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David V. Patton

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THE QUEEN, THE ATTORNEY GENERAL, AND THE MODERN CHARITABLE FIDUCIARY: A HISTORICAL PERSPECTIVE ON CHARITABLE ENFORCEMENT REFORM

*David Villar Patton**

* Assistant Attorney General, Office of the Ohio Attorney General. B.S. 1996, J.D. 1999, The Ohio State University. I would like to thank Craig R. Mayton, Thomas P. Gallanis, Kermit L. Hall, and Barbara J. Pfeiffer for their helpful comments of earlier drafts of this article. I would also like to thank Robert A. Patton for giving me an appreciation of history. This article reflects solely the views of the author and in no way is it intended to represent the views of the Ohio Attorney General or any other official position of the State of Ohio.

I. INTRODUCTION

When courts and commentators consider charitable enforcement reform, common law traditions and the exclusivity of attorney general enforcement stand as obstacles to hinder innovation and experimentation. While many decry the history and tradition that created the contemporary role of the attorney general, too few seem to appreciate its origins.[1] When the history is examined, however, it is apparent that the law of charitable enforcement has been fluid and malleable in responding to the needs and vagaries of society over time. In short, the traditional common law role of the attorney general is not so fixed and formidable as to preclude charitable enforcement reform.

The purpose of this article is threefold: (1) to interject history into the

1. *See infra* notes 263-276 and accompanying text.

charitable enforcement reform debate, (2) to evaluate proposed reforms in a historical context, and (3) to educate the public and the practicing bar on the origins of the modern role of the attorney general.[2] Frequently, contemporary commentators on charitable enforcement tend to mention its history, particularly the Statute of Elizabeth, in a perfunctory and cursory manner. Having dutifully raised the ancient origins of modern charitable enforcement, these commentators proceed to critique the current enforcement regime and its central actor — the state attorney general.[3] The history of charitable enforcement, however, demands a more thorough examination because of the lessons that it imparts to the current reform debate. The problems that faced the chancery courts of fifteenth century England are similar to the problems faced by modern regulators of non-profit corporations.[4] Thus, the contemporary debate over charitable enforcement reform is well informed by the lessons of the past.

This article examines the historical basis for charitable enforcement by the attorney general, paying particular attention to the American experience. Section II describes the early development of charitable enforcement in England from the thirteenth century until the American Revolution. Section III discusses early American judicial treatment of charities and the emergence of a restrictive view toward philanthropy. This section begins with the first of three watershed cases, *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*,[5] which indelibly shaped the American law of charity. Section IV describes the ultimate acceptance of a more permissive view toward charities resulting from *Vidal v. Girard*.[6] Section V discusses *Trustees of Dartmouth College v. Woodward*[7] and the coming of age of charitable enforcement law in the United States. Section VI explores the contemporary arguments both for and against attorney general enforcement of charitable trusts. Section VII discusses

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2. As to this third point, I must defer to the experiences of my colleagues in the charitable enforcement sections of the various state attorney general offices. When charitable enforcement issues arise, many private sector practitioners seem to regard the state attorney general as an unwelcome and meddlesome interloper. Much of this resistance results, no doubt, from an excusable ignorance on the part of many corporate practitioners regarding the history, tradition, and implications of charitable trust law. As this article will attempt to clarify, however, the attorney general's involvement in charitable enforcement is steeped in centuries of legal tradition.

3. *See, e.g.*, Mary Francis Budig et al., *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced*, 27 U.S.F.L. REV. 47 (1992).

4. *Compare* Preamble to the Statute of Elizabeth, *with* Daloia v. Franciscan Health System of Central Ohio, Inc. 679 N.E.2d 1084 (Ohio 1997). (The Preamble states: "Whiche [charitable assets] nevertheless have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same.").

5. 17 U.S. (4 Wheat) 1 (1819).

6. 43 U.S. (2 How.) 127 (1844).

7. 17 U.S. (4 Wheat) 518 (1819).

some of the more noteworthy alternatives to attorney general enforcement. Finally, Section VIII addresses impediments to proposed innovations and the role of history in judicial and legislative reforms.

II. CHARITABLE ENFORCEMENT IN ENGLAND FROM THE THIRTEENTH CENTURY TO THE AMERICAN REVOLUTION

A. *Early Charities and the Ecclesiastical Courts*

The earliest charities began in Egypt during the time of the pharaohs.[8] Charities were also known in the ancient Greek and Roman worlds.[9] One of the earliest Western laws affecting charity was enacted around 150 B.C.E. when "Roman law extended the legal heir concept to associations . . . thus giving the charitable associations the same legal status as the natural heir . . . ."[10] Charitable organizations in the British Isles pre-date the existence of the English nation.[11] In medieval England, charitable gifts typically involved conveyances of land held in frankalmoign by religious organizations.[12] While some conveyances of land to the church required quid pro quo services, "other gifts of land . . . might exact no precise spiritual service, but were given for general spiritual benefit, and for which no fealty was required; these tenures were known as frankalmoign, or free alms."[13] Property held in frankalmoign was exempt from the usual feudal

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8. *See* EDITH L. FISCH et al., Charities and Charitable Foundations § 17, at 8 (1974). *See generally* PHILANTHROPY IN THE WORLD'S TRADITIONS (Warren F. Ilchman et al. eds., 1998).

9. *See* Mary K. Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1345-46 (1994) (discussing the English ecclesiastical courts's incorporation of Roman charitable legal concepts into English law); *see also* FISCH ET AL., *supra* note 8, §18, at 18.

10. FISCH ET AL., *supra* note 8, § 18, at 18.

11. *See id.* §19, at 11. FISCH ET AL. explain:

> The Anglo-Saxon history of charities largely concerns the struggle between church and state. The English church was organized in Britain in 664 by Theodore of Tarsus before England existed as a state. During the time of the Saxons, there were many ecclesiastical organizations. Land was freely alienable to religious organizations and ecclesiastical institutions could take and hold property without limit.

Id.

12. *See* 4A WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS [formerly SCOTT ON TRUSTS] § 348.2, 27 (4th ed. 1989); *see also* Lundwall, *supra* note 9, at 1345-46 (discussing the historical background of charitable trusts from Roman development through early English law). *See generally* 4A WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (1956) (providing a comprehensive treatment of English legal history).

13. 1 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 4.05(b)(3)(xii), at 147 (David A.

incidents that were associated with secular, non-charitable tenures.[14] Because of this, feudal lords were denied the usual benefits of property once religious corporations obtained land through charitable gifts.[15] In response, forfeiture and mortmain statutes were enacted which "provid[ed] that lands held by religious bodies should be forfeited to the overlord[,] and if he failed to enter, then to his overlord, and finally to the Crown."[16] To defeat these mortmain and forfeiture statutes, religious charities quickly found a loophole by which property was conveyed to individuals for use by a religious order.[17] By the 1390s, however, the mortmain statutes were expanded to include conveyances to individuals, and the loophole was closed.[18]

Despite chronic sparring between the church and the Crown, English charity in the thirteenth century was principally a vehicle for the spiritual redemption of the soul.[19] Ecclesiastical courts enjoyed jurisdiction over charitable enforcement as a result of the theological character of philanthropy.[20] By the thirteenth century, jurisdiction over the probate of personalty became the exclusive province of the ecclesiastical courts.[21] This jurisdiction sprang from the bishop's power to enforce charitable bequests.[22] At the start of the fifteenth century, however, ecclesiastical

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Thomas ed., 1994).

14. *See id.* § 5.02(c), at 206-07. Feudal incidents were roughly equivalent to modern taxation. *See id.* In the feudal system, secular tenants paid rent to their landlords in the form of goods and services, such as crops or supplying the army with soldiers. *See id.* (discussing the incidents of military tenures including homage, wardship, marriage, aids, and relief). Religious organizations holding lands in frankalmoign were exempt from such obligations. *See id.*

15. *See* FRATCHER, *supra* note 12, § 348.2, at 27.

16. *Id.* (describing various mortmain statutes enacted during the thirteenth and fourteenth centuries).

17. *See id.*, § 348.2, at 28 (describing the exploitation of this loophole by the Franciscan Order during the thirteenth century).

18. *See id.* (discussing the expansion of the mortmain statutes under Stat. 15 Rich. II, c.5 (1391)).

19. *See* Note, *The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes*, 54 VA. L. REV. 436, 438 (1968); *see also* FISCH ET AL., *supra* note 8, § 19, at 15 ("Aid to the poor and unfortunate became not an end in itself but an effective means of saving the soul under the Augustinian doctrine that 'alms have power to extinguish and expiate sin.'"); Lundwall, *supra* note 9, at 1345-46 ("Part of the popularity for charitable giving came, no doubt, from the belief that gifts to the church were an effective way to atone for sins and attain salvation.").

20. *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532-1827 3, 5 (1969); *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 146-54 (3d ed. 1990) (discussing ecclesiastical courts); ALAN HARDING, THE LAW COURTS OF MEDIEVAL ENGLAND (1973) (discussing the early history of English courts from the ninth century through the thirteenth century).

21. *See* JONES, *supra* note 20, at 4 n.7.

22. *See id.*

courts earned a reputation for corruption and ineffectiveness.[23] In response, aggrieved beneficiaries increasingly sought relief for charitable enforcement issues in the chancery.[24]

B. *Chancery Enforcement*

The Chancellor's jurisdiction over charitable legacies always had been concurrent with the ecclesiastical courts.[25] Jurisdiction over charitable uses, or trusts,[26] however, had traditionally been within the exclusive domain of the chancery.[27] The English chancery courts enforced charitable trusts as early as the 1400s.[28] This fact would give American courts considerable difficulty centuries later, particularly in *Philadelphia Baptist Ass'n v. Hart's Executors* and *Vidal v. Girard.*

Once the enforcement of legacies, charitable and otherwise, became an established feature of the chancery, the law developed to distinguish between enforceable and unenforceable charities. The litmus test of this distinction evolved from the abuse and mismanagement of charitable bequests to Roman Catholic priests for the purpose of offering mass in honor of the deceased.[29] Such arrangements were known as chantries.[30] In response to widespread abuse of chantries among the priesthood, a series of laws was enacted to correct such abuses by suppressing chantries.[31] The restraint on chantries eventually led to the concept of the unenforceable, superstitious use.[32] Chantry statutes proved important in the evolving law

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23. *See id.* at 5 (describing the factors that contributed to the ecclesiastical court's "unpopular[ity] with the laity").

24. *See id.*

25. *See id.* at 6. Although both the chancellor and the bishop enjoyed jurisdiction over charitable enforcement cases, the bishops presided over the lion's share of such cases from 1350 until *c.*1530. *See id.* at app. A; *see also* BAKER, *supra* note 20, at 112-34 (discussing the court of chancery and equity).

26. *See generally* James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 639 (1985) ("In England charitable organizations ordinarily were organized as charitable trusts.").

27. *See* JONES, *supra* note 20, at 6. Jones notes that after Nicholas Bacon stepped down as Lord Keeper in 1579, suits to enforce legacies were directed to the ecclesiastical courts with the exception of charitable legacies. *See id.* at 17-18.

28. *See* FRATCHER, *supra* note 12, § 348.2, at 27.

29. *See* JONES, *supra* note 20, at 10 ("Complaints that chantries had been allowed to lapse and that their endowments had been appropriated by the priest, the founder or the founder's heirs were not infrequent . . . .").

30. The term "chantry" refers to "[a]n endowment for the maintenance of one or more priests to sing daily mass for the souls of the founders or others specified by them," as well as "the body of priests so endowed." THE OXFORD ENGLISH DICTIONARY, VOL. III, at 22 (2d ed. 1989).

31. *See* JONES, *supra* note 20, at 11.

32. *See generally id.* at 82-87 (describing the disfavored status of gifts to Roman Catholic charities under the general prohibition of charities for so-called superstitious uses). The first chantry

of charity for reasons apart from their reflection of anti-Catholic sentiments and changing social views toward religion. First, such statutes signaled a shift in the concept of philanthropy away from the religious to the secular.[33] Second, these statutes drew a distinction between enforceable and unenforceable charitable purposes.[34]

The distinction between enforceable and unenforceable charities underscored the need for an enforcement procedure.[35] By the mid-sixteenth century, the procedure of simple bill and answer emerged as the recognized method of redress for the misappropriation of charitable assets.[36] At first, the bill and answer promised to be a model of efficiency and simplicity.[37] Anyone alleging mismanagement of a charity was free to seek redress by filing a bill of complaint with the chancery.[38] The early promise of this procedure would not come to fruition, however, as the procedure was abused by litigants through delay tactics and protracted motions and pleadings.[39] Although the bill and answer allowed for representative actions brought in the name of the attorney general, the

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statute (37 Henry VIII c. 4) operated to void uses and bequests for chantry purposes. *See id.* at 11. The legislative purpose, however, was not aimed at theological issues, but rather at secular, economic concerns. *See id.* Thus, the statute was designed to stop the flow of assets into charitable uses for chantry purposes to the detriment of the Crown's war effort against France and Scotland. *See id.* The theological character of anti-chantry statutes was not stated explicitly until the enactment of 1 Edward VI c. 14. *See id.* Lord Coke noted that this second chantry statute was intended "to extirpate out of men's minds these superstitious errors, and to take them utterly away." *Id.* at 13. *See generally* HOLDSWORTH, *supra* note 12, Vol. IV, at 11-54 (discussing the Reformation).

