are decoupled, their reported revenues will be an indication of the portion of the tax expenditures represented by Code § 170 deductions, making further statutory differentiation unnecessary.

177. Victor Thuronyi, *Drafting Tax Legislation*, in TAX LAW DESIGN AND DRAFTING 74 (1996); *see* Miller v. Civil City of South Bend, 904 F.2d 1081, 1119 (7th Cir. 1990) (Coffey, J., dissenting) (referring to a statute as being "well-drafted" because of its clarity of purpose); Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 CHAP. L. REV. 181, 207 (2002) (stating that well-drafted statutes facilitate administrative implementation, which stems from a clear understanding of the reason for the legislation).

There would then be two possible ways of handling the other types of activities previously falling under the umbrella of "charitable" in 501(c)(3). One way would be to complete the decoupling process by delineating each separate type of activity as to which Congress intends to grant an exception. Assuming Congress is not opposed to the expansive range of activities that are currently tax exempt under the penumbra of "charitable," the list would be quite long. Absent a specific public policy reason for segmenting these activities similar to that articulated above for poverty relief organizations, this approach makes little sense. A better alternative would be to simply replace the word "charitable" in 501(c)(3) with the term "public benefit." Code § 501(c)(3) would then read as follows: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, general public benefit, scientific, testing for public safety, literary, or educational purposes...."

It should be further noted that, while I have focused on the provisions of Code §§ 501 and 170, there are also contribution deduction provisions in other Code sections, such as Code §§ 642 and 6034 (dealing with estates and trusts) and Code § 873 (providing for a contribution deduction for nonresident aliens). These sections, however, all refer to Code § 170 for the basis of the deduction, so amending the latter section is all that would be needed.

VI. CONCLUSION

We should be no less demanding of our public officials with the formulation and implementation of public policy just because the vehicle for such policy has shifted from the discretionary budget to the tax expenditures contained in the Code. Public policy issues underlying social programs in aid to the poor are becoming increasingly important, especially in light of the recently emerging popular suspicion and resentment of entitlement programs. Perhaps shifting the principle burden for the relief of society's poor from direct federal aid to private aid encouraged by favorable tax treatment is a viable response. Doing so, however, necessitates certain changes to ensure that the policies being pursued can be properly analyzed and evaluated for effectiveness in achieving their goals. The first step in this process is to isolate the specific statutory provisions implementing these policies.

The combination of tax deductions and exemptions for relief

of the poor with other socially desirable activities is more the result of historical accident than any cognizable jurisprudential logic. Creating a "legal definition" of charity that encompassed all activities for public benefit served a useful purpose in constructing a meaningful set of rules for evaluating the justification of departures from traditional constraints on the validity of trusts. That this purpose was distinct from that underlying favorable tax treatment for private contributions was of little importance until recently. Now that the primary repository for poverty relief programs has been located in the tax statutes, it is time to redesign the statutory language to make the policy results more accessible. Commingling substantive poverty relief legislation with varied and unrelated expenditure provisions makes reasonable policy analysis difficult at best, and perhaps impossible.

There is little evidence supporting the notion that decoupling tax exemptions for charitable organizations is not a viable alternative. There is precedent within the context of the charitable contribution provisions for making statutory distinctions between voluntary private funding of different types of organizations.[178] The Office of Management and Budget sifts out charitable contributions for education and health organizations in compiling its annual tax expenditure budget.[179] By decoupling the charitable contribution deduction and exemption from its unrelated statutory bedfellows, the public policy debate regarding the adequacy of federal subsidies to the poor can be put on an equal footing with other important policy issues facing our society.

178. *See supra* note 113 and accompanying text.

179. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 297-98, *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/spec.pdf (last visited Sept. 30, 2004).

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