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James J. Fishman

Elisabeth Haub School of Law at Pace University, jfishman@law.pace.edu

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CHARITABLE ACCOUNTABILITY AND REFORM IN NINETEENTH-CENTURY ENGLAND: THE CASE OF THE CHARITY COMMISSION

JAMES J. FISHMAN*

INTRODUCTION

Fraudulent behavior by charitable fiduciaries brings universal condemnation. Such wrongs never have been countenanced, though seemingly, they have always occurred.¹ However, disapprobation by itself never has translated into an efficient system for the accountability of charitable assets. This Article examines the nineteenth-century struggle to form a charity commission to oversee English charitable endowments. Administrative reform can have an interminable germination as the creation of the Charity Commission demonstrates. A conundrum is that even though the need for reform of charitable administration was long recognized and a consensus reached on the structure of the overseeing body (though not its scope), the resulting agency came under almost immediate criticism and was disliked, disrespected, deprived of resources, and ultimately ineffective.

Why is it so difficult to carry out effective institutional change? Why did the principle of charitable accountability, a nearly unanimously supported ideal, ring so hollow in practice? This Article offers hypotheses about the difficulties of administrative reform, through the prism of the nineteenth century, which may apply to contemporary issues of charitable accountability.

Charitable accountability is the process of ascertaining that assets devoted to charitable pursuits are put to their proper purpose and that information about their use is made available to the public or to governmental authorities. Modern approaches to charitable accountability, ranging from annual filing of a financial statement to periodic review of activities by a government official, can be traced to local efforts that commenced in eighteenth-century Great Britain. Earlier attempts to hold charitable fiduciaries to their trust included the visitation right by a settlor or founder of a charity,

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1. As early as the fifteenth century, bills of complaint came to the chancellor about the misuse of charitable legacies. See GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532-1827, at 7-9 (1969).

and a petition to the Chancellor by the Attorney General (or another governmental agency) or by individuals associated with the charity. The state's primary role in assuring charitable accountability was in defining which activities could be designated as "charitable" so as to allocate those resources to the government's vision of their highest use.

I. CHARITABLE REGULATION IN THE NINETEENTH CENTURY: THE BROUGHAM COMMISSION

Nineteenth-century England, often called an age of reform, was a period of enormous political, social, and economic change. In the first two decades came an increase in the rate of transformation of the economy, the polity, and society, and a greater stir and movement in all spheres of public activity caused by more "rational and purposive control based upon measuring, counting, and observing."² Political, economic, and governmental institutions developed modern structures and approaches.

Charitable regulation reflected these trends. As part of a broader movement of inquiry, supervision, and statutory reform, and in an effort to remedy the social evils of the time, the administration and abuse of charitable trusts became a part of a larger agenda of reform, leading to the creation at midcentury of a national charity commission that oversaw philanthropic organizations. The rationale for charitable reform was a governmental hope to capture a supposedly huge corpus of charitable assets, a proportion of which were misspent, unspent, or devoted to obsolete purposes, and to utilize them for modern needs such as education. Charities were examined with a new thoroughness and scope in contrast to the past. The catalyst and justification for change was the opportunistic fiduciary, misappropriating or misspending trust assets. Publicity surrounding charitable scandals provided the impetus for parliamentary reform. Chancery's inefficient hold of oversight of charities was loosened. By century's end a modern structure of charitable accountability was in place, a permanent charity commission, though of questionable vigor and modest effectiveness.

On the national level, there had been increasing governmental inquiries of social and economic problems using empirical techniques since the accession of George III in 1760. The pursuit of rational ends by rational means was furthered through the device of Royal Commissions of Inquiry. Social inquiries that measured the contours of society, assessed its wealth, probed some of the nastier problems, and suggested policy directions were

2. SIR EARNEST LLEWELLYN WOODWARD, *THE AGE OF REFORM 1815-1870*, at 39 (2d ed. 1962).

used as a basis for legislation.³ Not until the last quarter of the century was there any national interest in the administration of charities in England. In the 1780s, Parliament, at the urging of a member Thomas Gilbert, in the context of his interest in the examination of poor law expenditures and the use of charitable endowments for relief of the poor, passed a statute⁴ that required ministers and churchworkers to provide data on charities that benefited the poor.⁵ The response from English parishes was nearly comprehensive. Of thirteen thousand parishes, only fourteen failed to file, but the information was far from complete.⁶ The significance of the Irish experience and the “Gilbert Returns,” as they became known, was that they marked the national government’s initial step toward oversight of the charitable sector and reflected a need for better monitoring. The first stirrings for English charitable trust reform, based on a model used in Ireland, were introduced unsuccessfully in 1809 by William Wilberforce, the great anti-slavery advocate and others, but were rejected by the House of Commons. Subsequent efforts from 1809 to 1811 failed as well.⁷ In 1812, a registry provision was adopted, but it was unsuccessful.⁸ There were but four hun-

3. Though governmental inquiries can be traced to the Domesday book of 1086 and clerical visitations dated to the middle ages, in the eighteenth century, government’s focus on social problems led to a new kind of social inquiry based on empirical methods. This “political arithmetic,” as it came to be called, was commenced by private philanthropists and empiricists in the sixteenth and seventeenth centuries. For an excellent discussion of the growth of empirical social inquiry, see RICHARD TOMPSON, *THE CHARITY COMMISSION AND THE AGE OF REFORM* 42–50 (1979).

4. An Act for Procuring, upon Oath, Returns of all Charitable Donations, for the Benefit of Poor Persons, in the Several Parishes and Places Within that Part of Great Britain Called England (Return of Charitable Donations Act), 26 Geo. 3, c. 58 (1786) (Eng.).

5. DAVID OWEN, *ENGLISH PHILANTHROPY 1660–1960*, at 86 (1964). This statute supplemented “another Act, passed shortly before, which called upon overseers to report statistics on Poor Law expenditures for 1783–1785.” *Id.* (citing An Act for Obliging Overseers of the Poor to Make Returns, upon Oath, to Certain Questions Specified Therein, Relative to the State of the Poor, 26 Geo. 3, c. 56 (1786) (Eng.)). Parishes were not expected to provide detailed information but to indicate “‘by whom, when, and in what Manner, and for what particular Purpose’ each benefaction had been made, to distinguish between those in land and in money, and to specify the annual [income] of each.” *Id.* (citing 26 Geo 3, c. 58).

6. *Id.* The report to Parliament in a familiar refrain noted:

[U]pon the face of the said Returns many of the said Charitable Donations appear to have been lost; and that many others of them, from neglect of payment, and the inattention of those persons who ought to superintend them, are in danger of being lost, or rendered very difficult to be recovered; and that the matter seems to be of such magnitude, as to call for the serious and speedy attention of Parliament, to amend and explain the [Gilbert] Act, by specifying with certainty and precision the objects to which they may think fit to direct their enquiries, in order to procure full and satisfactory Returns, and the establishment of such measures as may be effectual for the relief of poor persons who were the objects of those Donations, and for carrying the charitable and benevolent purposes of the Donors into execution.

Report from the Committee on Charitable Donations for the Benefit of Poor Persons, 9 REPS. COMMS. OF THE HOUSE OF COMMONS 733 (1788).

7. TOMPSON, *supra* note 3, at 90–91.

8. An Act for the Registering and Securing of Charitable Donations (The Charitable Donations Registration Act), 52 Geo. 3, c. 102 (1812) (Eng.).

dred plus registrations after two years of operation.⁹ Many decades would pass before any concrete vehicle was put into place to assure accountability. Despite the inadequacies of the Gilbert Returns and of the local surveys in the eighteenth century, these efforts did draw attention to the charitable sector, its waste and inefficiency, and deficiencies in the administration of charitable trusts. Correction of charitable abuses could only be achieved through a proceeding brought in Chancery involving the Attorney General acting on information supplied by an individual complainant who often had to pay mightily for his efforts.¹⁰ The Attorney General assumed more of a role of mediator in these circumstances than plaintiff or prosecutor.¹¹ Under the English practice, if a suit was unsuccessful, the person bringing the complaint would have to pay the legal costs of the victor, a strong disincentive to all but the most determined. The information was even more tardy, costly, and frustrating. At the beginning of the nineteenth century, there were some modest efforts at reform, efforts that led to little substantive change.¹² Oversight of charities remained a matter of great laxity.