33. *See* JONES, *supra* note 20, at 10.

34. *See id.* at 14-15.

35. Charitable enforcement involves the concept of breach of fiduciary duties as well as the concept of charitable purposes that the law is prepared to recognize and protect. Although there is considerable overlap between these two concepts, the focus of this article is on the latter. Nevertheless, the fiduciary duty issue was addressed at common law by "[v]isitorial [r]ights." Fishman, *supra* note 26, at 645-46. Fishman explains: "At common law the founders of a charitable corporation, the individuals who originally donated funds and revenues, and their heirs, had the right to visit, inquire into, and correct all irregularities and abuses which arose in the course of the administration of the funds donated." *Id.* at 646; *see also* Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 695-96 (1998) ("At common law, founders and endowers of charitable corporations had a power of visitation to supervise their gifts.").

36. *See generally* JONES, *supra* note 20, at 16-21, and app. B (describing mid-sixteenth century bills and answers in the chancery courts concerning alleged abuses of charitable uses); W.J. JONES, THE ELIZABETHAN COURT OF CHANCERY 177-336 (1967) (discussing the history and procedure of the chancery courts from 1558 until 1603).

37. *See* JONES, *supra* note 20, at 19.

38. *See id.* at 17-19.

39. *See id.* at 19 ("The procedure of the Court of Chancery was initially both simple and speedy. . . . Pleadings became progressively more verbose and delaying motions, both before and after judgment, more frequent.").

small amount of money involved in a typical complaint simply made it impractical to challenge the disposition of charitable assets in the chancery court.[40] As a result of these short-comings, over the period in which the chancery bill and answer was the exclusive means of charitable enforcement, the Chancellor entertained an average of only one to two suits per year.[41] Although the bill and answer procedure retained the traditional canon law bias in favor of charities, it ultimately proved cumbersome and ineffectual.[42]

C. *The Statute of Elizabeth and the Commissioners*

The Statute of Elizabeth[43] was enacted in 1601 in response to the lack of chancery enforcement.[44] Although this statute would ultimately exert a tremendous influence on the substantive law of charity, its original purpose was merely to correct the procedural infirmities that plagued late sixteenth century enforcement.[45] As previously discussed, deficiencies in ecclesiastical enforcement gave rise to chancery enforcement. In turn, deficiencies in chancery enforcement gave rise to the enforcement regime set forth in the Statute of Elizabeth.

Most significantly, the Statute of Elizabeth's new enforcement scheme

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40. *See id.* at 20-21 (describing the issue of standing regarding charitable enforcement issues where "there was no single 'legal' person whose interests would be affected. . . . ").

41. *See id.* at 18-19 ("The number of bills to enforce charitable uses and legacies between 1532 and 1601 . . . was, as far as can be judged from the Public Record Office Lists and Indexes, 131; so that for the period from 1400 to 1601, the number of bills amounted to [approximately] 223.").

42. *See id.* at 18 (discussing the *Entry Books of Decrees and Orders*).

43. *See* Stat. 43 Eliz. I, c.4 (1601). This statute is also known as the "Statute of Charitable Uses," the "Charitable Uses Act," and "An Act to Redress the Misemployment of Lands, Goods, and Stocks of Money Heretofore Given to Charitable Uses." The majority of American courts and commentators, however, simply refer to it as the "Statute of Elizabeth." *See* Terry M. Knowles, *A Brief History of Charitable Regulation*, NEW HAMPSHIRE B.J., Dec. 1996, at 8, 9; JONES, *supra* note 20, at 23. The Statute of Elizabeth was preceded by a similar statute enacted in 1597, "An Acte to reforme Deceits and Breaches of Trust, touching Lands given to Charitable Uses," 39 Eliz. I, c. 6; *see* JONES, *supra* note 20, at 23. This earlier statute was enacted in response to the social unrest resulting from late sixteenth century famine and war with Spain. *See id.* at 22. In order to more effectively cope with this social upheaval, Parliament sought to aid charitable endeavors by improving enforcement. *See id.* The 1601 enactment of The Statute of Elizabeth was necessary to correct a conflict with the Magna Carta's mandate of "challenges to jurors" contained in 39 Eliz. I, c. 6. *See* JONES, *supra* note 20, at 24-25. The Statute of Elizabeth, however, is substantively a re-enactment of its predecessor. *See id.* The most significant difference between the two statutes is the inclusion of the preamble in the later enactment. *See id.*

44. *See generally* HOLDSWORTH, *supra* note 12, Vol. IV, at 398-99 (discussing the Statute of Elizabeth).

45. *See infra* notes 2-4 and accompanying text.

replaced the Chancellor with groups of commissioners.[46] These commissioners were "appointed to inquire into 'any breach of trust, falsity, non-employment, concealment, misgovernment or conversion' of charitable funds."[47] The commissioners exercised jurisdiction over the types of charities enumerated in the preamble of the statute.[48] The commissioners's jurisdiction also extended to charities within the "equity" of the preamble.[49] Essentially, both the express terms and the spirit of the preamble combined to bring virtually all secular charities within the commissioner's jurisdiction. Consequently, religious charities were beyond the scope of the statute and, thus, remained within the purview of the Chancellor.[50]

The procedure and mechanics of a commission's inquiry were simple. Under the Statute of Elizabeth, the Lord Chancellor was empowered to "set down such orders, judgments and decrees" as necessary to enforce charitable trusts in accordance with the intent of the donor.[51] In order to accomplish this task, the Lord Chancellor appointed a minimum of five commissioners for a given county.[52] Typically, a charitable abuse came to the attention of the commissioners through a complaint brought under oath by twelve men.[53] Based on the complaint, the sheriff issued warrants and summoned "interested part[ies]" to the hearing.[54] Many of these hearings were held in relatively informal settings, such as a commissioner's home.[55] The commissioners convened a hearing and began the inquiry in the presence of a jury of "twelve 'honest and lawful' men of the county who did not pretend title and made no claim to the property devoted to the trust . . . ."[56] After hearing witness testimony and receiving other evidence, the

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46. *See generally* JONES, *supra* note 20, at 25 (discussing the origin of the office of attorney general).

47. *Id.*

48. *See id.*

49. *See id.* at 27-29. Some of the charitable purposes found to be within the equity of the preamble included charities dedicated "[t]o find bows and arrows for children between the age of seven and seventeen . . . [t]o build a causeway to a mill . . . [t]o support bastards, orphaned on the death of their mothers . . . [t]o relieve the inhabitants of taxes for bastards . . . [and t]o maintain a public midwife within the parish . . . ." *Id.* at 27-28 (quoting the *Reading* of Frances Moore).

50. *See infra* notes 68-74 and accompanying text.

51. The Statute of Elizabeth, Stat. 43 Eliz. I, c.4 (1601), *reprinted in* FRATCHER, *supra* note 12, § 348.2, at 30-31, n.8.

52. *See* JONES, *supra* note 20, at 40. One of the commissioners was required to be the "Bishop of the diocese," while the others were required to be "persons of good and sound behavior." *Id.*

53. *See id.* at 41.

54. *Id.* at 42. According to Jones and others, the term "interested party" was liberally construed and included a broad class of individuals. *See id.* at 42-43.

55. *See id.* at 44.

56. *See id.* at 42 (quoting Moore).

commissioners issued a decree to the court of chancery.[57] Parties that did not prevail before the commissioners could appeal to the Chancellor.[58] If the appeal to the Chancellor was unsuccessful, a final appeal could be made to the Crown.[59]

Historical accounts suggest that charitable enforcement by the commissioners was a great success initially.[60] Moreover, the commissioner's inquiry was, at the outset, a marked improvement over the bill and answer procedure that it replaced. Legal historian Gareth Jones explains:

> The initial success of the commissioners' investigations can be measured by the fact that in the twenty-four years from the enactment of the first charity statute in 1597 to the death of James I [in 1625[61]] over one thousand decrees were sealed, each one of which concerned the administration of a particular charitable trust; whereas in the two hundred years between 1400 and 1601 not more than one or two decrees affecting charitable trusts could have been made by the Chancellor annually.[62]

Thus, the commissioners corrected a great number of charitable abuses that would have continued unabated under the previous enforcement regime.

The most significant reason for the early success of the commissioners was, perhaps, the commitment, confidence, and enthusiasm of those who served as commissioners and jurors.[63] However, once this public confidence and enthusiasm waned, the efficacy of the commissions was fundamentally undermined.[64] The death knell of the commissions was

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57. *See id.* at 44.

58. *See id.* at 45.

59. *See id.* at 46.

60. *See id.* at 52.

61. *See* HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY 25 (C.R. Cheney, ed. 1945).

62. JONES, *supra* note 20, at 52.

63. *See id.* at 53 ("As long as society appreciated the urgency of the charity commissioners' task, the statutory procedure would flourish. However, once men become indifferent to the need to sustain 'good godly and charitable uses,' the procedure would be revealed as cumbersome rather than summary, dilatory rather than speedy, costly rather than cheap in execution.").

64. *See id.* ("The method of investigation . . . could not efficiently function in a society whose gentry served with reluctance as commissioners, whose jurors resented their jury service, whose parish officers were lax and inefficient, whose central government was apathetic, and whose Chancellor would not 'oppress any man for the sake of a charity' and bitterly regretted the privileges which his predecessors had afforded the charitable trust.").

finally sounded with the Civil War.[65] The post-war hardships from the end of the Civil War until the Restoration[66] caused people to simultaneously misappropriate charitable assets and to turn a blind eye to such behavior.[67] Therefore, with the proliferation of charitable violations, and increased public apathy, the once promising commissions ultimately failed to effectively safeguard charitable trusts.

D. *The Attorney General and the Re-emergence of Chancery Enforcement*

From the enactment of the Statute of Elizabeth until the Restoration, the commissioners continued to investigate and correct charitable abuses. However, as previously discussed, the subject matter jurisdiction of the commissioners only extended to charitable endeavors specifically enumerated in, or within the equity of, the preamble to the Statute of Elizabeth.[68] For matters outside the letter and the spirit of the preamble, and consequently, outside the scope of the statutory reform, the chancery

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65. *See id.* at 53-54 (discussing the comments of Henry Twyford and John Herne in the mid-1670s).

66. The English Civil War ended in 1645. *See* HOLDSWORTH, *supra* note 12, Vol. VI, at 142-63. The Restoration occurred in 1660. *See id.* at 148-49.

67. *See* JONES, *supra* note 20, at 53-54.

68. *See supra* note 49 and accompanying text. The preamble to the Statute of Elizabeth provides as follows:

> Whereas Landes Tenementes Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money have bene heretofore given limitted appointed and assigned, as well by the Queenes most excellent Majestie and her moste noble Progenitors, as by sondrie other well disposed persons, some for Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highewaies, some for Educacion and prefermente of Orphans, some for or towardes Releife Stocke or Maintenance of Howses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for releife or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitantes concerninge paymente of Fifteenes, setting out of Souldiers and other Taxes; Whiche Landes Tenementes Rents Annuities Profitts Hereditaments Goodes Chattells Money and Stockes of Money nevertheles have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of Fraudes breaches of Truste and Negligence in those that shoulde pay delyver and imploy the same.

Preamble to the Statute of Elizabeth, Stat. 43 Eliz. I, c.4 (1601), *reprinted in* JONES, *supra* note 20, at 224, App. D.

courts simply retained jurisdiction.[69] Among the charitable purposes enumerated in the preamble, a secular character was the common denominator.[70] The preamble, thus, reflected the shift in late-sixteenth century English philanthropy from religious to secular purposes.[71] More significant, however, was the exclusion of religious charities from the subject matter jurisdiction of the commissioners under the Statute of Elizabeth.[72] Therefore, by the early seventeenth century, enforcement of religious charities (e.g., "uses for the support of preaching ministries"[73]) was exclusively within the jurisdiction of the chancery.[74]

At approximately the same time, the attorney general made its first brief appearance on the charitable enforcement scene. The modern office of attorney general originated with Edward II's appointment of William Langley to the position in 1315.[75] At common law, the attorney general enjoyed the power to bring the malfeasance of charitable fiduciaries to the attention of the Chancellor.[76] Procedurally, this was accomplished by filing an information in the form of a bill and answer.[77] Additionally, individuals could file bills in the Court of Chancery in the name of the attorney

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69. *See* JONES, *supra* note 20, at 26.

70. *See supra* note 68.

71. *See supra* note 35 and accompanying text.

72. *See* JONES, *supra* note 20, at 34-35.

73. *Id.* at 34.

74. *See id.* at 34-35. This issue arose in *Pember v. Inhabitants of Kington*, in which a group of commissioners was rebuked in their attempt to assert jurisdiction over a charitable bequest "for and towardes the maynteninge of a preachinge." *Id.* at 35. The presiding Justices agreed "that the circumstances of the case considered the maintenaunce of a preacher the in said case is not within the meaninge of the statue of 43 Elizabeth . . . ." *Id.*

75. *See* JOHN SAINTY, A LIST OF ENGLISH LAW OFFICERS, KING'S COUNSEL AND HOLDERS OF PATENTS OF PRECEDENCE 41-42, 278-88 (1987). Sainty explains:

> At first [the attorney general's antecedent] was not accorded a specific title in the letters patent but in 1327 he was designated king's attorney . . . . The holder of the post was originally in principle an officer of the Court of Common Pleas. However, William Langley was given authority to act elsewhere in 1315 and this precedent was invariably followed from . . . 1382. . . . The salary of the attorney general was originally £10.

Id. at 41. Some accounts suggest an overlap in responsibility as well as a common origin among the offices of attorney general, king's attorney, king's serjeants at law, and king's prime or ancient serjeant. *See generally id.*; MAUREEN MULHOLLAND, THE OXFORD COMPANION TO BRITISH HISTORY 63-64 (John Cannon ed. 1997) (discussing the origin of the office of attorney general). For an interesting discussion of the contemporary attorney general's role in the British Commonwealth, see JOHN EDWARDS, THE ATTORNEY GENERAL, POLITICS AND THE PUBLIC INTEREST (1984).

76. *See* JONES, *supra* note 20, at 34.

77. *See generally id.*

general.[78] Historian Jones notes "a small crop of informations brought in the name of the Attorney-General and directed to recalcitrant churchwardens and parishioners" filed between 1635 and 1638.[79] These complaints, however, were limited to religious charities and were not part of a cohesive enforcement regime.[80]

In the early seventeenth century, the commissioners had subject matter jurisdiction over secular charities while the chancery, employing the "information" with the involvement of the attorney general, enjoyed subject matter jurisdiction over religious charities.[81] The chancery court remained as the sole means of charitable enforcement to fill the void left by the failure of the commissioners.[82] The fall of the commissioners was also accompanied by the rise of the attorney general as the principal actor in charitable enforcement.[83] The attorney general's authority over charitable trusts was rooted in the Crown's power as *pater patriae*, which encompassed religious charities as well as the commissioner's jurisdiction over secular charities.[84] Charitable abuses were brought to the attention of the chancery by an information filed by the attorney general.[85] By the late seventeenth century, this procedure was firmly established as the appropriate means to enforce all charities.[86] Essentially, the split in subject matter jurisdiction between secular and religious charities was erased with the decline of the commissions.[87] Thus, matters within the scope of the commissioners' jurisdiction (secular charities) came to be treated in the same way as matters traditionally outside of their jurisdiction (religious charities). The chancery and the attorney general, therefore, assumed roles as regulators of all charitable trusts.

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78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 54.

82. *See id.* at 54-55 (discussing statements of subject matter jurisdiction contained in informations filed in the chancery courts from the 1670s and 1680s in an effort to persuade the court to exercise jurisdiction).

83. *See id.* at 55 n.3 (listing a series of cases, from 1670 through 1680, which solidified the propriety of the information in the chancery as the preferred means of charitable enforcement).

84. *See id.* at 55.

85. *See id.*

86. *See id.* at 55-56; *see also id.* at 93 n.3 ("[b]y [the 1690s] it had been held that the proper procedure to determine the fate of surplus [charitable] funds was by information in Chancery, in the name of the Attorney-General at the relation of an individual . . . .").

87. *See id.* at 56 (noting that "[t]he last commission was issued in 1787. By this time the statutory procedure was a creaking anachronism.").

E. *English Charitable Enforcement and the American Revolution*

Although the commissions ultimately failed to successfully reform charitable enforcement, the Statute of Elizabeth marked a crucial milestone in the development of charitable trust law for several reasons. First, the preamble's list of recognized charitable activities proved important in shaping the law of England, and later the United States, by delineating the scope, nature, and legality of charitable purposes.[88] Second, by codifying the common law of charitable trusts, the Statute of Elizabeth synthesized custom, practice, and precedent and provided a concrete foundation for the further refinement of charitable trust law. Finally, the adoption and subsequent failure of the enforcement provision helped clarify the role of the attorney general as the primary agent of charitable enforcement.[89]

In time, however, the attorney general would also fail to adequately enforce charitable trusts, just as the ecclesiastical courts and the commissions previously had failed. As Jones notes, "the information proved to be even more tardy, costly and frustrating than the commission-procedure it supplanted . . . ."[90] Attorney general enforcement proved inadequate for largely procedural reasons. In seventeenth and eighteenth century England, informations alleging charitable abuses were filed in the chancery in the name of the attorney general.[91] The attorney general's powers, however, were limited in two respects. First, the attorney general could only act upon the relation of a private individual.[92] Second, in the interests of fairness, the attorney general could not bear the costs of maintaining an action to correct a charitable abuse.[93] This meant that the relator had to bear the costs of litigation, and understandably, most potential relators were unwilling to do so.[94] These deficiencies were not corrected until the early nineteenth century.[95] By this time, however, the United States had long since gained independence from England, and

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88. *See id.* at 120. The preamble to the Statute of Elizabeth was ultimately adopted as the legal definition of "charity" in 1804 in *Morice v. Bishop of Durham*, 9 Ves. 399 (1804). *See* JONES, *supra* note 20, at 120.

89. *See* JONES, *supra* note 20, at 120.

90. *Id.* at 160.

91. *See id.* at 161.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.* at 165. Under Romilly's Act (25 George III, c. 101 (1812)), interested parties could file a petition with the Lord Chancellor seeking a summary inquiry of an alleged charitable abuse and, thus, obviate the need to file a relator action in the name of the attorney general. *See id.*

American law was no longer subject to English statutory reforms.

Despite the innovations that flowed from the Statute of Elizabeth, its English heritage posed unique problems to the courts of the emerging United States. The former colonies "were in the curious predicament of rebelling against the British Crown, and yet being forced by circumstances to continue operating under British laws."[96] As with all English statutes, the Statute of Elizabeth presented a dilemma to the newly independent states. While the preamble applied to conditions in the United States, the remedial provision was limited by its terms to English circumstances.[97] Moreover, the prevailing wisdom of the late 1700s was that English charitable enforcement was dependent upon the Statute of Elizabeth.[98] The repeal of English laws in the United States, including the Statute of Elizabeth, placed the status of charities on precarious ground in the emerging American law.[99] Throughout the first half of the nineteenth century, the United States Supreme Court would resolve these issues, including the appropriate role of the attorney general.

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96. HOWARD S. MILLER, THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY 1776-1844, at 9-10 (1961) (discussing the temporary retention of English statutes in Vermont in 1797); *see also* Stanley N. Katz et al., *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893*, 3 LAW & HIST. REV. 51, 59 (1985) (discussing the temporary retention of English statutes under the New York Constitution of 1777). *See generally* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (2d ed. 1994) (discussing post-revolutionary legal changes in New England in general, Massachusetts in particular).

97. *See generally* FRATCHER, *supra* note 12, § 348.3, at 35-36.

98. *See infra* note 114-25 and accompanying text. *But see* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 427-28 (3d ed. 1768); *infra* notes 104-06 and accompanying text.

99. *See* FRATCHER, *supra* note 12, § 348, at 35.

III. *TRUSTEES OF THE PHILADELPHIA BAPTIST ASS'N V. HART'S EXECUTORS* AND THE RESTRICTIVE VIEW TOWARD CHARITIES[100]

A. *The Case*

The legal status of charities and the enforcement of charitable trusts were unsettled questions in the years immediately following the American Revolution. Much of this confusion stemmed from the treatment of English statutes and legal traditions by early eighteenth century American courts.[101] The leading charitable enforcement case from this period is *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*.[102] In *Hart's Executors*, the United States Supreme Court defined the legal nature of charities in light of the evolution that occurred as the nation graduated from colonial to full-fledged sovereign status.[103]

Silas Hart was a resident and citizen of Virginia.[104] In 1790, Hart executed a will, providing that "'what shall remain of my military certificates . . . I give and bequeath to the Baptist Association . . . which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry . . . .'"[105] Hart's will described the Baptist Association as "that, for ordinary, meets at Philadelphia, annually . . . ."[106] At the time Hart executed his will, the Baptist Association was unincorporated and was not known by a more

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100. The majority view of the development of charitable trust law in the United States adopts the "first restrictive, then permissive" paradigm. Some commentators, however, reject this dichotomy as overly simplistic. *See, e.g.*, Katz et al., *supra* note 96, at 55, 88. Katz, et al. explain:

> The history of the law of charity in New York illustrates the difficulties of viewing American charity law in the nineteenth century as a battleground between advocates of a "liberal" trust-based policy and a "restrictive" corporation-based policy. Understanding the relationship between private direction and public control of charity demands a close examination in individual jurisdictions of institutional, social and political factors affecting changes in private law. More important, it demands that the law of charity be understood in its relationship, often a collateral one, to developments in the fields of corporations, real and personal property, trusts and wills.

Id. at 88.

101. *See, e.g.*, Note, *supra* note 19, at 442-51, 460-63 (discussing the apparent restrictive to permissive evolution of judicial treatment of charities).

102. 17 U.S. (4 Wheat) 1 (1819).

103. *See id.* at 4-27.

104. *See id.* at 2.

105. *Id.*

106. *Id.*

specific designation.[107] The Baptist Association did not become "The Trustees of the Philadelphia Baptist Association," with the benefit of a state charter, until 1797.[108] Silas Hart died in 1795.[109]

The controversy, and subsequent litigation, began when the executors of Hart's will refused to pay the charitable devise to the Baptist Association in accordance with the will.[110] The executors defended their refusal to convey the property on the grounds that because the Baptist Association was unincorporated at the time of Hart's death, the Baptist Association lacked legal standing to accept the devise.[111] The Court accepted the executors's argument and found in their favor on the dispositive issue of the Baptist Association's lack of competency to take under a will as an unincorporated entity.[112] In the opinion of the Court, Chief Justice Marshall noted that "[a]t the death of the testator, then, there were no persons in existence who were capable of taking this bequest .... This bequest was intended for a society which was not, at the time, and might never be capable of taking it."[113]

The Supreme Court, however, did not end its inquiry there. Rather, the Court examined the fundamental nature of charities in the evolving American law: "whether the character of this legacy, as a charity, will entitle it to the protection of this court?"[114]

The issue was framed by the parties in terms of the applicability and effect of the Statute of Elizabeth under Virginia law.[115] In keeping with the general trend of the former colonies, the Commonwealth of Virginia repealed all English statutes, including the Statute of Elizabeth, in 1792.[116] The Baptist Association maintained that a court's power to enforce charities flowed directly from a court's general equity powers and jurisdiction.[117] The executors, however, contended that the power to enforce charities was derived directly from the Statute of Elizabeth and the *parens patriae* power of the King, and not from general equity powers.[118]

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107. *See id.* at 2-3.

108. *See id.* at 3.

109. *See id.* at 2.

110. *See id.* at 3.

111. *See id.* at 3, 28.

112. *See id.* at 28.

113. *Id.*

114. *Id.* at 29.

115. *See id.* at 3.

116. *See id.;* Katz et al., *supra* note 96, at 55 (discussing the treatment of English statutes and common law in the New York Constitution of 1777).

117. *See* 17 U.S. at 30.

118. The Executors contended that such a charitable legacy "would be sustained in virtue of the statute of the 43 of Elizabeth, or of the prerogative of the crown, or of both; and not in virtue of those rules by which a court of equity, exercising its ordinary powers, is governed." *Id.* at 29.