A. Chancery Discontents

The Chancery Court was supposed to correct the inflexibility of the common law courts and to provide remedies where the common law did not apply. However, the “equity” of the court had almost disappeared under a mass of cumbersome rules and practices. Eldon, the Lord Chancellor,¹³

9. TOMPSON, *supra* note 3, at 91. The statute excluded charitable trusts not secured on land and those that gave the donors or fiduciaries discretion in the expenditure of such funds. *Id.* at 92.

10. OWEN, *supra* note 5, at 182. The Attorney General represented the crown in its character of *parens patriae*, was the protector of charities (as the property of the public), and could sue *ex officio* by information for the reform of abuses to which charities might be subject. The Attorney General alone could bring suit, but he might be sent into action by an individual complainant about the administration of any charity, in which case such person would appear as relator in the suit. RICHARD EDMUND MITCHESON, CHARITABLE TRUSTS: THE JURISDICTION OF THE CHARITY COMMISSION 3–4 (1887).

11. See *Ludlow (Corporation of) v. Greenhouse*, 4 Eng. Rep. 780, 791 (1827); JONES, *supra* note 1, at 161.

12. See 52 Geo. 3, c. 102 (requiring the central listing of endowments in the hopes of preventing their loss); An Act to Provide a Summary Remedy in Cases of Abuses of Trusts Created for Charitable Purposes (The Charities Procedure Act), 52 Geo. 3, c. 101 (1812) (Eng.). The Charities Procedure Act was intended to provide a summary remedy in cases of breach of trusts created for charitable purposes, but in the context of Chancery practice, this meant very little. *Id.*; OWEN, *supra* note 5, at 183.

13. Lord Eldon, (1751–1838) born John Scott, was Lord Chancellor for much of the period of 1801–1827. He was an inflexible conservative who opposed Roman Catholic political emancipation, the abolition of imprisonment of debtors, the abolition of the slave trade, and any reform of the Chancery Court. Eldon harmonized and systemized Equity. The delays in Chancery under his administration were notorious. In Holdsworth’s words: “Lord Eldon would often express a clear opinion after hearing the argument, and then as Campbell says, ‘he expressed doubts—reserved to himself the opportunity for further consideration—took home the papers—never read them—promised judgment again and again—and for years never gave it—all the facts and law connected with it having escaped his memory.’” 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 437–38 (3d ed. 1922) (citation omitted) [hereinafter

opposed as long as possible all changes in an antiquated system that caused loss and misery to thousands of suitors. Chancery cases resembled Dickens' famous *Jarndyce v. Jarndyce*. "Twenty years was not an unusual length for a Chancery case."¹⁴

By the nineteenth century, Chancery procedure had become more elaborate, dilatory, technical, and ineffective. A Chancery suit could bankrupt a charity and its trustees.¹⁵ The court was understaffed, and during the eighteenth century the rules of procedure became an esoteric body of knowledge known only to the officials of the court.¹⁶ The backlog of informations was so great that members of Parliament began to complain, often illustrating Chancery's deficiencies with descriptions of fiduciary misdeeds involving charitable trusts. In 1812, a member of Parliament, Michael Angelo Taylor, criticized the delays, noting that the business of Chancery only had increased in the instance of bankruptcy cases. He attacked Lord Eldon for his lack of talent for reaching a quick decision, a charge which, though true, doomed the motion to investigate.¹⁷

The situation for obtaining charitable accountability through an action in Chancery was dire. In 1818, Sir Samuel Romilly,¹⁸ a leading Whig re-

1 HOLDSWORTH]. For a description of Eldon's life and achievements, see 13 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 595-638 (A.L. Goodhart & H.G. Harbury eds., 1971) [hereinafter 13 HOLDSWORTH].

14. WOODWARD, *supra* note 2, at 471-72. An interesting comment on the state of equity jurisdiction was that when a prizefighter put his opponent at his mercy, he was said to hold him "in chancery." *Id.* at 472 n.1. Lord Eldon gave in to public opinion in 1812 and agreed to allow an additional judge to catch up on some of the arrears in his own court, but the procedure of the court remained unchanged until Lord Henry Peter Brougham suggested whole scale legal reform in 1828. Shortly thereafter, Brougham became Lord Chancellor and Chancery reform occurred. *Id.* at 472; *see infra* p. 731.

15. Speaking on a bill in 1846 to create a permanent charity commission, Lord Wrotlesley spoke of Chancery interference and problems:

[I]n the Bushbury Grammar School, the income of which is £98, there was a suit for appointing trustees, for an account, and for removing the master. The suit lasted for 23 years; for twelve years there was no school, and the charity houses were in ruins, and the costs were £1,171. Again, in the Hayward Charities: in 1831, the master of the school received notice to quit the premises; he disregarded that notice, and he disregarded three successive notices to quit. . . . [T]he trustees then, very unadvisedly proceeded to eject him by force. For this he brought an action; a second action was brought by his wife, a third by his son, and a fourth by his daughter, in all four actions, for assaults committed on the expulsion. In 1832, the master was restored on petition; and on the hearing of the petition, no less than ninety-nine affidavits were read. Besides these proceedings, there were some in the Exchequer, and a costly Commission to examine witnesses in the country. The costs of one side exceeded £1300 and three of the trustees were reduced to ruin and their property sold.

86 PARL. DEB. (3d ser.) (1846) 806-07.

16. *See* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 338-43, 370-71 (1926) (citing Report of the Chancery Commissioners of 1850, 21 PARL. PAPERS 5-10 (1852)).

17. 23 PARL. DEB. (1st ser.) (1812) 58-59. Taylor pointed out that in Hilary Term 1812, only five decrees were pronounced and no appeals were decided, yet one hundred cases and thirty-nine appeals arrived from the Master of the Rolls, who in the same period made 102 decrees. *Id.*

18. Samuel Romilly (1757-1818), privately educated, was admitted in 1778 to Gray's Inn and called to the Bar in 1783. In 1806, he became solicitor general and a member of Parliament. He sup-

former, could state: “it was impossible, through the Court of Chancery, to obtain redress for the abuses of charitable institutions.”¹⁹ In the end it was often the innocent relators who were ruined because of the delays and the ongoing costs of Chancery procedure.²⁰

An effort to deal expeditiously with breaches of charitable trusts was proposed by Romilly. A statute, passed in 1812, provided that upon a breach of a charitable trust, two or more persons could present a petition to the Lord Chancellor or Master of the Rolls,²¹ and they were required to hear the petition in a summary manner.²² It didn’t work. Lord Eldon interpreted the statute so restrictively that it was ineffective.²³ In 1819, it was provided that the Charity Commissioners could certify, and refer to the Attorney General, matters involving breaches of trust²⁴ or any other cause of complaint, for which orders or discretion of the Court of Chancery were necessary.²⁵ This was to be a summary procedure, but giving the matter to Chancery meant little in terms of expedition.²⁶

The ever-increasing backlog of Chancery cases led to the creation in 1813 of a Vice-Chancellor to assist the Chancellor.²⁷ This, however, actu-

ported law reform attempting to amend the criminal law. On the death of his wife, he shut himself up in his house and committed suicide. 17 THE DICTIONARY OF NATIONAL BIOGRAPHY 188–91 (Leslie Stephen & Sidney Lee eds., 1917). See 13 HOLDSWORTH, *supra* note 13, at 274–81 for a vignette.

19. 38 PARL. DEB. (2d ser.) (1818) 1230–31. There was little independent enforcement by the Attorney General. See JONES, *supra* note 1, at 161. If someone brought an information to enforce a charitable trust, it was almost always brought by the Attorney General *ex rel* or on relation of an individual who bore the crown’s costs. *Id.* (citing Ludlow (Corporation of) v. Greenhouse, 4 Eng. Rep. 780, 791 (1827)). Charitable trustees’ expenses were paid from the charity’s endowment. *Id.*

20. Henry Brougham, *infra* p. 731, in his motion to establish a commission to educate the poor discussed the difficulties of using Chancery, 38 PARL. DEB. (2d ser.) (1818) 1221, and Taylor in 1827 noted that hundreds and hundreds had been ruined by the Court. 17 PARL. DEB. (new ser.) (1827) 257.

21. The Lord Chancellor is an officer of state who presides over the House of Lords and heads the judiciary. As a cabinet minister, he has control over judicial appointments. The Lord Chancellor is also president of the Chancery Division and a member of the Court of Appeal. The Master of Rolls is the most important of the Lord Chancellor’s assistants in the Court of Chancery, so called because he was responsible for the records, originally on rolls of parchment. Initially, Master of Rolls advised the Chancellor in the Chancery Court, and, in 1729, he became a second judge in Chancery. Since 1881, the Master of the Rolls has been a judge of the Court of Appeal.

22. An Act to Provide a Summary Remedy in Cases of Abuses of Trusts Created for Charitable Purposes (The Charities Procedure Act), 52 Geo. 3, c. 101 (1812) (Eng.).

23. See *In the Matter of the Masters, Governors, and Trustees of the Bedford Charity*, 36 Eng. Rep. 696 (1819) (noting that petitioner under statute had to have direct interest); Attorney General v. Green, 37 Eng. Rep. 391, 391 (1820) (holding that an information and a petition could not proceed together under the Charities Procedure Act); *Ex parte Skinner*, 35 Eng. Rep. 1013, 1013 (1817) (holding that the Charities Procedure Act does not apply if the breach of trust was not by trustee); see also JONES, *supra* note 1, at 165–67.

24. See *infra* pp. 737–38.

25. An Act for Giving Additional Facilities in Applications to Courts of Equity, Regarding the Management of Estates or Funds Belonging to Charities, 59 Geo. 3, c. 91 (1819) (Eng.).

26. See JONES, *supra* note 1, at 168 n.4.

27. An Act to Facilitate the Interests of Justice, 53 Geo. 3, c. 24 (1813) (Eng.).

ally slowed things down as the new official could only decide cases specially delegated to him by the Chancellor, and the parties could thereafter appeal to the Chancellor, thus prolonging the process even more.²⁸ As a result of repeated motions in Parliament, a commission was appointed in 1824 to inquire into the state of the court, but the head of the commission was none other than Lord Eldon, the Chancellor! To little surprise, the Commissioners concluded that they were satisfied that:

much misconception has arisen relative to the causes of that delay. . . that much of it is imputable, neither to the court, nor to its established rules of practice; but to the carelessness of some parties, the obstinacy or knavery of others, or the inattention or ignorance of agents.²⁹

No reference was made to the lack of judicial staff or to Chancery procedure.

Not until the 1830s was Chancery procedure reformed. Over the years, certain responsibilities of the court were hived off: additional judges were appointed; the Court of Appeal was established; and the staffing reorganized. At last, at midcentury, there was substantial reform of Chancery practice, but an unintended consequence was that these efforts slowed down the creation of a permanent Charity Commission.³⁰ Even though these court-based corrections were and continued to be tried, nonetheless, it was clear from around 1820 on that reform of charitable trusts would have to occur through parliamentary action rather than through the courts.

B. The Impetus for Reform of Charitable Trusts

As the industrial revolution spread from London and Bristol throughout the country, doubts about the efficacy of private charity had arisen. It had long been clear that voluntary charity alone would be insufficient to meet the needs of the poor.³¹ As a way station to the modern idea that the government is the primary source of support for the indigent, the common wisdom was: if wasted or misappropriated charitable assets could be recovered, they might be used to cure social ills, reducing the need for public monies.³²

28. 1 HOLDSWORTH, *supra* note 13, at 442.

29. *Id.* (quoting Report of the Chancery Commission 9 (1826)).

30. See An Act to Abolish the Office of Master in Ordinary of the High Court of Chancery, and to Make Provision for the More Speedy and Efficient Despatch of Business in the Said Court, 15 & 16 Vict., c. 80 (1852) (Eng.); An Act to Amend the Practice and Course of Proceeding in the High Court of Chancery, 15 & 16 Vict., c. 86 (1852) (Eng.); 9 HOLDSWORTH, *supra* note 16, at 375–76; TOMPSON, *supra* note 3, at 206–07.

31. This had been recognized as far back as 1601 with the passage of the Poor Law, which raised taxes to assist the worthy poor. An Act for the Relief of the Poor, 43 Eliz. 1, c. 2 (1601) (Eng.).

32. See TOMPSON, *supra* note 3, at 58–59.

Though the nineteenth century was a period of startling new developments, certain persistent problems remained. The first quarter of the century was a golden era of chicanery involving charities. A common problem was that property left to trustees to administer for the benefit of the poor had appreciated enormously in value. The beneficiaries of the charitable trusts received the sum originally bequeathed, but the trustees took the remainder. The great universities and public schools were part of this tactic of misappropriation, as was the Church of England.³³

The episodic efforts to document charitable trusts in the eighteenth century showed that assets had disappeared or been misappropriated at an alarming rate, and the misapplication of charitable assets was commonly known. In 1795, Lord Kenyon noted the lamentable state to which grammar schools were reduced: "empty walls without scholars, and every thing neglected but the receipt of the salaries and emoluments."³⁴ Even Lord Eldon, who opposed all change and specifically anything that might alter the timeless privileges of visitation³⁵ or Chancery with its horrendous backlog, the latter of which he was a prime cause, stated "Charity Estates all over the kingdom [were] dealt with in a manner most grossly improvident; amounting to the most direct breach of trust."³⁶

33. Though the clergy were frequent perpetrators of this practice, in the early nineteenth century, the church was a foundation of society if not of the Conservative and later the Tory Party and nearly sacrosanct from criticism. FRANCES HAWES, HENRY BROUGHAM 107 (1957); G.F.A. BEST, TEMPORAL PILLARS: QUEEN ANNE'S BOUNTY, THE ECCLESIASTICAL COMMISSIONERS, AND THE CHURCH OF ENGLAND 70-71 (1964). One writer has described the late-Victorian Church of England as "The Tory Party at prayer." ANDREW ROBERTS, SALISBURY: VICTORIAN TITAN 26 (1999).

34. *The King v. The Archbishop of York*, 101 Eng. Rep. 664, 665-66 (1795).

35. With antecedents in Roman and Canon Law, perhaps the oldest device for monitoring charitable activity is the right of visitation, the authority of a founder of a charity to examine the conduct of the organization or the affairs of a church or a religious foundation or society in order to prevent or correct abuses. Roscoe Pound, *Visitation Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369 (1936). Under canon law, visitations of parishes and dioceses took place to correct abuses. *The Case of Sutton's Hospital*, 77 Eng. Rep. 937, 971 (1613); Pound, *supra*, at 371. After the Reformation, ecclesiastical corporations were subject to visitation by the bishop and lay or private charitable corporations by the founder and his heirs unless otherwise provided. Pound, *supra*, at 371. Corporations in the Middle Ages were religious or municipal. Under common law, religious houses were subject to visitation by the bishop. Later, the monasteries were excepted from visitation but religious and charitable foundations were not. For other corporations, the visitatorial power was in the king, exercisable through a writ of mandamus and by information in the nature of *quo warranto* in *The King's Bench. Philips v. Bury*, 87 Eng. Rep. 289, 298-99 (1694). The theory of the king's visitation right is as *parens patriae*, as power of the state exercisable by judicial scrutiny and application of judicially administered remedies, by legislation providing for investigation of the activities and correction of the abuses committed or suffered by the corporate authorities, and by their administration. Pound, *supra*, at 372. The visitation power derives from the recognition that the founder of a charity and his heirs retain some control of the administration of his gift. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 416 (2d ed. rev. 1991). The founder or visitor could inquire into and correct all irregularities and abuses that may arise. *Id.*

36. *The Attorney-General v. Griffith*, 33 Eng. Rep. 406, 411 (1807).