The executors reasoned that because (1) the American Revolution eliminated the powers of the Crown in the United States and (2) the Virginia Legislature repealed the Statute of Elizabeth, there was no basis for state courts to enforce charities.[119]

After an exhaustive examination of the legislative intent of the Statute of Elizabeth and a review of a number of English chancery decisions, Chief Justice Marshall concluded that, under English law, the sole basis for equity jurisdiction over charities was rooted in the Statute of Elizabeth.[120] To support this contention, Marshall pointed to an apparent lack of chancery cases enforcing charities prior to the enactment of the Statute of Elizabeth in 1601.[121] "We have no trace . . . of an attempt in the court of chancery . . . anterior to the statute, to enforce one of these vague bequests to charitable uses."[122] The Court reasoned that because the equitable power to enforce charities originated solely from the Statute of Elizabeth, the repeal of this statute in Virginia, and the other states, stripped state courts and attorneys general of the power to enforce and repair charitable trusts where the bequest was vague or otherwise defective.[123]

In a separate opinion, Justice Story enumerated a number of English equitable doctrines that generally supported the protection and enforcement of charities.[124] In an opinion that would ultimately set the stage for the Court's decision in *Vidal v. Girard*,[125] Justice Story made the case that equitable jurisdiction to enforce charities could spring from a court's legal jurisdiction.[126] Such an argument would free the equitable enforcement of charitable trusts from its dependency upon the Statute of Elizabeth. Nevertheless, in light of the absence of any records of equitable enforcement of charities in the English chancery courts prior to 1601, Justice Story was forced to conclude that the repeal of the Statute of Elizabeth in Virginia deprived the Court of jurisdiction to enforce Hart's attempted bequest to the Baptist Association.[127]

There are a number of possible reasons for the *Hart's Executors*

Because the Chancellor's powers also derived from the Crown, it is rather curious that the Executors would argue that charitable enforcement authority derives from both the Statute of Elizabeth, as well as the Crown. This assertion seems to undermine the Executor's position as the King's *parens patriae* power arguably provides an extra-statutory basis for charitable enforcement.

119. *See id.* at 29.

120. *See id.* at 27-50.

121. *See id.* at 38.

122. *Id.* at 38.

123. *See id.* at 38-50.

124. *See id.* at 51.

125. 43 U.S. (2 How.) 127 (1844).

126. *See id.* at 144-45, 196-97.

127. *See id.*

Court's historical error. First, the Court seemed to look for a clear and unequivocal example of chancery enforcement of a bequest to a vague or ambiguous beneficiary.[128] The Court could not find, and the Baptist Association failed to produce, such a "smoking gun." Although the Baptist Association offered a number of ancient cases that generally addressed pre-seventeenth century charitable enforcement, the Court was able to distinguish and ignore these cases and remain focused on the issue as they narrowly defined it.[129]

For example, the Court was persuaded by the executor's interpretation of the treatment of conditional bequests in *Porter's case*.[130] If a conveyance is conditional, the *Hart's Executors* Court reasoned, then the conveyance fails if the condition fails.[131] In *Porter's case*, a conditional bequest failed, but there was no attempt to compel the Chancellor to cause the condition to occur or to otherwise cure the failure.[132] Therefore, the *Hart's Executors* Court concluded, if the grantor or beneficiary could have repaired and enforced the bequest through the chancery, they would have.[133] In other words, the Court mistakenly interpreted the absence of enforcement of the failed trust in *Porter's case* as proof of an absence of chancery enforcement prior to the Statute of Elizabeth.

Second, the *Hart's Executors* Court accepted the premise that, by virtue of the terms of the Statute of Elizabeth, only the types of charities described in the statute were enforceable.[134] The flaw in this premise is that certain charities (i.e., religious charities) were beyond the scope of the Statute of Elizabeth's enforcement scheme, yet were nonetheless enforceable in the chancery.[135] Neither the *Hart's Executors* Court nor Blackstone (on whom the Court relied) squarely addressed this split in subject matter jurisdiction between enforcement of secular and religious charities by the commissioners and the Chancellor, respectively. Blackstone, however, came closer to recognizing the bilateral regime of charitable enforcement that existed with the enactment of the Statute of Elizabeth.[136] Blackstone noted:

> The king, as *parens patriae*, has general superintendence of all charities; which he exercises by the keeper of his

128. 17 U.S. (4 Wheat) 1, 6-10 (1819).

129. *See id.*

130. *See id.* at 35.

131. *See id.* at 33-35.

132. *See id.*

133. *See id.*

134. *See id.* at 33 ("The statute of the 43 Eliz. certainly gave validity to some devises to charitable uses, which were not valid, independent of that statute.").

135. *See supra* notes 68-69 and accompanying text.

136. *See* BLACKSTONE, *supra* note 98, at 427-28.

> conscience, the chancellor. And therefore, whenever it is necessary, the attorney general, at the relation of some information . . . files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto.[137]

Thus, Blackstone describes a bilateral regime of charitable enforcement, involving both the traditional role of the attorney general in the chancery and the statutorily established role of commissioners and the Lord Chancellor.

The fact that the *Hart's Executors* Court was aware of Blackstone's work and, presumably, his description of a bilateral enforcement regime compounds the factual and historical error of the Court. Nevertheless, the root of the Court's error may lie in the fact that both it and Blackstone ignored the split in subject matter jurisdiction between religious and secular enforcement. Consequently, the Court erroneously concluded that all charitable enforcement began and ended with the Statute of Elizabeth.[138]

Finally, the *Hart's Executors* Court could only consider what was presented before it. It is possible that the Court was led astray by counsel on both sides, who were undoubtedly more concerned with zealous advocacy than with historical accuracy.[139] In any event, the Court would seize the opportunity to rectify this historical blunder in *Vidal v. Girard*.[140] The historical *faux pas* notwithstanding, *Hart's Executors* was a milestone in the developing law of charity and reflected the prevailing social views that influenced nineteenth century American philanthropy.

B. *The Restrictive View Toward Charities*

Presumably, the Supreme Court could have enforced the charitable trust at issue in *Hart's Executors*. Hart's testamentary intent was clear and it would have been a short step in logic from the "'Baptist Association

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137. *Id.*

138. *See Hart's Executors*, 17 U.S. at 36.

139. *See generally* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1972) (discussing the mishandling of history on the part of judges and attorneys and the intellectual and historical difficulties that often result).

140. *See infra* notes 172-98 and accompanying text.

that, for ordinary, meets at Philadelphia, annually'"[141] to "The Trustees of the Philadelphia Baptist Association."[142] The fact that the Court was willing to find a fatal uncertainty in Hart's will reflected deeper societal attitudes toward charities and equity that informed and shaped the Court's legal reasoning.

The English origins and traditions that pervade charitable trust law invited anti-British hostility. In the years following independence, much of American society viewed all things British with distrust.[143] This anti-British sentiment included hostility toward English laws and was attributable to a prevailing conviction that "English law was the product of an aristocratic society, and, therefore, unfit for America."[144] Many Americans were simply not content to perpetuate a legal regime that originated from their former colonial master.[145] Reverend William Ellery Channing remarked in 1830, for example, that "'the true sovereigns of a country are those who determine its mind. A people, whose government and laws are nothing but the embodiment of public opinion, should jealously guard this opinion against foreign dictation.'"[146]

In addition to an anti-British prejudice, early Americans were deeply committed to separating religion and government and maintaining a balance between them.[147] Charities have historically possessed a strong religious character and were administered primarily by religious groups in the new states, just as they had been in England.[148] Legal rules that disfavored charities insured that religious organizations would be unable to amass wealth and power through charitable trusts.[149] Henry Saint-George Tucker, of the Virginia Supreme Court, stated this point in *Gallego's Executors v. Attorney General*,[150] warning that "the Church, 'if made capable to take, . . . never can part with any thing.' Unless Virginia act[s] quickly to curb bequests to religious organizations, the 'whole property of society' would be 'swallowed up in the insatiable gulph of public charities . . . .'"[151]

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141. 17 U.S. at 27.

142. *See* MILLER, *supra* note 96, at 12-13.

143. *See id.* at 11.

144. *Id.* at 12.

145. *See id.*

146. *Id.* at 11. Poet Philip Freneau made this same point more eloquently: "Can we never be thought to have learning or grace; Unless it be brought from that horrible place; Where tyranny reigns with her imprudent face?" *Id.*

147. *See* Note, *supra* note 19 at 443.

148. *See id.*

149. *See id.*

150. 30 Va. 450 (1832).

151. MILLER, *supra* note 96, at 25; *see also* Note, *supra* note 19, at 443-44.

A related concern involved the desire to keep financial assets out of charitable trusts so they could remain in the economy at-large.[152] Many charitable bequests involved grants of land or personal property which were neither easily convertible to cash nor amenable to exchange.[153] As one commentator noted, "[o]nce such property was placed in trust for the benefit of a perpetual charity, it was likely to remain in the charity's control and out of the flow of commerce indefinitely. The effect of this withdrawal was to stifle economic development by lessening the amount of available capital."[154]

Early American society was also wary of equitable doctrines and chancery courts.[155] "In the sixteenth and early seventeenth centuries, . . . the decisions handed down [by chancery courts] often appeared arbitrary and high-handed."[156] Moreover, chancellors were accused of abusing their broad discretion by blindly approving the "royal prerogative."[157] Additionally, many jurists regarded equitable doctrines as difficult to implement.[158] As one commentator noted, "[m]ost of the critics of chancery objected to the administration of the court rather than to the character of equity law."[159] As a result of these perceived shortcomings, equitable doctrines were out of favor in early America as a source of authority and jurisdiction.[160] Because charitable trusts depended on equity as a basis for enforcement, the popular sentiment against equity translated into an unfavorable environment for charitable trusts.[161] Moreover, the disfavored status of equity deprived the attorney general of its primary basis of enforcement.

Another factor militating against a favorable legal view toward charities involved early American belief in the social utility of poverty.[162] The essential function of charities has traditionally been the alleviation of human suffering, particularly indigence.[163] There were many people of the

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152. *See* Note, *supra* note 19, at 446.

153. *See id.*

154. *Id.* at 444. Echoes of this economic critique are found in contemporary commentaries on charitable enforcement. *See infra* notes 277-80 and accompanying text.

155. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 121 (1986).

156. *Id.*

157. *Id.*

158. *See id.*

159. *Id.*

160. *See id.*

161. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 381, 399 (1959) (defining the primary equitable charitable enforcement doctrines of deviation and cy pres, respectively).

162. *See* Note, *supra* note 19, at 445-46.

163. *See generally* PHILANTHROPY IN THE WORLD'S TRADITIONS (Warren F. Ilchman, Stanley N. Katz, & Edward L. Queen, II eds. 1998) (describing the historical, religious, and cultural aspects of philanthropy on a global and historical basis).

opinion, however, that poverty acted "as a goad to spur the ambitious to success and as a penalty for failure in the economic struggle."[164] Based upon this reasoning, charities were viewed as antithetical to economic growth because they sought to remove the incentives for economic success and the consequences of economic failure.[165] This attitude was also supported by religious and moral teachings of the day.[166] Ironically, such a world view upset the traditional alliance between religion and charity.[167] Nevertheless, economic status was viewed as the just result of one's moral character.[168] "[A] man's economic condition derived from his own moral shortcomings. Excessive drinking, promiscuity and laziness were thought to be the chief causes of indigence."[169] Therefore, just as society viewed charities as upsetting the economic balance, society believed that charities upset the moral balance by removing the consequences of "immoral" behavior.

Other reasons for hostility toward charities under early American law included concerns that the creation of charitable trusts would operate to unfairly disinherit heirs[170] and upset the authoritative resonance that the restrictive view of charities enjoyed as a result of Marshall and Story's endorsement in *Hart's Executors*.[171] The result of these legal rules and prevailing societal attitudes was an atmosphere that generally disfavored charitable trusts. Consequently, both contrary legal doctrines and social opposition impeded charitable enforcement.

IV. *VIDAL V. GIRARD* AND THE PERMISSIVE VIEW TOWARD CHARITIES

A. *The Case*

Judicial and social hostility toward charities slowly began to decline throughout the 1820s and 1830s. This shift in attitude culminated in 1844 in *Vidal v. Girard*.[172] Like *Hart's Executors*, *Vidal* was essentially a will contest.[173] Stephen Girard was born in France in the mid-1700s and settled

164. Note, *supra* note 19, at 446.
165. *See id.* at 445.
166. *See id.* at 446.
167. *See id.* at 445-46.
168. *See id.*
169. *Id.*
170. *See id.* at 445.
171. *See* MILLER, *supra* note 96, at 24. "[I]nferior courts soon cited and followed the [*Hart's Executors*] ruling. Its restrictive doctrines, supported by the reputations of Story and Marshall ...." *Id.*
172. 43 U.S. (2 How.) 127 (1844).
173. *See id.*

in Philadelphia around 1780.[174] At the time of his death in 1831, Girard had amassed a considerable fortune.[175] Girard's will contained a charitable bequest "to provide for such a number of poor male white orphan children . . . a better education, as well as a more comfortable maintenance . . . ."[176] In order to realize his goal of assisting certain children of Philadelphia, Girard's will created a trust of two million dollars "to apply and expend so much of that sum as may be necessary, in erecting . . . a permanent college, with suitable out-buildings, . . . decent and suitable furniture, ... books and all things needful to carry into effect my general design."[177] Girard designated "the Mayor, Aldermen, and Citizens of Philadelphia" as the trustees of his various trusts.[178]

Shortly after Girard's death, the Pennsylvania legislature passed a number of acts for the express purpose of enabling "'the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements, and to execute [Girard's] trusts.'"[179] Four years later, in October 1836, Girard's heirs filed a complaint in federal court against the City of Philadelphia seeking to prevent the city from taking funds from the trust created under Girard's will.[180] The heirs, through their attorney Daniel Webster, attacked Girard's trusts on several grounds. First, the heirs argued that because the City of Philadelphia was "incapable of executing [a trust like the one created by Girard's will], or of taking and holding a legal estate for the benefit of others,"[181] the trusts failed as "indefinite, vague, and uncertain."[182] Second, the trusts were attacked on jurisdictional grounds.[183] The heirs, relying on *Hart's Executors*, argued that the equity jurisdiction to enforce charitable trusts in England was rooted in the "king's prerogative," and, therefore, with the repeal of the Statute of Elizabeth and the severing of political ties with England, there was no jurisdictional basis in American law to enforce vague or uncertain

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174. *See id.* at 128.