C. *Sir Henry Peter Brougham and the Creation of the Brougham Commissions*

From 1786, when the Gilbert Returns were filed and public attention first was called to the status of charities, little was done to uncover their real condition. Cases of abuse and spoliation were occasionally exposed by proceedings. It was known that in many instances charitable lands were leased to the friends of trustees, and not infrequently to trustees themselves, but the charities involved in such activities generally were obscure.³⁷

The extent of charitable fiduciaries' misdeeds was publicized by a Scottish politician, Henry Peter Brougham, one of the more remarkable figures in nineteenth-century English public life. Brougham (1778–1868), a lawyer, inventor, leading Whig politician, and reformer, was educated at the University of Edinburgh and was a founder of the *Edinburgh Review* in 1802, a leading journal of the day. He was a member of the Scottish and English Bars and became a member of Parliament as a Whig in 1810. Brougham served as legal advisor and defender to Queen Caroline in the annulment action initiated by King George IV. A noted orator and reformer, Brougham criticized the slave trade and urged educational, parliamentary, and legal reform. A founder of the University of London and the Society for Diffusion of Useful Knowledge, which made books available at low prices to the working class, Brougham became Lord Chancellor in 1830 and commenced the effective reform of Chancery. He became the primary force behind the creation of the Charity Commission.³⁸ According to Professor Woodward, Brougham had many of the qualities of a leader: "He was quick, versatile, sharp in debate, but too rash in temper and judgment," and distrusted by the Whig magnates, who were "jealous of his parliamentary reputation and disliked his novel habit of introducing subjects like education into the business of the House."³⁹ His strong commitment to reform and argument, his middle class origins, and his undisguised ambition caused others to view him with distrust throughout his career.⁴⁰

37. J.P. FEARON, *THE ENDOWED CHARITIES: WITH SOME SUGGESTIONS FOR FURTHER LEGISLATION REGARDING THEM* 8–9 (1855).

38. See generally CHESTER W. NEW, *THE LIFE OF HENRY BROUGHAM TO 1830* (1961); HAWES, *supra* note 33; TROWBRIDGE H. FORD, *HENRY BROUGHAM AND HIS WORLD: A BIOGRAPHY* (1995); TROWBRIDGE H. FORD, *CHANCELLOR BROUGHAM AND HIS WORLD: A BIOGRAPHY* (2001).

39. WOODWARD, *supra* note 2, at 56. The political diarist C.C. Greville said of him: "Brougham is . . . a . . . very remarkable instance of the inefficacy of the most splendid talents, unless they are accompanied with other qualities, which scarcely admit of definition, but which must serve the same purpose that ballast does for a ship." 1 *THE GREVILLE MEMOIRS 1814–1860*, at 196 (Lytton Strachey & Roger Fulford eds., 1938).

40. See 13 HOLDSWORTH, *supra* note 13, at 195–200 for an excellent vignette of Brougham.

Despite a constant enthusiasm for causes, and the general suspicion that many were generated by political opportunism rather than principle, Brougham did have two long-time interests: legal and educational reform. These became united when he focused on the administration of charitable endowments and their abuse by opportunistic fiduciaries. Brougham primarily was interested in education, particularly—in the blunt language of the times—for the “lower orders of society.” He pointed out that 120,000 children in London alone were without a means of education and between two and four thousand were rented out by their parents to professional beggars!⁴¹ As a lawyer, Brougham was appalled by the laxity with which charitable trusts were handled and believed that if charitable trusts were more properly administered, their resources could be marshaled to provide the country with a better educational system.⁴² In May of 1816, Brougham proposed a Select Committee on the Education of the Lower Classes in the Metropolis (i.e., London), which was readily agreed to by Parliament.⁴³

The original 1816 Committee amassed a store of information on the subject matter of education. Additionally, unsolicited testimony poured in from around the country that charitable endowments were grossly misappropriated, diverted, and used for every purpose save education of the poor.⁴⁴ The Committee’s report found numerous abuses,⁴⁵ and Brougham soon found deficiencies in schools outside of London. What began as the rumbling of distant artillery in the effort to create the original committee to “inquire into the education of the lower orders in the metropolis” became a close-at-arms fire-fight when Brougham introduced a bill to investigate all charities and to expand the investigation of education of the poor beyond London.

In an effort to place the Committee on a more permanent footing with a grander mission, Brougham used the tools of the rabble-rouser by flinging accusations with an underpinning of truth, but which were difficult to counter in the context of parliamentary debate. Sometimes a very different interpretation emerged when the truth was pursued by an investigation. In debate Brougham outlined some of the abuses involved with charitable trusts:

41. NEW, *supra* note 38, at 211. Brougham’s *Practical Observations upon the Education of the People* (1825) sold 50,000 copies in a few weeks and quickly went through twenty editions. ASA BRIGGS, *THE AGE OF IMPROVEMENT 1783–1867*, at 223 (1959).

42. OWEN, *supra* note 5, at 184.

43. 34 PARL. DEB. (2d ser.) (1816) 633; ROBERT STEWART, *HENRY BROUGHAM, 1778–1868: HIS PUBLIC CAREER* 122–23 (1986).

44. STEWART, *supra* note 43, at 122–23.

45. 34 PARL. DEB. (2d ser.) (1816) 1230–34.

- In Charles I's reign, £4000 were left for the use of a school. Land was purchased, but the amount of rent received was only £196, five percent on the original purchase 150 years before and only £10 more than the land received a few years after the Restoration.⁴⁶
- Other schools and charities possessed lands valued in the thousands of pounds, but they were let for very small sums or for extraordinarily long periods.
- Charitable funds disappeared.⁴⁷
- In the county of Norfolk, a school was founded in 1680 for educating forty children. None were taught; the estates produced £300 per year, and the accounts had not been audited for thirty years.⁴⁸
- In other cases, schools lapsed, but teachers remained, still receiving their sinecures.⁴⁹
- A charity had special visitors appointed who had not attended to their duties in twenty years.
- In some cases, schoolmasters received a salary but did no teaching. The funds were intermingled, and the trustees deceased. In others, the trustees were alive but had pocketed the endowment.⁵⁰

Brougham, to no challenge in Commons, stated: "I hold in my hand forty or fifty more instances of abuse, extracted from the numerous returns made by the resident clergy."⁵¹ In the course of debate, Brougham listed several classes or types of fiduciary wrongdoing and reasons why the returns of charitable assets were lower than they should have been:

- 1) Trustees have insufficient powers for the profitable management of the funds under their care. For example, they could not sell or exchange lands in the middle of towns.⁵²

46. 38 PARL. DEB. (2d ser.) (1818) 595-99.

47. *Id.* at 599.

48. *Id.*

49. *Id.* at 600-02, 761-62.

50. *Id.* at 1219.

51. *Id.* at 599.

52. Presumably this was so because they had to go to Chancery in a *cy pres* petition that was expensive and would take a very long time. The theory of *cy pres* is that when a charitable purpose becomes impossible, inexpedient, impracticable of fulfillment, or already accomplished, equity will permit the trustee to substitute another charitable object that approaches the original purpose as closely as possible. BOGERT & BOGERT, *supra* note 35, § 431. Related to *cy pres* is the doctrine of deviation, under which a court may alter the administrative or procedural provisions of a trust. The deviation doctrine is applied if it appears that owing to circumstances not known to the settlor nor anticipated by

- 2) There was a diminution of revenue because of loss of property through defects in the original charitable instrument and a consequent extinction of the trustees without the possibility of supplying their replacements.
- 3) Trustees exhibited negligence in all its branches, including carelessness, ignorance, indolence, and omission.
- 4) Various kinds of wilful abuses.⁵³

Brougham urged that his committee examine education and charities throughout the land.⁵⁴ The expanded Commission passed in Commons, but the bill was eviscerated in the House of Lords by granting exemptions to universities and institutions that had visitors. Some of the most egregious violations involved charities and schools where the visitors did not visit. Nor could the Commission bring legal proceedings. Finally, appointed to the Commission were some of the proposal's greatest opponents.⁵⁵

In response to the watering down of the new Commission, Brougham published *A Letter to Sir Samuel Romilly M.P.: Upon the Abuse of Charities* in October of 1818, which, though a political broadside, went through at least twelve editions⁵⁶ and was the most widely read of Brougham's publications. Brougham not only criticized the emasculation of his Commission but also listed a variety of charitable wrongs. Though Brougham used specific examples, the abuses enumerated were believed to be widespread. They included the following:

- A corporation in Hampshire, entrusted with the management of estates above £2000 for the use of the poor, let them for two or £300 in fines,⁵⁷ but there was no accounting how the fines were applied and charitable assets were used to pay the debts of the corporation.⁵⁸

him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. RESTATEMENT (SECOND) OF TRUSTS § 381 (1959).

53. 38 PARL. DEB. (2d ser.) (1818) 595-96. Brougham's bill was opposed by Eldon for cutting back the power of visitors, to which Brougham responded with an attack on Chancery procedure. See 13 HOLDSWORTH, *supra* note 13, at 214-15.

54. 37 PARL. DEB. (2d ser.) (1818) 815-17.