175. *See id.* Girard's estate consisted of $1,700,000 in real estate and at least $5,000,000 in personal property. *See id.*

176. *Id.* at 129. In addition to an intent to benefit certain children, Girard sought to improve the area of Philadelphia near the Delaware River by providing funds for the building and maintenance of various capital improvements. *See id.*

177. *Id.* at 130. Girard's will contained highly detailed instructions regarding the design and furnishing of the school, as well as directives on curriculum, admissions standards, discipline, and the hiring of faculty and staff. *See id.* at 130-36.

178. *Id.* at 129.

179. *Id.* at 138. One such act was enacted on March 24, 1832 and another was enacted on April 4, 1832. *See id.*

180. *See id.* at 139. The heirs's complaint was in the form of a bill, an amended bill, and a bill of revivor. *See id.*

181. *Id.* at 141.

182. *Id.*

183. *See id.* at 143.

charitable trusts in equity.[184] Finally, the heirs argued that Girard's trusts were void as against public policy because certain requirements in the trust instrument forbade clergymen from holding office in, or even visiting, the college created by the trust.[185] The crux of the heirs' argument, therefore, was that American courts were without jurisdiction to enforce vague, uncertain, or otherwise defective charitable trusts as a result of the English statutory pedigree of the chancery court's equity jurisdiction over such matters.

In response, the City of Philadelphia answered the heirs' arguments by seeking to divorce the basis of charitable enforcement jurisdiction from the Statute of Elizabeth.[186] This was accomplished by demonstrating the existence of charitable enforcement under English law prior to 1601.[187] If charitable enforcement was rooted in the non-statutory, equitable doctrines of England, then the repeal of the Statute of Elizabeth in the various states, as well as the lack of royal *parens patriae* power or prerogative, would not deprive state courts or attorneys general of the authority to enforce charitable trusts. Rather, American courts would be free to exercise equity jurisdiction over charitable trusts as a direct result of the legal tradition inherited from England. Moreover, American attorneys general would be able to enforce charitable trusts, just like their English counterparts.

In support of its argument, the City of Philadelphia pointed to the existence of tenures in "frankalmoign," and other "perpetual charities in trust" that existed during the late fourteenth century.[188] The city then briefly detailed the history of charities and the mortmain statutes that were enacted by various monarchs to seize charitable assets for the Crown.[189] In light of this historical background, the city argued that the Statute of Elizabeth was enacted merely to codify the preservation of charities and "to lessen the evil of pauperism by hunting up charities, but which established no new principle in the laws of England."[190] In other words, the city contended that the Statute of Elizabeth simply codified an ancient and

184. *See id.* at 144. Girard's heirs argued that "[t]he jurisdiction over charities is not within the ordinary powers of equity, but falls back upon the king's prerogative. . . . It must be an extra-judicial function to set aside a will. How could this power have passed over to a revolutionized and republican state?" *Id.* at 144-45.

185. *See id.* at 143. Girard's will provided that "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college . . . ." *Id.*

186. *See id.* at 150.

187. *See id.* at 150-51.

188. *See id.* at 151.

189. *See id.* The City of Philadelphia pointed to a transfer of charitable assets from the Knight Templars to the Knights of St. John in 1334, as well as the mortmain statutes instituted under Henry VIII in an attempt to seize monastic properties. *See id.*

190. *Id.*

recognized practice and procedure; it did not substantively add to the body of charitable enforcement law.

Justice Story, writing for the Court, began where he left off in *Hart's Executors*. In rejecting the heirs' first argument, the Court held that "where the [City of Philadelphia] has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do."[191] As to the second argument advanced by the heirs concerning the validity of charitable trusts under Pennsylvania law, the Court began by citing numerous English opinions in support of the proposition that charitable enforcement stems from general equity jurisdiction and not from the Statute of Elizabeth.[192] Most significantly, however, was Justice Story's reliance upon newly discovered English chancery cases that conclusively demonstrated the existence of charitable enforcement which pre-dated the Statute of Elizabeth.[193] The consequences of this discovery were that (1) a court's equity power to enforce charities was undoubtedly rooted in an extra-statutory and equitable legal tradition, and (2) such power existed independent of the Statute of Elizabeth. Thus, the repeal of the Statute of Elizabeth by the several states did not deprive state courts or attorneys general of the power to enforce charitable trusts.

Between *Hart's Executors* and *Vidal*, the Commissioners of the Public Records in England began a review of chancery records dating from prior to the enactment of the Statute of Elizabeth.[194] Published in 1827, the *Calendars of the Proceedings in Chancery* "showed conclusively that English courts had indeed enforced charitable trusts long before 1601."[195] The publication of the *Calendars* was immediately seized upon by American courts as a basis to undermine the restrictive view of charities that arose from the *Hart's Executors* decision.[196] Based upon the findings

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191. *Id.* at 187-88.

192. *See id.* at 194.

> There are, however, dicta of eminent judges . . . which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the [Statute of] Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute.

Id. The Court rejected the third of the heirs's arguments—objections to the prohibition against clergymen contained in Girard's trust—because it failed to find any conflict between the terms of the trust and the constitution, laws, or policies of the state of Pennsylvania. *See id.* at 199-201.

193. *See id.* at 196.

194. *See id.*

195. MILLER, *supra* note 96, at 30.

196. *See* Note, *supra* note 19, at 447 (discussing Chancellor Samuel Jones's sustainment of a charitable devise based upon the *Calendars* in *M'Cartee v. Orphan Asylum Soc'y*, 9 Cow. 437

published in the *Calenders*, Justice Story noted that "[a]mong these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the [Statute of] Elizabeth . . . . They establish . . . that . . . charities . . . were familiarly known to, and acted upon, and enforced in the Court of Chancery."[197]

Because charitable enforcement was part of the equity law of England, the *Vidal* Court reasoned, the power, authority, and jurisdiction to enforce charitable trusts was, therefore, "part of the common law of Pennsylvania."[198] As a result of the discovery of pre-Elizabethan charitable enforcement and *Vidal,* American courts were given broad discretion to liberally enforce charitable trusts.

B. *The Permissive View Toward Charities*

Although the *Vidal* Court authoritatively approved the permissive view of charities, certain states were more progressive in their enforcement of charitable trusts prior to 1844. The constitutions of Pennsylvania, Massachusetts, Vermont, and New Hampshire, for example, contained provisions that expressly encouraged philanthropy.[199] The constitutions of Connecticut and Rhode Island were silent on the issue of charity; however, these states generally "displayed a friendly attitude toward charitable trusts and uses during the first decades of national independence."[200]

This hospitable attitude toward charities was reflected in the courts of these states.

> In those states where social conditions and public opinion combined to produce an atmosphere favorable to charities, the judiciary was not inclined to be concerned about how the power to enforce charitable trusts originated. Instead, they found sufficient justifications for enforcement in custom, benefit to the public, the English heritage of permissiveness, and the power of a testator to control the disposition of his property.[201]

(N.Y. 1827)).

197. *Vidal,* 43 U.S. at 196.

198. *Id.*

199. *See* MILLER, *supra* note 96, at 15-17; *see also* Fishman, *supra* note 26, at 621-23 (discussing philanthropy in North America from the beginning of settlement through the early post-revolutionary period).

200. MILLER, *supra* note 96, at 17.

201. Note, *supra* note 19, at 460; *see also* Fishman, *supra* note 26, at 631-37 (describing various state statutes in the late eighteenth century designed to facilitate and encourage the creation of charitable corporations).

Even in the so-called restrictive states, such as Virginia and Maryland, there were periodic judicial and legislative attempts to ease restrictions on charitable trusts.[202]

Despite the experiences of the individual states, *Vidal* imposed the permissive view of charitable trusts upon the entire nation. Several factors account for the shift in judicial treatment of charities between *Hart's Executors* and *Vidal*.[203] One of the arguments against a permissive view of charities concerned fears that such a legal regime would allow religious institutions to grow too strong, and thus, upset the delicate balance between church and state.[204] Because "politically powerful, state-supported church[es]" never emerged in permissive jurisdictions, these fears eventually subsided.[205]

At the time *Hart's Executors* was decided, the American economy was largely agricultural.[206] Charitable trusts were disfavored because it was believed that they operated to keep potentially productive land out of the economy.[207] By the middle of the eighteenth century, however, "this objection declined in importance as the growing use of currency changed a land-based economy into one of a more fluid, exchange-oriented nature."[208] Moreover, with increased urbanization, poverty was no longer seen as a pro-social influence to motivate the industrious and punish the idle.[209] Therefore, the alleviation of poverty through charitable trusts ceased to be viewed as an economic hindrance.

> [D]evelopments in the latter part of the century clearly indicated that man was not necessarily the master of his own fate and that indigence was often the result of conditions over which the individual had no control . . . . Since philanthropy was an obvious means of improving the lot of the poor, it was natural that it be encouraged in any way possible.[210]

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202. *See* MILLER, *supra* note 96, at 28 (discussing Justice Dabney Carr's attempted retreats from the *Gallego* and *Janey's Executor* decisions, the Virginia legislature's attempt "to alter the course of the state's charity law," and the Maryland legislature's response to the *Dashiell* case). *See generally* Gallego's Executors v. Attorney General, 30 Va. (3 Leigh) 450 (1832); Janey's Executors v. Latane, 3 Va. (1 Va. Cas.) 327 (1833); Dashiell v. Attorney General, 5 H&J 392 (1822).

203. *See generally* MILLER, *supra* note 96, at 41-42 (noting that a concern for individual rights and property rights, as well as the popularity of social causes among the upper-class created an atmosphere of permissiveness toward charities).

204. *See* Note, *supra* note 19, at 461-62.

205. *Id.* at 461.

206. *See id.*

207. *See id.*

208. *Id.*

209. *See id.*

210. *Id.* at 461-63.

Finally, charities commanded favorable legal treatment because of their widespread popularity.[211] Charitable works for the benefit of the poor in Boston were widely imitated in other cities.[212] Local women's societies, for example, typically engaged in educational and religious charitable works.[213] Charitable activities became so widespread that one commentator of the day noted, "'every infirmity, every misfortune, every vice even, has a phalanx of philanthropists to oppose its effects.'"[214] The proliferation of charitable organizations did not escape judicial notice. In interpreting issues involving charitable bequests, one judge advised, "'[l]aws and acts which tend to public utility . . . should receive the most liberal and benign interpretation to effect the object intended or declared.'"[215] Such an interpretative philosophy also mirrored a growing judicial deference toward the donative intent of settlors.[216] The shift toward a favorable treatment of charities, reflected in *Vidal*, allowed courts to be more proactive and assertive in upholding and preserving charitable trusts. This permissive view also cleared the way for the attorney general to assume its traditional enforcement role in the United States.

V. *TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD* AND THE CONTEMPORARY ROLE OF THE ATTORNEY GENERAL

A. *The Case*

In England, the attorney general played an integral role in charitable enforcement since at least the early 1600s.[217] Before this role could be incorporated into American law, the status of charitable trusts needed to be resolved. The result of *Hart's Executors* and *Vidal* was that charitable trusts became favored under American law, and courts liberally construed them in order to repair minor flaws in their creation and effectuate the charitable intent of the settlor. Thus, by 1844, the courthouse became a safe haven for charitable trusts in the United States. Once the courts settled the legal status of charitable trusts, American law was ready to embrace the traditional role of the attorney general.