55. An Act for Appointing Commissioners to Inquire Concerning Charities in England for the Education of the Poor, 58 Geo. 3, c. 91 (1818) (Eng.); OWEN, *supra* note 5, at 186-87.

56. NEW, *supra* note 38, at 218 (citing HENRY PETER BROUGHAM, A LETTER TO SIR SAMUEL ROMILLY, M.P.: UPON THE ABUSE OF CHARITIES (9th ed. 1818) [hereinafter LETTER TO ROMILLY]).

57. Fines were equivalent to points on a mortgage. They were an amount paid at the time the renewal of the lease came up, and as often as not went into the pocket of the trustees. Because of the fine, which was an up-front payment, the lease renewal was at a lower rate than the market would permit.

58. LETTER TO ROMILLY, *supra* note 56, at 8-9.

- Abuses involving clergy nepotism, misappropriation, and visitors who did not visit.⁵⁹
- Charities with substantial endowments educating or providing alms for too few given the resources available or attainable if the property was properly managed. Two estates in Croydon, which should bring in £1000 to £1500, were worthless because they were burdened by ninety-year leases.⁶⁰
- School lands at St. Bees Cumberland had been let for 1000 years, with an additional lease for mineral rights to the family of the trustees of the school.⁶¹
- Abuses that continued because of the weakness of the legislation approving the Commission.
- Some school masters, often clergymen, would receive a salary and housing for teaching, but did none. At other times, a school master might take the salary and lodging, teach no charity pupils but conduct a proprietary school teaching modern subjects.⁶²
- Schools which had received educational endowments for the children of the poor to learn Latin or Greek for entry into the church benefited the well-to-do; parents of the poor desiring more practical education for their children in an industrializing society were not accommodated.

In the *Letter*, Brougham rolled out the notorious Pocklington school, which had a large endowment where but one boy was taught, and the school room had been converted into a saw-pit. Yet, the school had visitors from no less than St. John's College, Cambridge!⁶³ Brougham had used Pocklington before in the House of Commons.⁶⁴ Despite the exaggerations and several pamphlets produced in defense and opposition, the *Letter* had an unexpected effect. The government in 1819 adopted almost all of

59. *Id.*

60. *Id.*

61. *Id.* at 12. This controversy dated back to 1742. The Charity Commissioners visited the school in September 1819, concluded the leasing was illegal, and certified it to Chancery, which in 1827 cancelled the lease. TOMPSON, *supra* note 3, at 110–11.

62. LETTER TO ROMILLY, *supra* note 56, at 10–11.

63. *Id.* at 9–10.

64. Here Brougham was playing loosely with the truth. According to Tompson, fellows from St. John's had visited the school in 1817, held a public meeting, and made a set of recommendations to the Master, just what visitors were supposed to do. TOMPSON, *supra* note 3, at 111–12. At the time the *Letter to Romilly* was published, the school had been taken down and rebuilt. However, after the school was rebuilt, it was found to be educating only twenty boys on an annual income of £1,000. *Id.*

Brougham's positions, excepting institutions with special visitors (which were exempted until 1831). Parliament created a Select Commission on Public Charities,⁶⁵ which in the course of twenty years exposed not only charitable chicanery but also fiduciary fidelity.

In a typical burst of nineteenth-century English reformist enthusiasm, the Select Committee on Education of the Lower Orders in the Metropolis expanded into a commission, known as the Brougham Commission, that investigated all charitable endowments and conducted a massive survey of nearly 30,000 charities. The Commission labored for the better part of two decades, produced forty volumes of reports and cost £250,000 by the time it finished its efforts. The Brougham Commission's final report appeared in six parts between 1837 and 1840, and recommended the establishment of a charity commission, which took Parliament nearly twenty years to adopt.

D. *The Brougham Commission in Action*

The Brougham Commission was a creation of Parliament and an appendage of the Home Office with a separate account in the Treasury. In some ways it reflected the law of unintended consequences, for its charge was to inquire and report, but it became an agent of reform through its investigations.⁶⁶ From 1819, the Commissioners were empowered to certify cases to the Attorney General for litigation.⁶⁷ The purposes of the Commission's inquiries were to determine the amount, nature, and application of the earnings of estates or funds; and whether by change of circumstances or by other means, the trusts could not be beneficially applied for their origi-

65. An Act to Amend an Act of the Last Session of Parliament, for Appointing Commissioners to Inquire Concerning Charities in England for the Education of the Poor; and to Extend the Powers thereof to Other Charities in England and Wales; to Continue in Force until the First Day of August One Thousand Eight Hundred and Twenty Three, and From Thence Until the End of the then Next Session of Parliament (Charitable Foundations Act), 59 Geo. 3, c. 81 (1819) (Eng.).

66. TOMPSON, *supra* note 3, at 116–17. There were actually four commissions. The first was to be devoted to an investigation of educational charities. *Id.* at 117; An Act for Appointing Commissioners to Inquire Concerning Charities in England for the Education of the Poor, 58 Geo. 3, c. 91 (1818) (Eng.). In 1819, the inquiry was extended to all charities and subsequently renewed twice. TOMPSON, *supra* note 3, at 117; 59 Geo. 3, c. 81. The third commission was enabled in 1831 and expired in 1834. TOMPSON, *supra* note 3, at 117; An Act for Appointing Commissioners to Continue the Enquiries Concerning Charities in England and Wales for Two Years, and from Thence to the End of the then Next Session of Parliament, 1 & 2 Will. 4, c. 34 (1831) (Eng.). The fourth commission was enabled in 1835 and expired in 1837. TOMPSON, *supra* note 3, at 117; An Act for Appointing Commissioners to Continue the Inquiries Concerning Charities in England and Wales Until the First Day of March One Thousand Eight Hundred and Thirty-Seven, 5 & 6 Will. 4, c. 71 (1835) (Eng.).

67. 59 Geo. 3, c. 91, *continued and amended by* An Act to Continue and Extend the Provisions of an Act Passed in the Fifty-Ninth Year of His Majesty King George the Third, for Giving Additional Facilities in Applications to Courts of Equity Regarding the Management of Estates or Funds Belonging to Charities; and for Making Certain Provisions Respecting Estates or Funds Belonging to Charities, 2 Will. 4, c. 57 (1832) (Eng.).

nal purposes.⁶⁸ The Commissioners prepared annual reports of their deliberations, which were published as Parliamentary Papers.

The Commissions were traveling boards usually composed of two Commissioners and a clerk.⁶⁹ Throughout the country, the Commissioners took evidence and testimony on the state of charitable trusts. Circulars were sent to clergy asking for their knowledge about charitable trusts. The response was compared to the information in the Gilbert Returns and the returns of the 1818 Select Committee.⁷⁰ Then the Commissioners would visit, prepare an advertisement in the local paper inviting people to give information,⁷¹ send letters to clergy and precepts to others, and attempt to gain access to documents. If there was any suggestion of fiduciary wrongdoing, the Commissioners might offer remedial suggestions or turn the matter over to the Attorney General for enforcement. The hearings were not private, but few appeared save those invited.⁷² Beyond the trustees, most people knew little about charitable trusts in their communities. Beneficiaries were not in a position to challenge or discuss the sources of largesse. In the words of the vicar Dr. Folliott in Thomas Love Peacock's satirical novel, *Crotchet Castle*, "The state of public charities, sir, is exceedingly simple. There are none. The charities here are all private, and so private, that I for one know nothing of them."⁷³

In many instances, the use of charitable assets for personal use had the sanction of tradition.⁷⁴ If the Commissioners could not mediate a resolution of the fiduciary wrongdoing, they could certify an action to Chancery. There were friendly and hostile actions. If Chancery was the only authority that could resolve a property or trust settlement, or a declaratory judgment, an uncontested petition might be entered. If the abuse was maintained in the face of the Commissioners' injunctions, the Commission could bring suit by an information through the Attorney General.⁷⁵ The threat of certi-

68. TOMPSON, *supra* note 3, at 122.

69. OWEN, *supra* note 5, at 189.

70. The Select Committee's survey dealt only with schools. TOMPSON, *supra* note 3, at 132-33.

71. *Id.* at 133-35.

72. *Id.* at 137.

73. THOMAS LOVE PEACOCK, MAID MARIAN AND CROCHET CASTLE 222 (McMillan and Co. 1927) (1831). Thomas Love Peacock, 1785-1866, wrote several novels that are a mixture of satire and romance and take place in a country house. He probably is best remembered today, if at all, as Percy Bysshe Shelley's close friend and executor.

74. TOMPSON, *supra* note 3, at 141.

75. *Id.* at 144. Certification of either kind was approved by the General Board on the recommendation of reporting Commissioners. A copy of the report was sent to the solicitor for the Attorney General who took opinion from counsel, and if counsel so recommended, the Attorney General endorsed and placed the case in Chancery. *Id.*

fictionation was used as a tool for compliance.⁷⁶ Sometimes the investigations of the Commissioners were resisted.⁷⁷ Not all of the work of the Commission involved intentional breaches of fiduciary obligation. There were also *cy pres* actions, where the original purposes of the trust had failed, times had changed, or the trust instrument needed a variance.

The Commissioners occasionally faced singular problems, which they resolved in unique ways. In 1836, a commissioner, Edmund Clark, visited Symond's Almshouses in Hereford. He found that the almshouse, given for "four poor men," had passed into the patronage of a Mr. Lewis who discovered that the only persons left in the houses were four women, the widows of the persons legally placed in residence. A doubt arose in Mr. Lewis' mind whether the charitable corpus destined for the use of poor men could be given lawfully to poor women. He consulted with his attorney, and it was settled between them that the widows must be ejected, and four men were forthwith appointed to fill their places. In the words of the Commissioner's report:

But a decree and its execution are very different matters. The widows stood upon the defensive, and when an attempt was made to storm the premises, the doors were locked and the inmates appeared at the upper windows armed at all points with very offensive weapons. In short the widows gained the day & left Mr. Lewis in a dilemma. He could not pay them because they were not men & he could not pay his nominees because they were not in the almshouses & he was therefore under the painful necessity of keeping the money in his pocket—a thing which has by lapse of time become habitual & he almost fainted when I told him he would be responsible for the arrears.⁷⁸

Commissioner Clark advised Mr. Lewis to place the money in a savings bank. The Commissioners resolved that Lewis pay the arrears to the poor men and continue their allowance as it became due. When the widows passed on, the proper tenants would obtain possession.⁷⁹

76. *Id.* at 145.

77. The situation at Meer Hospital is an example of such resistance. Richard Pretyman, of the clerical family that gathered preferments the way organized crime families collect carting companies, was the warden of Meer Hospital in Lincoln. A foundation originally meant to support thirteen poor persons had been reduced to the relief of six at a cost of £24 per annum. The buildings had completely disappeared, and since Pretyman had become warden in 1817, he had earned over £14,000 by fines and the sale of timber. When charity commissioner John Macqueen sought to examine the records of Meer Hospital, he was refused access by the Dean of Lincoln Cathedral. Commissioner Macqueen, after extended stonewalling by the Dean, had the case turned over to the Attorney General. G.F.A. Best, *The Road to Hiram's Hospital: A Byway of Early Victorian History*, VICTORIAN STUDIES 135, 139-43 (Dec. 1961).

78. TOMPSON, *supra* note 3, at 190-91.

79. *Id.* at 191.

E. *The Impact of the Brougham Commission*

The Commissioners had enormous flexibility and produced annual reports that were largely fact finding.⁸⁰ The scope of the Charity Commission's inquiry was impressive. By 1834, 26,751 charities had been examined, though half of Wales and six English counties remained untouched.⁸¹ Approximately, four hundred had been referred to the Attorney General for prosecution, most of which were acted on, though that meant getting involved in the maws of Chancery.⁸² Another 2,100 trusts were reformed or renovated in some way.⁸³

Though the Charity Commission's inquiry seemed to muddle on for twenty years with neither plan nor focus, it did serve several important purposes: increasing the transparency of charitable trusts, bringing malefactors to justice, and reaffirming the overwhelming basic probity of the sector. While many fiduciaries breached their trust, and many trusts needed to be reformed or better administered, nearly ninety percent of the charities examined were in order.⁸⁴ The Commission also placed a spotlight on the scope of charitable assets in Great Britain.⁸⁵ It advanced the cause of law reform by highlighting the lack of clear principles to guide fiduciaries, and also demonstrated the dearth of effective mechanisms for accountability.

The Commission's investigatory process itself abated some evils in charity administration, making it unnecessary to commence legal proceedings.⁸⁶ Many trustees who had been ignorant of their duties or guilty of nonfeasance focused for the first time on their fiduciary obligations. This by itself improved the accountability of many charities. The Commissioners also offered technical assistance, mediated disputes, recommended changes in practices, offered suggestions and observations, and, where needed, occasionally threatened and browbeat trustees.⁸⁷

80. OWEN, *supra* note 5, at 189–90.

81. *Id.* at 190.

82. *Id.* at 193.

83. TOMPSON, *supra* note 3, at 197.

84. *Id.*

85. An Analytical Digest was printed in the Parliamentary Papers for 1843. OWEN, *supra* note 5, at 192. According to the Analytic Digest, the charitable sector surveyed consisted of land of 442,915 acres; funds, bank and India Stock worth £5,656,746; and mortgages and other personalty worth £1,001,782. *Id.* Charitable endowments had an annual yield of £1,209,397, and this did not include approximately 4,000 charities not examined by the Commissioners. *Id.*

86. 21 PARL. DEB. (new ser.) (1829) 1759.

87. TOMPSON, *supra* note 3, at 138–40. The most common recommendations related to facets of trust administration: trustee actions on dispensing income; hiring, firing, and pensioning superannuated schoolmasters; distribution of income; or recordkeeping. *Id.*

A member of the Solicitor General's office and of the first permanent Charity Commission summarized the work of the Brougham Commissions:

[I]n a very large proportion of the suits, the gain cannot be estimated in money. The improvement and regulation of schools; the appointment of new trustees, obliged under the provisions of a scheme to publish annual accounts in the place of self-constituted bodies, the application to useful purposes of funds previously squandered in indiscriminate relief; and the abolition of sinecures, are instances of this kind.⁸⁸

An ongoing theme, barely below the surface throughout the inquiry, was the inadequacy of Chancery procedures as a device to remedy abuse or to encourage the more efficient administration of charitable assets. More difficult for the Commission than referring misdealing to the Attorney General, and a problem for the charities themselves, was the lack of a jurisdiction more summary than the equity courts to remedy administrative problems such as the appointment of trustees, difficulties in the sale or exchange of property, or oversight of the handling of charitable investments.⁸⁹ The practice of renewing leases of land for fines rather than adequate increments in the rent was deleterious, widespread, and particularly harmful in a period of inflation of land values.⁹⁰ Sometimes charitable funds for the poor were used to provide relief or to offset parish poor rates, or charities had outmoded purposes.⁹¹

There were persistent problems that the ad hoc charity commissions could not correct. These included charities with special visitors who ignored their responsibilities and the terrible conditions of the grammar schools that only could be addressed in a systematic way by a permanent body.⁹²

88. FEARON, *supra* note 37, at 23.

89. OWEN, *supra* note 5, at 194.

90. *Id.* at 194–95. Sometimes the trustees liked the practice of fines because it lined their pockets, but often the practice was the result of inertia, ignorance, or habit. *Id.*

91. *Id.* at 195–96. Schools often taught poor children Greek and Latin, when in an industrializing society, children of modest origins needed more practical instruction. In other cases charitable endowments grew and the beneficiaries were too few. At the Hospital of Archbishop Holgate in York, a Reformation foundation from 1555, the endowment had grown so much that the beneficiaries—poor people given sustenance—received an annual increment of £94, quite an enormous largesse. *Id.*

92. The Committee's report of that year illustrated the kinds of problems that afflicted charitable grammar schools under the existing regulatory structure by describing the situation of the Berkhamstead Grammar School, which even though under the superintendence by a special visitor and administered by the Court of Equity, the appropriately titled Master ran without any restraining control. The endowment was wasted by the costs and delays of legal proceedings. The institution had the resources to educate a large number of children. However, the Committee found a master and usher, the latter being the son of the master and appointed by him when a minor; the trustees receiving considerable stipends from trust property; the school-house dilapidated; no boys being educated; and surplus revenue exhausted by litigation and other expenses. FEARON, *supra* note 37, at 17.