Trustees of Dartmouth College v. Woodward arrived immediately after *Hart's Executors* and its restrictive rule toward charitable trusts. Nevertheless, elements of *Dartmouth College* survived into the permissive,

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211. *See* MILLER, *supra* note 96, at 41-42.
212. *See id.* at 42.
213. *See id.*
214. *Id.* (quoting Samuel Gridley Howe's 1833 report in the *North American Review*).
215. *Id.* (quoting Judge Henry Baldwin).
216. *See id.*
217. *See supra* notes 75-80 and accompanying text.

post-*Vidal* era and provided the precedential authority for charitable enforcement by the state under the aegis of the attorney general.[218] *Dartmouth College* involved a power struggle among the school's officers and trustees.[219] In the mid-1750's, Reverend Eleazer Wheelock established "a charity school for the instruction of Indians in the Christian religion."[220] Reverend Wheelock received a royal charter in 1769, which incorporated the school under the name "Dartmouth College."[221] In 1816, the New Hampshire legislature passed a series of acts "'to amend the charter, and enlarge and improve the corporation of Dartmouth College.'"[222] The impetus for these amendments was partly the dissatisfaction among the trustees with John Wheelock, Reverend Wheelock's son and successor as college president.[223] In response to the amendments to the charter, the trustees of the college split into two factions.[224] One group organized itself under the name "Dartmouth University," while the other continued to operate as "Dartmouth College."[225] The remaining trustees of Dartmouth College brought an action to recover "the book of records, corporate seal, and other corporate property" from the treasurer of Dartmouth University.[226]

Despite the academic infighting, the substantive importance of the case was the constitutionality of state legislative amendments to corporate charters.[227] Although the bulk of the *Dartmouth College* decision concerned the developing status of corporations under the United States Constitution,[228] the Court also explored the nature of eleemosynary[229]

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218. *Dartmouth* was decided in 1819, the same year the U.S. Supreme Court endorsed the restrictive view of charities in *Hart's Executors*. *See* Trustees of Dartmouth College v. Woodard, 17 U.S. (4 Wheat.) 518 (1819); 17 U.S. (4 Wheat.) 1 (1819). As discussed below, however, *Dartmouth* established the attorney general's monopoly on charitable enforcement. *See infra* notes 217-42. This feature of charitable enforcement survived into the emergence of the permissive view of charities announced in 1844 in *Vidal*. *See* 43 U.S. 127 (1844); *supra* notes 172-216 and accompanying text.

219. *See generally* KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 141-42 (2d ed. 1996).

220. *Dartmouth*, 17 U.S. at 631.

221. *See id.* at 626.

222. *Id.*

223. *See* HALL ET AL., *supra* note 219, at 141-42.

224. *See Dartmouth*, 17 U.S. at 624.

225. *See* HALL ET AL., *supra* note 219, at 141-42.

226. *Dartmouth*, 17 U.S. at 624.

227. *See* HALL ET AL., *supra* note 219, at 141.

228. Specifically, *Dartmouth* concerned the "Law impairing the Obligation of Contracts" clause of the United States Constitution. U.S. CONST. art I, § 10, cl. 1; *see also Dartmouth*, 17 U.S. at 625.

229. "Eleemosynary" means "[o]f or pertaining to alms or almsgiving; charitable. . . . [d]ependent on or supported by alms. . . . [o]f the nature of alms; given or done as an act of charity; gratuitous." THE OXFORD ENGLISH DICTIONARY, VOL. V, at 129 (2d ed. 1989).

corporations and the relationships among their various parties. The Court noted that, by the terms of incorporation, Dartmouth College was "an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specific objects of that bounty . . . ."[230] The Court, however, grappled with the roles, responsibilities, and duties of the various groups and individuals associated with the college.[231] The Court noted that "[t]he founders . . . have parted with the property . . . , and their representatives have no interest in that property. The donors of land are equally without interest.... The students are fluctuating, and no individual . . . has a vested interest in the institution."[232] Even though the trustees of Dartmouth College were embroiled in litigation over the amended corporate charter, the Court maintained that "the trustees ha[d] no beneficial interest to be protected."[233] Therefore, the Court concluded, the donors and settlors of the charitable trust did not have any recognized equitable interests because they were divested of any interest at the moment the charity was created.[234] On the other hand, the beneficiaries (i.e., the future students of Dartmouth College) had no vested interests prior to enrollment.[235] Finally, the Court reasoned that although the individual trustees were responsible for the administration of the charitable trust, the trustees "possessed no private, individual, beneficial interests . . . ."[236]

The Court, then, excluded settlors and beneficiaries as potential legally interested parties in enforcement and administrative issues.[237] Additionally, the Court excluded trustees when acting in an individual and private capacity.[238] When acting in a collective and fiduciary capacity, however, the Court found that "the whole legal interest [of a charitable trust] is in [the] trustees, and can be asserted only by them."[239] As one commentator noted, Chief Justice Marshall's opinion in *Dartmouth College* "is important not so much because it decided who can represent the interest of the charitable beneficiaries, but because it decided who cannot."[240]

Although the Court spoke in absolute terms regarding the trustees' role in charitable enforcement and administration, the Court rooted the

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230. *Dartmouth* 17 U.S. at 640.
231. *See id.* at 641-42.
232. *Id.*
233. *Id.* at 641.
234. *See id.* at 643.
235. *See id.*
236. *Id.*
237. *See id.* at 642.
238. *See id.* at 643.
239. *Id.* at 645.
240. Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 41 (1993).

trustees' power in an implied contract.[241] In the *Dartmouth College* context, the contract was between "the donors, the trustees, and the crown . . . ."[242] In a general eleemosynary context, the parties to an implied charitable trust contract are the settlor, the trustees, and the crown's successor, the state. With the exclusion of settlors and beneficiaries, the trustees and the state, acting through the attorney general, remained as the recognized interested parties in American charitable trust law. Thus, *Dartmouth College* firmly established the attorney general as a recognized participant in charitable enforcement and as the primary guardian of the beneficiaries's interests.

B. *The Contemporary Role of the Attorney General*

The result of *Dartmouth College* signaled the beginning of the contemporary regime of charitable regulation in American law. While the trustees remain primarily responsible for the administration of charitable trusts, the attorney general stands ready to challenge the trustees when the direction of the charity deviates from its purpose, to the detriment of the intended beneficiaries.[243] The modern American attorneys general fulfill their regulatory duty primarily by invoking the court's equitable powers of deviation[244] and *cy pres*.[245] When charitable assets are jeopardized, the attorney general is empowered to file suit or intervene, petitioning the

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241. *See Dartmouth*, 17 U.S. at 643.

242. *Id.*

243. *See* Budig et al., *supra* note 3, at 108 ("Although the corporate standard is usually applied to nonprofit directors, it is significant that the attorney general is vested with the power and discretion to bring suit against directors who do not perform their duties.").

244. The Restatement (Second) of Trusts defines the doctrine of deviation as follows:

> The court will direct or permit the trustee to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

RESTATEMENT (SECOND) OF TRUSTS § 381 (1959).

245. The Restatement (Second) of Trusts defines the doctrine of *cy pres* as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general intention of the settlor.

RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

court to preserve the charitable character of the property in equity.[246]

Daloia v. Franciscan Health System, Inc.[247] provides an illustrative example of the contemporary role of the state attorneys general in the United States. *Daloia* concerned two charitable trusts established by a pair of sisters for the benefit of a Catholic medical center.[248] The purpose of the trusts was for "use among the sick-poor in accordance with the hospital's mission."[249] The hospital was eventually sold.[250] The sale, however, rendered the express terms of the trust impossible to implement.[251] Accordingly, the trustee sued the hospital-beneficiary to recover the funds that had been received by the hospital and to redistribute the funds to alternate beneficiaries.[252] In response, the hospital sought to apply the funds from the charitable trusts to another Catholic hospital in a nearby city.[253] After successfully intervening in the case, the attorney general argued for the application of both *cy pres* and deviation under the court's equity powers.[254] The court ultimately accepted the attorney general's arguments in favor of the application of deviation to allow the trust funds to be diverted to the other hospital, finding that "the award of the funds to [the other hospital] will not change the settlors' underlying charitable objectives."[255]

The *Daloia* case demonstrates the results of the historical development of attorney general enforcement and reflects the modern legacy of *Hart's Executors*, *Vidal*, and *Dartmouth College*. First, by invoking the attorney general's mandatory involvement in the case,[256] the court acknowledged the exclusivity of attorney general enforcement that survives from the pre-Elizabethan era. Contemporary law, therefore, gives modern-day form and substance to the principles of charitable regulation and the role of the attorney general espoused in the *Dartmouth College* decision.

Second, *Daloia* reaffirms the long-recognized need for a unique regulatory regime in the eleemosynary context. Although the hospital-

246. *See* Blasko et al., *supra* note 240, at 45.

247. 679 N.E.2d 1084 (Ohio 1997).

248. *See id.* at 1089-90.

249. *Id.* at 1086.

250. *See id.* at 1087.

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.* at 1091. *But see* First Nat'l Bank v. Unknown Heirs of Donnelly, 122 N.E.2d 672 (Ohio App. 1954) (applying the doctrine of deviation upon the volition of the court without the involvement of the attorney general).

255. *See Daloia*, 679 N.E.2d at 1092. The court explained that "[g]iven the change in circumstances, we believe that a deviation from the express terms of the trust instruments is appropriate to carry out the settlors' charitable wishes." *Id.*

256. *See id.* at 1087 n.4.

beneficiary in *Daloia* also argued for the application of *cy pres* and deviation,[257] its motivations differed significantly from those of the attorney general. The hospital, like any reasonable corporation, was undoubtedly loath to part with the income from the trusts. The attorney general, however, discharged its obligation under the law by seeking equitable relief on behalf of the ultimate beneficiaries of the charitable trusts, the people of the state.[258] The ultimate beneficiaries of the charity would not otherwise have been able to participate in the contest over the funds. *Daloia*, therefore, acknowledges the attorney general's function of speaking for those who cannot speak for themselves and echoes the standing principles espoused in *Dartmouth College*. This function goes to the very essence of philanthropy and reflects many of the same regulatory goals enumerated in the preamble to the Statute of Elizabeth.[259]

Finally, *Daloia* upholds the viability of the permissive view of charities that prevailed from the *Hart's Executors* and *Vidal* debate. The *Vidal* decision authoritatively conferred a special status upon charities under American law. Specifically, charitable trusts are favored under the law and equity will still step in to preserve and effectuate a settlor's philanthropic intentions. Under a more intolerant standard, the *Daloia* trusts would have failed once circumstances rendered the express terms of the trust instruments impossible to implement. Under the permissive *Vidal* rule, however, the attorney general has the latitude to seek the modification and preservation of trusts through the equitable powers of a sympathetic and responsive judiciary.

VI. CRITICISM AND DEBATE OF THE MODERN ATTORNEY GENERAL'S ENFORCEMENT OF CHARITABLE TRUSTS

A. *Critics of Attorney General Enforcement*

The modern form of charitable enforcement by state attorneys general is not, however, without its critics. A number of commentators have addressed the issue by exploring the deficiencies in attorney general enforcement and by offering alternative enforcement regimes.[260] These critiques can largely be boiled-down to the assertion that a politically influenced[261] state attorney general suffers from a lack of funds, a lack of

257. *See id.* at 1087 (noting that the appellees argued that the "funds . . . should be distributed 'to St. Elizabeth Medical Center . . . '").

258. *See id.* at 1087 n.4.

259. *See supra* note 68.

260. *See infra* notes 263-80 and accompanying text.

261. Critics allege that the attorney general's oversight of charities is uniquely affected by its inherent political nature as an elective office. Specifically, such critics assert that political

staff, and an impossibly overwhelming case load resulting in insufficient and ineffective regulation of charitable fiduciaries.[262] Although there is considerable overlap, the criticisms of attorney general enforcement generally fall into four basic categories. Each category is discussed, in turn, below.

1. The Preclusion of Legitimately Interested Parties from Correcting Charitable Abuses

As discussed in Section V, charitable enforcement is exclusively within the authority of the state attorney general. As a result, the public is precluded from compelling the attorney general's intervention in cases of misappropriation of charitable assets.[263] Attorney Mary Frances Budig explains the problems that result from limited standing: "Despite the attorney general's monopoly on enforcement, the attorney general cannot be compelled to bring an action for enforcement . . . . In practice, the attorney general's vast authority is seldom used . . . . In fact, the attorney general generally avoids taking affirmative action, unless the case involves dishonesty or extreme imprudence."[264]

Thus, critics argue that the preclusion of other potential charitable regulators rests on the dubious premise that, in a case of alleged trustee misconduct, the attorney general is the only party with a legally cognizable interest in charities sufficient to bring an enforcement action.[265] The corollary to this premise is that the true party in interest in such cases is the public at large.[266] Therefore, the attorney general, as the legal representative of the public, is the only party with standing to bring an enforcement action.[267] Reform-minded critics, however, regard this

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considerations taint the attorney general's charitable enforcement policy and agenda. Blasko, for example, notes that attorneys general "may well see no point to a muckraking investigation of charges against respectable trustees and corporate officers." Blasko et al., *supra* note 240, at 48 (citing Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 478 (1960)).

262. *See id.*

263. *See* Budig et al., *supra* note 3, at 108-10.

264. *Id.* at 109-10.

265. *See* Blasko et al., *supra* note 240, at 41 (criticizing the reasoning of the Court in *Dartmouth College v. Woodward*).