F. *The Creation of a Permanent Charity Commission*

As early as 1835, the Commissioners proposed the formation of a Permanent Board of Commissioners for the Superintendence of Charities, a structure similar to what was eventually adopted two decades later.⁹³ The Select Committee recommended the creation of an “independent authority” in whom many of the powers of the Court of Chancery should be vested. This body would have two main powers. The first was the preservation and proper administration of any charitable trusts.⁹⁴ The second was to relax the doctrine of *cy pres* and give the body the power “to suggest such other appropriation as might be desirable when the object of a trust [was] useless or unattainable.” This recommendation went beyond traditional *cy pres*.⁹⁵ The first power was attained. The second was not achieved until the Charities Act of 1960.⁹⁶ Though bills regularly were introduced, a permanent charity commission was created only after contemporary scandals in the 1840s and early 1850s jarred the public and led to another Royal Commission that prodded for reform.⁹⁷

From 1841 to 1846, Sir Robert Peel’s government attempted to pass legislation that would have acted on the recommendations of the 1835 Brougham Committee report, which inter alia recommended a permanent charities commission.⁹⁸ Unlike reform’s old antagonist, Lord Eldon, Lord

93. *Id.* at 13–15 (citing Parl. Papers 449 (1835)).

94. This was to be accomplished by giving the proposed body the authority:

1) to inquire into the administration of any charitable trust; 2) to compel the production of and from time to time to audit the accounts of the expenditure of any trust; 3) to facilitate the administration of trusts both as to the development of property and the direct execution of trusts by supplementing the powers of trustees when defective; 4) to secure the safe custody and due investment of the property of charitable trusts; and 5) to control, to facilitate, or to diminish the cost of legal proceedings taken on behalf of trusts.

REPORT OF THE COMMITTEE ON THE LAW AND PRACTICE RELATING TO CHARITABLE TRUSTS, 1952, Cmd. 8710, ¶ 82, at 20 [hereinafter NATHAN REPORT].

95. *Id.* ¶ 84, at 21. For a discussion of *cy pres*, see *infra* pp. 772–74.

96. An Act to Replace with New Provisions the Charitable Trusts Acts, 1853–1939, 8 & 9 Eliz. 2, c. 58 (1960) (Eng.).

97. OWEN, *supra* note 5, at 199. At least ten bills were introduced to create a charity commission. *Id.*

98. Robert Peel (1788–1850) made his original reputation as an able and incorruptible administrator when he was Chief Secretary for Ireland in 1812. In 1822, as Secretary of State for the Home Department, he led a comprehensive reorganization of the criminal code. In 1829, after passage of the Metropolitan Police Act, 10 Geo. 4, c. 44 (1829) (Eng.), Peel created the London police force, who were called bobbies after him. He is considered the founder and first leader of the Conservative Party. Peel became prime minister in 1834–1835 and again in 1841. In his second administration, he reduced the scale of protective tariffs, reinstated the income tax, and repealed the Corn Laws in 1846. The latter act led to his resignation. See TRESHAM LEVER, *THE LIFE AND TIMES OF SIR ROBERT PEEL* (1942); NORMAN GASH, *PEEL* (1976).

Chancellor Lyndhurst⁹⁹ brought forward legislative proposals during 1844–1846, whereupon they became entangled in party politics. The Lord Chancellor pointed out the inadequacy of Chancery for small charities and offered examples of the ruinous costs.¹⁰⁰ The universities, the public schools, the hospitals, voluntary associations, and sectarian religious philanthropies all demanded and received exemptions from these legislative proposals,¹⁰¹ but the guilds against which numerous informations had been filed and which expended charitable funds on lavish dinners did not.¹⁰² Though bills were introduced by the Whig government, in the next few years they were defeated, and, as in the past, the major institutions sought exemption from their coverage.

The expiration of the Charity Commission did not mean that all charitable trusts had been reformed or that the public interest turned elsewhere. Applications constantly were made by parties seeking redress of grievances concerning the internal governance of charities.¹⁰³ These complaints came by petitions to the crown and memorials¹⁰⁴ to the Lord Chancellor and other equity judges, to the secretary of state for the home department, the Attorney General, the solicitor general, and to members of Parliament, hoping the latter would bring the matter before the house.¹⁰⁵

Under such pressures, in September 1849, the government established on a temporary basis a more regular machinery for the preliminary examination of such claims, a Royal Commission of Inquiry under the sign manual.¹⁰⁶ The purpose of the Royal Commission was “to inquire into those cases [of charity malpractice] which were investigated by and reported

99. Lord Lyndhurst (1772–1863), born John Singleton Copley in Boston (son of the portrait painter of the same name), served three times as Lord Chancellor. He attended Trinity College, Cambridge where he excelled. Lyndhurst was called to the Bar in 1804. He became a member of Parliament in 1818, Solicitor General the following year, Attorney General in 1824, and Master of the Rolls in 1826. He succeeded Lord Eldon that year. He was little interested in legal principle and was not a judge for the lawyers but rather for the parties. *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 128–29 (A.W.B. Simpson ed., 1984); see 16 *SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW* 5–27 (A.L. Goodhart & H.G. Hanbury eds., 1966).

100. 86 *PARL. DEB.* (3d ser.) (1846) 747; 85 *PARL. DEB.* (3d ser.) (1846) 155; OWEN, *supra* note 5, at 199–200.

101. In practice, this meant that the only oversight was through a visitation.

102. OWEN, *supra* note 5, at 200. Even today, establishment charities have often resisted more efficient regulation. For example, when New York State desired to consolidate a wholly unworkable registration system lodged in the Secretary of State’s office to the Attorney General, a logical repository, larger nonprofits opposed the move.

103. FEARON, *supra* note 37, at 34.

104. Memorials are statements of facts forming the basis of or expressed in the form of a petition or remonstrance to a person in authority. *BLACK’S LAW DICTIONARY* 998 (7th ed. 1999).

105. FEARON, *supra* note 37, at 35.

106. The sign manual was a direction of the crown under the queen’s signature and at the suggestion of the Attorney General. *BOGERT & BOGERT, supra* note 35, § 432.

upon by the Charity Commissioners, but not certified to the Attorney-General, and to report what proceedings, if any, should be taken thereupon."¹⁰⁷ As it was not appointed under parliamentary authority, it had no compulsory powers, and its authority was challenged in many cases.¹⁰⁸

In its first report, dated June 25, 1850, the temporary commission recommended that nine cases should be referred to the Attorney General, who successfully proceeded in eight. The Commission's existence generated additional complaints. The Commission urged the government in its 1850 report for "some public and permanent authority, who should be charged with the duty of supervising the administration of all these charitable trusts."¹⁰⁹ Bills were introduced annually, but unsuccessfully, from 1850 to 1852.¹¹⁰

There were several reasons for the delay in implementation. One was that Brougham was behind the proposal. Other reforms and issues overlapped and were more important: changes in Chancery practice and procedure, the establishment of the Poor Law Commission, and the Ecclesiastical Commission.¹¹¹ The general direction of the reform campaign was really a matter of finding an acceptable formula for the administration of charitable trusts that would bring some order to trust management with the least disturbance to existing institutions. The bills were progressively watered down from an independent commission to a commission of existing judges to an administrative commission under the courts.¹¹² Charitable trust reform was opposed by the church, the courts, municipal corporations—the latter among the most corrupt institutions—as well as by the universities, in a word by the establishment.¹¹³ It was one thing for the Charity Commissioners to terrify the Mr. Lewises, the small trustees. It was quite another to tackle the big institutions.

107. FEARON, *supra* note 37, at 35.

108. *Id.*

109. OWEN, *supra* note 5, at 201 (quoting Royal Committee for Inquiring into Cases (1849), First Report 4 (1850)).

110. FEARON, *supra* note 37, at 38–40.

111. In 1846, a charities bill failed by one vote and got tangled in party politics and the Corn Law struggle. OWEN, *supra* note 5, at 199.

112. TOMPSON, *supra* note 3, at 210.

113. *Id.* at 209.