266. *See id.* at 42.

267. *See id.* at 41-42. Blasko, et al. explain:

> The [*Dartmouth College*] Court's reasoning . . . leads to the conclusion that only a trustee or the attorney general has an interest that allows a suit. Both judicial and scholarly commentators have given more pragmatic reasons for the exclusivity of attorney general enforcement. Observers were concerned that charities would be embroiled in "vexatious" litigation, constantly harassed by suits brought by parties

conclusion as narrow and formalistic.[268] If the "public" is the true party in interest in charitable enforcement, they argue, then it stands to reason that a sufficiently identifiable subset of the "public" can, and perhaps should, also be recognized as a true party in interest and enjoy standing to enforce charitable trusts.[269]

2. The Attorney General is Equipped to Remedy Only the Most Egregious Violations

This charge is largely a matter of supply and demand. On the demand side, most states have thousands of charitable trusts and corporations.[270] Each trust represents a potential for abuse and misappropriation of charitable assets. Therefore, the demands for investigation and enforcement are great. On the supply side, the attorney general's resources are relatively meager.[271] Thus, the attorney general must judiciously and carefully allocate resources to maximize its regulatory resources. As a practical matter, then, only abuses that (1) involve high dollar amounts, (2) receive media attention and notoriety, or (3) involve particularly reprehensible behavior, are subject to the attorney general's scrutiny.[272]

3. Infrequent and Arbitrary Enforcement by the Attorney General

Critics generally find infrequent and arbitrary enforcement symptomatic of a lack of funds, a lack of interest, or both. Brenda Boykin, for example, explains that "[l]imits on the resources of the Attorney General's office may make it . . . unresponsive. Several commentators have argued that state attorneys general lack both the finances and the

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with no stake in the charity.

Id. at 41.

268. *See, e.g., id.* at 52.

269. *See id.*

270. *See* Fishman, *supra* note 26, at 617-18 (discussing the proliferation of charitable organizations in the United States); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1408 (1998) ("What has undeniably changed, however, is the size and behavior of the charitable sector itself, and the need of thousands of new charities to reach beyond traditional populations to staff their boards. Explosive growth and expansion into commercial activities have transformed the typical charity from a perpetual fund invested by trustees into a modern enterprise subject to the management demands of a complex operating business.").

271. *See* Fishman, *supra* note 26, at 669-70 (describing the general "lack of resources devoted to monitoring" of charities throughout the various states).

272. *See* Budig et al., *supra* note 3, at 109-10; *see also* Blasko et al., *supra* note 240, at 39 ("Lack of money, coupled with the obligation to discharge the other important duties of the attorney general's office, contributes to inadequate staffing for the purpose of supervising charities. This often results in a necessarily selective prosecution of only the most egregious of abuses.").

incentive to oversee effectively nonprofit corporate managers."[273] Additionally, Budig notes that "[a]ctual enforcement against charitable trusts and corporations has been sporadic. The attorney general has many responsibilities beyond supervising charities and that duty often takes low priority."[274] The essence of this view was perhaps best expressed by the Delaware Attorney General in *Oberly v. Kirby*,[275] lamenting that charitable beneficiaries are forced to rely upon "'the inclination and budget of a public official to vindicate their rights.'"[276]

4. Economic Critique

Not surprisingly, Chief Judge Richard Posner of the Seventh Circuit critiques the current supervision of charitable trusts on economic grounds and dismisses the attorney general's role as "largely formal."[277] Posner contends that charitable trusts suffer because they are disconnected from the economic forces that guide the behavior of corporate directors in the for-profit realm.[278] Posner endorses a rule that would require "charitable foundations to distribute every gift received . . . within a specified period of years."[279] He claims such a rule would "give trustees and managers of charitable foundations an incentive they now lack to conduct a tight operation."[280]

B. *Defenders of Attorney General Enforcement*

Many of the complaints leveled against the current charitable enforcement regime are creditable and well-reasoned. Nevertheless, there is evidence to suggest that state attorneys general are at least somewhat effective in preserving charitable assets and disciplining fiduciaries.[281] Professor of Law Rob Atkinson, in particular, has noted the positive

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273. Note, *The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits*, 63 N.C. L. REV. 999, 1009 (1985); *see also* Fishman, *supra* note 26, at 669 (discussing the "multiplicity of responsibilities and extremely limited resources" of the attorney general).

274. Budig et al., *supra* note 3, at 110; *see also* Blasko et al., *supra* note 240, at 39-40 ("Attorney General enforcement is problematic on a practical level for several reasons. Given the current budgetary constraints facing almost all state governments, the effectiveness of attorney general enforcement is likely to be sporadic, at best.").

275. 592 A.2d 445 (Del. 1991).

276. *Id.* at 468 (quoting the Attorney General's Opening Brief at 16).

277. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 484 (3d ed. 1986).

278. *See id.*; *see also* Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227 (comparing and contrasting for-profit and nonprofit corporations).

279. POSNER, *supra* note 277, at 484.

280. *Id.*

281. *See infra* notes 282-91 and accompanying text.

attributes of exclusive attorney general enforcement as well as deficiencies in its criticism.[282] First, Atkinson points to the "unproven premise," based on "anecdotal . . . horror stories," that charitable enforcement falls far short of some idealized and hypothetical gold standard of perfect enforcement.[283] Second, in response to the assertion that attorneys general are too preoccupied with other matters to do a proper job of charitable enforcement, Atkinson notes that "[o]ther areas arguably need more attention than charity, and may properly be getting it."[284]

Third, critics who point to the multitude of duties and responsibilities of the attorney general as a cause of deficient enforcement[285] ignore the fact that most state attorney general offices are compartmentalized into specialized sections, much like the various practice groups typically found in larger law firms.[286] When considered as a whole, the state attorney general's office is charged with a plethora of responsibilities. Nevertheless, specialized and focused units with a high degree of expertise perform most of the charitable regulation.[287] Fourth, critics also tend to overlook the deterrent effect appurtenant to the existence of regulation and the threat of enforcement.[288]

Fifth, Atkinson points to "extra-legal methods" of charitable regulation that operate as a *de facto* supplement to attorney general enforcement.[289] Specifically, charities that squander donations on wasteful or dubious endeavors risk the loss of future donations as benefactors vote with their wallets.[290] Finally, by virtue of the attorney general's monopoly on enforcement, charities are shielded from the dangers of over-regulation

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282. *See generally* Atkinson, *supra* note 35.

283. *Id.* at 683. Atkinson asks rhetorically, "[w]hen proponents of [charitable enforcement reform] argue that attorneys general are underfunded and understaffed, we have a right to ask, 'In comparison to what?'" *Id.*

284. *Id.* (noting that "I am more disturbed about my wife's grandfather's gold watch being in the hands of a burglar than I am about some deacon dipping into the collection plate at her ancestral church.").

285. *See, e.g.*, Blasko et al., *supra* note 240, at 48 (noting that "[a]ttorneys general's offices . . . have many pressing concerns aside from charities").

286. *See, e.g.*, STATE OF OHIO ATTORNEY GENERAL BETTY D. MONTGOMERY OFFICE OVERVIEW. The Office of the Ohio Attorney General, for example, is divided into twenty-six sections, including a Charitable Law Section which is dedicated in large part to the enforcement of Ohio's Charitable Trust Act. *See id.*

287. *But see* Fishman, *supra* note 26, at 669 (discussing that, in 1977, while some states devoted personnel and resources exclusively for charitable enforcement, such states were in the minority).

288. *See* Budig et al., *supra* note 3, at 110 (criticizing attorney general enforcement on the grounds that "[i]n practice, the attorney general's vast authority is seldom used").

289. *See* Atkinson, *supra* note 35, at 684.

290. *See id.*

and wasteful litigation.[291]

VII. PROPOSALS FOR REFORM

As Section VI demonstrates, the debate over charitable enforcement reform continues with reasonable arguments on both sides. However, as with all systems, including enforcement regimes, there is room for improvement. To this end, a number of commentators have offered proposals to reform and improve the state of charitable enforcement. Some of the more notable and intriguing reform proposals are briefly outlined below.

A. *Reforms Based Upon Increased Standing*

1. Special Interest Doctrine

As with all of the reforms that address the standing issue, the special interest doctrine seeks to increase the class of those who can enforce a charity by connecting standing to a more expansive theory or definition.[292] The theory at work in the special interest doctrine is the analogy between private trusts and charitable trusts.[293] In a private trust, both trustees and beneficiaries have standing to enforce. As attorney Mary Grace Blasko explains, "[c]ourts that allow private [trustees] to sue charities basically transplant this doctrine of an 'interest' in a trust into the philanthropic setting."[294] The analogy between trustees of private trusts and their counterparts in charitable trusts is quite clear and obvious. The analogy between private beneficiaries and charitable beneficiaries, however, is decidedly more difficult to appreciate as charitable beneficiaries are by

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291. *See* Blasko et al., *supra* note 240, at 39 (warning against the possibility of "over-regulating philanthropy or exposing it to increased litigation. . . . "); Fishman, *supra* note 26, at 670 ("A more practical reason for denying the public standing is that the persons benefited by charities are usually members of a large and shifting class of the public. If any member of that class had standing, the charity would by subjected to much unnecessary litigation."); Note, *supra* note 273, at 1011 (cautioning against the potential for "vexatious lawsuit[s]" that could accompany a departure from exclusive attorney general enforcement of charities).

292. When considering increased standing, Brody warns that advocates of increased standing impliedly "believe that the gains in preventing charity abuses outweigh the additional cost in administration, interference in decisionmaking, and the possibility of getting the wrong result." Brody, *supra* note 270, at 1431-32. Brody's cautionary stance is well advised as it is an open question whether the "cure" of expanded standing is better, or worse, than the "disease" of exclusive attorney general enforcement.

293. *See* Blasko et al., *supra* note 240, at 59-60; *see also* Atkinson, *supra* note 35, at 664-85 (discussing standing to enforce charities among donors and beneficiaries among various theoretical models).

294. Blasko et al., *supra* note 240, at 60.

necessity an ambiguous and loosely defined group.[295] The special interest doctrine, however, expands standing to include certain charitable beneficiaries and "provides access to the courts only to those with a particularized and justified involvement in the accomplishment of charitable objectives."[296]

In order to decide which beneficiaries have a "special interest" to justify increased standing, Blasko offers a five-part test.[297] The five elements of the special interest doctrine include: "(a) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff; (b) the presence of fraud or misconduct on the part of the charity or its directors; (c) the state attorney general's availability or effectiveness; .... (d) the nature of the benefitted class and its relationship to the charity[;]"[298] and finally, (e) "subjective and case-specific factual circumstances."[299]

The special interest doctrine accomplishes a number of objectives. First, it provides the courts with a comprehensive analytical framework in which to consider increased standing in the charitable enforcement context. Second, it provides a sound basis in which to grant standing to legitimately interested beneficiaries and to deny standing to those who would merely bring nuisance suits against fiduciaries. As Blasko notes, "[i]f the private party successfully demonstrates the requisite special interest in a charity's philanthropic goals, the action is not likely to be frivolous or needlessly vexatious."[300] Finally, increased standing would augment attorney general enforcement without resulting in overly burdensome regulation of charitable fiduciaries.[301]

2. Relators

Rather than a truly novel reform, the modern use of relators in the charitable enforcement context represents the return of an idea that was used in seventeenth century England.[302] Modern advocates of relators, however, avoid the problems that plagued their earlier use. A relator has been defined as "a party who may or may not have a direct interest in a transaction, but is permitted to institute a proceeding in the name of the

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295. *See id.*

296. *Id.* at 61.

297. *See id.* at 61-78 (describing the five elements and their relationship to one another).

298. *Id.* at 61.

299. *Id.*

300. *Id.*

301. *Id.* ("Correctly applied, the special interest exception creates enforcement opportunities for private parties, enabling them to act essentially as private attorneys general, while still avoiding the most important policy pitfalls associated with lax standing rules.").

302. *See supra* note 78 and accompanying text.

people when that right to sue resides solely in the attorney general."[303] The theoretical basis for the use of relators in the charitable enforcement context lies in *quo warranto* proceedings.[304] Professor of Law James Fishman notes that courts have granted relator status in the nonprofit context to "bar associations, taxpayers, cemetery plot holders, directors of other state departments, and members of a social club."[305] The use of relators increases the scope of standing far beyond the attorney general in jurisdictions that recognize relator actions in charitable enforcement cases.[306] Procedurally, states that have adopted the use of relators in the charitable context permit relators to "file with the attorney general informations alleging abuses by charitable organizations."[307] Perhaps the most intriguing aspect of the use of relators is to allow "the attorney general to bring suit in absentia — to draw upon private resources for the conduct of the suit, but simultaneously retain ultimate control of the proceeding."[308]

3. Grantor Enforcement

Much like the use of relators, grantor enforcement is really an old idea that is experiencing a rebirth. The concept of grantor enforcement is rather similar to the ancient visitorial rights.[309] Grantor enforcement is recognized in private trusts on three bases. First, grantors may enforce trusts if a foreseeable economic interest is the subject of the alleged breach of fiduciary duty.[310] Second, grantors may enforce trusts where the trustee's misdeeds result in a substantial departure from the grantor's expectations.[311] Finally, the grantor may act as "a representative of beneficial interests" to justify an enforcement action.[312] This final basis of grantor enforcement has been applied to charitable trusts on the theory that if a grantor can enforce the "beneficial interest" of a private trust, then there is nothing to prevent the grantor of a charitable trust from doing the

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303. Fishman, *supra* note 26, at 671 (citing Brown v. Memorial Nat'l Home Found., 329 P.2d 118 (Cal. Ct. App. 1958), *cert. denied* 358 U.S. 943 (1959)).

304. *See id.* at 671-72.

305. *Id.* at 673.

306. *See id.* at 673-74.

307. *Id.* at 673 (describing the use of relators and the accompanying procedure under California law). Once again, an old idea (informations) is incorporated into a modern reform proposal. *See supra* notes 81-87 and accompanying text.

308. Blasko et al., *supra* note 240, at 49.

309. *See supra* note 35 and accompanying text (discussing visitorial rights).

310. *See* John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 916-17 (1984).

311. *See id.* at 917.

312. *See id.*

same.[313]

B. *Reforms Modeled After Shareholder Derivative Actions*

Where the directors and officers of a for-profit corporation are guilty of mismanagement, corporate law recognizes the right of a shareholder to bring an action on behalf of the corporation for redress.[314] The basis of this right is the fact that for-profit corporations ultimately exist for the benefit of their shareholders.[315] When one considers that charitable corporations exist for the benefit of their beneficiaries, then the analogy between beneficiaries and shareholders is readily apparent. Thus, the shareholder derivative suit has been advocated as an obvious model for charitable enforcement reform.[316] However, because charitable beneficiaries are necessarily unidentified, reformers substitute beneficiaries with the next best group — members of the nonprofit organization acting on behalf of the beneficiaries.[317]

Boykin explains how some courts have made the leap of importing the shareholder derivative suit into the charitable context:

> Courts in several jurisdictions . . . have recognized the right of members to bring derivative suits on behalf of nonprofit corporations. In most of the decisions, the courts have reasoned that common-law precedent giving shareholders a derivative suit right conferred such a right on members of nonprofit corporations by implication and that this right continues until the state's legislature . . . expressly denies it.[318]

The cornerstone of the shareholder derivative suit is the breach of the duties of care and loyalty. Breach of duty is evaluated in the nonprofit context in terms of "whether a particular transaction allows the entity's assets to be used for the charitable purposes . . . and serves the best

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313. *See id.*

314. *See* Blasko et al., *supra* note 240, at 53.

315. *See id.*

316. *See id.* at 54. Blasko explained: "Although members [of charitable corporations] do not have 'pecuniary interests' . . . , it has gradually been recognized that they do have an 'interest' in the corporation distinct from that of the general public. Since this interest is in some ways analogous to that of a shareholder in a for-profit corporation, members of nonprofit corporations often can use derivative suits to enforce the rights and purposes of the organization." *Id.; see also* Atkinson, *supra* note 35, at 670-73 (discussing derivative suits and member standing); Brody, *supra* note 270, at 1433-34 (discussing director standing).

317. *See* Note, *supra* note 273, at 1004-05.

318. *Id.*

interests of the corporation and the community."[319]

The shareholder derivative model of charitable enforcement has a number of advantages. A mature and well-settled body of substantive law supports shareholder derivative actions.[320] Therefore, unforeseen difficulties are less likely to undermine the implementation of this type of reform as compared to more novel reforms. Similarly, the shareholder derivative procedure is established and generally well-understood by the practicing bar. Thus, unlike other types of reforms, the shareholder derivative model is feasible on both a pragmatic and conceptual level. Finally, like other reforms aimed at increased enforcement standing, the shareholder derivative model would enhance, strengthen, and supplement the existing powers of the attorney general.

C. *Statutory Supplements to the Attorney General's Common Law Powers*

One of the forces driving charitable enforcement reform is the confusion caused by the overlap between corporate law and trust law. Corporate officers find themselves, often unwittingly, embroiled in charitable trust issues. Conversely, state attorneys general often find themselves ill equipped in the corporate arena, armed only with charitable trust law. This phenomenon is perhaps most evident in the nonprofit to for-profit hospital conversion context.[321] A number of hospitals were originally founded as nonprofit organizations.[322] Over time, these formerly charitable hospitals became predominantly for-profit.[323] Nevertheless, these hospitals continue to retain some measure of charitable assets.[324] Thus, a nonprofit to for-profit hospital conversion implicates both trust law and general corporate law.

In an attempt to bring clarity to the overlap of corporate law and trust law, some commentators have suggested a combined solution.[325]

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319. Naomi Ono, *Boards of Directors Under Fire: An Examination of Nonprofit Board Duties in the Health Care Environment*, 7 ANNALS HEALTH L. 107, 130 (1998) (discussing the duties of care and loyalty in a nonprofit shareholder derivative context).

320. *See, e.g.*, Note, *supra* note 273, at 1007.

321. *See generally* Lawrence E. Singer, *The Conversion Conundrum: The State and Federal Responses to Hospitals' Changes in Charitable Status*, 23 AM. J.L. & MED. 221 (1997); Note, *Nonprofit Hospital Conversions in Kansas: The Kansas Attorney General Should Regulate All Nonprofit Hospital Sales*, 47 U. KAN. L. REV. 521 (1999) [hereinafter Kansas Conversions]; Note, *Turning Patients Into Profit: Nonprofit Hospital Conversions Spur Legislation*, 22 SETON HALL LEGIS. J. 627 (1998); Craig R. Mayton, *The View From Ohio*, Mar.-Apr. 1997 HEALTH AFF. 92.

322. *See* Ono, *supra* note 319 at 107.

323. *See id.*

324. *See id.* at 107-08.

325. *See* Kansas Conversions, *supra* note 321, at 562 (discussing a Louisiana statute that

Specifically, by augmenting the attorney general's common law powers with statutory guidance, the best elements of both corporate and trust law can be harnessed.[326] This type of reform has been implemented in Louisiana, New Hampshire, Ohio, and Washington.[327] Advocates claim that such statutory reforms would: (1) outline requisite disclosures and duties for directors; (2) provide guidance for decision making and compliance; (3) ensure fairness by requiring attorney general approval; and (4) preserve charitable assets without unduly burdening legitimate business transactions.[328]

D. *The Internal Revenue Service as a* De Facto *Regulator of Charities*

Charities, by definition, are non-profit organizations. Consequently, charities typically qualify for tax exempt status under section 501(c)(3) of the Internal Revenue Code.[329] As a result, imprudent charitable fiduciaries may avoid implicating charitable trust law, but may run afoul of federal tax law. Thus, the tax collector may operate as a *de facto* charitable regulator.[330] This fact is particularly evident in the nonprofit to for-profit managed care conversion context. Professor of Law Evelyn Brody explains:

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defines the duties of directors and the attorney general in the sale of nonprofit hospitals).

326. *See id.*

327. *See id.* at 562 n.237 (discussing nonprofit hospital conversion statutes in New Hampshire, Ohio, and Washington).

328. *See id.*

329. Section 501(c)(3) of the Internal Revenue Code provides as follows:

> List of exempt organizations.—The following organizations are referred to in subsection (a): (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. §501(c)(3) (1998). Interestingly, I.R.C. § 501(c)(3) reads somewhat like a modern restatement of the preamble to the Statute of Elizabeth. *Compare id.*, *with* Stat. 43 Eliz. I, c.4 (1601), *supra* note 68.

330. *See generally* Brody, *supra* note 270, at 1434-40.

> [C]ongressional tax law writers became captivated by the sorry facts of management buyouts of nonprofit health maintenance organizations at reportedly phenomenal bargain prices to the insiders .... The federal tax rules were helpless to punish this type of wrongdoing. A charity selling all its assets and distributing the sales proceeds to other charities in liquidation doesn't care about losing its tax exemption .... Reformers sought a legal structure that would penalize the wrongdoers rather than the injured charity and its beneficiaries, without imposing an absolute ban on self-dealing.[331]

These reforms, therefore, target charitable fiduciaries that participate in self-serving transactions.

If such transactions result in financial gain for the fiduciary, at the expense of the charity, the fiduciary faces a tax penalty.[332] Although these tax consequences are not a true reform in the sense that they are part of an intentional and comprehensive initiative, the tax laws undeniably operate to deter fiduciary misconduct.[333] More importantly, these tax reforms demonstrate how the Internal Revenue Service can serendipitously operate as a "uniform, super-regulatory board."[334]

VIII. RECONCILING REFORM WITH HISTORY

Reformation of charitable enforcement is inhibited for a variety of reasons. One obstacle is the close relationship between trust law and nonprofit corporation law.[335] The current enforcement regime evolved to address abuses of charitable trusts when charitable trusts were the primary philanthropic vehicle.[336] Nonprofit corporations, however, have joined the charitable trust as a means to harness charitable giving.[337] Nevertheless, the law has lagged behind the rise of the nonprofit corporation and continues to treat both types of philanthropic arrangements in the same

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331. *Id.* at 1436-37.

332. *See id.* at 1438. Brody notes that this tax rule is "only the latest in a series of federal tax laws that impose tighter restrictions on charity behavior than do state rules." *Id.*

333. *See id.*

334. *Id.* at 1439.

335. *See* Note, *supra* note 273, at 1001 (explaining that "the law of nonprofit corporations is considerably less developed than the law of for-profit corporations. This relative lack of development is due in part to the close relationship between charitable nonprofit corporations and charitable trusts. Because of the similarities between charitable trusts and charitable corporations, courts fashioning rules for charitable corporations frequently borrow from the law of trusts ....").

336. *See id.*

337. *See id.* at 999-1002.

manner.[338] Another impediment to reform is the fact that the majority of courts view the history and common law tradition of attorney general enforcement as sufficient reason, by itself, to continue the status quo and reject reform initiatives.[339] Finally, the tradition of charitable enforcement in America is a victim of history. The United States split from England at a time when the attorney general was the exclusive guardian of charitable trusts.[340] This exclusivity in England was, however, short lived as statutory reforms expanded standing.[341] Although England and the United States share a common legal tradition, the United States retains an enforcement regime that England abandoned almost two centuries ago.[342]

Reform, however, makes sense. The case for reform predicated on increased standing is particularly compelling. Expanded standing accomplishes a number of laudable policy goals such as (1) recognizing the reality that other parties, apart from the state attorney general, have a legitimate stake in charities, (2) bolstering overall enforcement, and (3) avoiding the pitfalls of over-regulation, such as vexatious and wasteful litigation.[343]

Courts and legislatures should not rely on mere history and tradition as a basis to prevent such innovations. On the contrary, history and tradition militate in favor of charitable enforcement reform. Charitable enforcement has always changed to reflect the contemporary needs of society. When ecclesiastical enforcement became corrupt and ineffectual, the law changed to provide for chancery enforcement.[344] Later, when chancery enforcement was no longer sufficient, commissioners replaced the Chancellor.[345] Thus, history suggests that, if the needs of society so demand, the attorney general's monopoly on enforcement should yield to reform.

As evidenced by the debate over charitable enforcement reform, it seems that, once again, society is no longer satisfied with the current state of the law.[346] This dissatisfaction is particularly acute in the nonprofit hospital conversion context.[347] In keeping with the true history and

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338. *See id.* at 1001.

339. The courts are undoubtedly persuaded to maintain the attorney general's monopoly on enforcement at the behest of the various state attorneys general. *See supra* notes 243-55 and accompanying text.

340. *See supra* notes 89-94 and accompanying text.

341. *See supra* notes 90-95 and accompanying text.

342. *See supra* note 95 and accompanying text (discussing, *inter alia*, Romilly's Act).

343. *See supra* notes 298-312 and accompanying text.

344. *See supra* notes 21-24 and accompanying text.

345. *See supra* notes 39-50 and accompanying text.

346. *See supra* notes 256-91 and accompanying text.

347. *See supra* notes 321-28 and accompanying text. *See, e.g.*, Shelly A. Sackett, *Conversion of Not-For-Profit Health Care Providers: A Proposal for Federal Guidelines on Mandated*

tradition of charitable enforcement law, judges and legislatures should embrace thoughtful reforms and give such innovations a chance to succeed. In the end, charitable enforcement and the traditional role of the state attorney general are neither immutable nor so formidable as to preclude reform. Thus, statutory and judicial reforms of charitable enforcement should be encouraged to better serve the needs of contemporary society.

Charitable Foundations, 10 STAN. L. & POL'Y REV. 247, 247 (1999).