II. THE CHARITY COMMISSION

A. *The First Permanent Charity Commission*

Finally in 1853, a bill creating a permanent Charity Commission passed in Commons, though it was severely watered down in Lords.¹¹⁴ The Charitable Trusts Act¹¹⁵ created a permanent Charity Commission of four Commissioners, three of whom were to be paid and two barristers of whom were to have at least twelve years' experience.¹¹⁶ The Commission had investigatory and subpoena powers.¹¹⁷ The Commission could require Trustees to submit accounts and statements of a charity.¹¹⁸ Perhaps the most important provision was to place the custody of charity funds under the management of the Commission. The Secretary of the Commission was to serve as Treasurer of Public Charities, a corporation in which could be vested charity property.¹¹⁹ Additionally, the Act created the Official Trustees of Charitable Funds to whom charity trustees might give over funds for holding and investments at no cost to the trustees or the charity.¹²⁰ The income from the investment would be returned to the charity and applied in furtherance of the organization's purposes.

114. The government's original proposal would have permitted the Charity Commission to reorganize "obsolete or vicious" endowments, trusts that had failed, and those which had "tended to the encouragement of 'pauperism' and 'immorality'"—two Victorian code words. 126 PARL. DEB. (3d ser.) (1853) 1016–17. One of the political compromises urged by the government was an exemption for Catholic charities because of their questionable legality. OWEN, *supra* note 5, at 201. Many Catholic charities had been established to provide masses for the dead and were violative of the law against superstitious uses. Others had failed to enroll under the Mortmain Act of 1736. An Act to Restrain the Disposition of Lands, Whereby the Same Become Unalienable (Mortmain Act), 9 Geo. 2, c. 36 (1736) (Eng.). If they were placed under the aegis of the proposed Charity Commission, many such charities would have been invalidated. 129 PARL. DEB. (3d ser.) (1853) 1158. The exemptions for Catholic charities were prolonged from time to time by special acts. See An Act to Continue for a Limited Time the Exemption of Certain Charities from the Operation of the Charitable Trusts Act, 19 & 20 Vict., c. 76 (1856) (Eng.); An Act Further to Continue for a Limited Time the Exemption of Certain Charities from the Operation of the Charitable Trusts Act, 20 & 21 Vict., c. 76 (1857) (Eng.); An Act Further to Continue the Exemption of Certain Charities from the Operation of the Charitable Trusts Act, 21 & 22 Vict., c. 51 (1858) (Eng.). Eventually, Roman Catholic charities became subject to the operation of the Charitable Trust Act. An Act to Amend the Law Regarding Roman Catholic Charities, 23 & 24 Vict., c. 134 (1860) (Eng.).

115. An Act for the Better Administration of Charitable Trusts, 16 & 17 Vict., c. 137 (1853) (Eng.).

116. *Id.* §§ 1–2.

117. *Id.* §§ 10–12.

118. *Id.* § 10.

119. *Id.* §§ 47–50. The treasurer of Public Charities was later renamed Official Trustee of Charity Lands. An Act to Amend the Charitable Trusts Act, 1853 (Charities Act), 18 & 19 Vict., c. 124, § 15 (1855) (Eng.).

120. *Id.*

B. *Charity Scandals and Problem Trusts Redux*

Despite the efforts of the Brougham Commission, a substantial number of endowments remained devoted to useless, eccentric, or obsolescent purposes, or their assets were misappropriated by the trustees. Not all of these charities were small trusts in the hinterlands. The livery companies of the City of London furnished a cornucopia of abuses. With a combined income of £440,000, the livery companies spent £150,000 on public and benevolent objects, £175,000 on administrative costs, and £100,000 on banquets.¹²¹

Even more outrageous were the funds used for bizarre, personal, or outmoded purposes. Ringers at Abbey Church, Bath, had been bequeathed £50 a year by one Thomas Nash:

on condition of their ringing, on the whole peal of bells, with clappers muffled, various solemn and doleful changes, allowing proper intervals for rest and refreshment, from eight o'clock in the morning until eight o'clock in the evening, on the fourteenth of May in every year, being the anniversary of my wedding-day; and also on every anniversary of the day of my decease to ring a grand bob major and merry mirthful peals, unmuffled, during the same space of time, and allowing the same intervals as before mentioned, in joyful commemoration of my happy release from domestic tyranny and wretchedness. . . . And now that dear divine man—(to use Mrs. Nash's own words)—the Rev. P.B., may resume his amatory labours without enveloping himself in a sedan-chair for fear of detection.¹²²

Other donors to the indigent assured they were remembered by requirements in the trust. One Greene perpetuated his name by supplying elderly women with green waistcoats trimmed with green lace. A donor named Gray provided for garbing the poor in gray.¹²³ Some trusts were bound by archaic religious or other restrictions, such as the Bristol almshouse “for five old bachelors and five old maidens ‘who are not inclined to Roman Catholicism.’”¹²⁴

121. L.T. HOBHOUSE & J.L. HAMMOND, *LORD HOBHOUSE: A MEMOIR* 171 (1905) [hereinafter *HOBHOUSE MEMOIR*]. Arthur Hobhouse was a charity commissioner and a leading voice for reform of charitable endowments.

122. *Id.* at 30. A founder at Burton had made a condition for a school under which “[a]ll the children are to be taught to read, but none are to be taught the dangerous acts of writing or arithmetic, except such as the lord of the manor shall think fit.” *Id.* at 30–31.

123. OWEN, *supra* note 5, at 325.

124. *Id.* at 507. The breadth of the definition of charity allowed for some bizarre trusts. In one parish, a trust was created with the direction that half of the income was to be “distributed among fifteen maidens of the parish who should be the prettiest and most regular in attendance at church, the other half among fifteen spinsters over fifty with ‘like qualifications.’” This bequest was sanctioned as a valid charity except for the beauty qualification. *Id.* at 322 (citation omitted).

Occasionally, trusts were founded for purposes that proved positively pernicious. Such was one created by George Jarvis of Herefordshire in 1793. Apparently distressed by his daughter's marriage, the testator disinherited his descendants and left £100,000—an enormous sum—to the poor of three Herefordshire parishes with a population of less than 900. He expressly forbade any of the funds to be used for a building, such as an almshouse.¹²⁵ The consequence of this largesse was to draw paupers from neighboring areas and others seeking, not work, but a portion of the Jarvis bounty.¹²⁶ Nor was the Jarvis bequest unique.

The Charity Commissioners regularly criticized trusts established to give grants to the poor of a particular place.¹²⁷ Though some were well managed, most made little effort to determine need, and the result was the creation of dependence by the idle poor.¹²⁸ The problem for charity reformers was the *cy pres* doctrine, which was still construed strictly in favor of the intentions of the founders. The Charity Commission never obtained authority to reform these types of trusts. Its powers were coextensive with Chancery in the absence of parliamentary action.¹²⁹ Nor did the Commission ever receive the power to unilaterally reorganize larger charities, those with an annual income greater than £50, or to amalgamate thousands of smaller trusts into an efficient, equally distributed endowment that could implement a public policy to relieve the poor or aged. Many of the worst abuses still involved schools. In one with a net income of £792, the headmaster taught three boarders and no others, the under master only attended when he chose, and the usher taught in an inferior village school.¹³⁰

Another problem was the trust to benefit poor relations. In England, but not in the United States, charitable trusts could be established for a donor's poor family members.¹³¹ In the seventeenth century, a London

125. *Id.* at 76.

126. *Id.* at 308–09; SIR ARTHUR HOBHOUSE, *THE DEAD HAND* 40–41, 96–98, 209–210 (1880). Though the Jarvis bequest was reformed by an act of Parliament in 1852, as late as 1946, Charity Commissioners were holding a public inquiry into its administration. OWEN, *supra* note 5, at 76.

127. See *TIMES* (London), Mar. 19, 1873, at 12b (“The Commissioners repeat their opinion of the mischief resulting from the expenditure of charitable funds in the distribution of doles.”).

128. See HOBHOUSE, *supra* note 126, at 38–39, 195–215. Hobhouse cites Lovejoy's Charity in Canterbury, part of whose endowment was to be applied to poor, ancient, and sick people not receiving parochial relief. According to the Commissioners of Education, 500 were receiving relief. As to 113, the Commissioners could obtain no information, but of the remainder they found 145. Fifty one were employed and needed no relief, 36 paupers were expressly excluded by the statutes of the foundation from any such aid, 18 were occasional paupers, 18 drunkards, 17 bad characters, 4 brothel-keepers, and 1 convicted felon. *Id.* at 42.

129. See *infra* p. 751.

130. *TIMES* (London), June 20, 1864, at 8f.

131. *Re Scarisbrick's Will Trusts*, 1 All E.R. 822 (Ch. C.A. 1951); *Dingle v. Turner*, 1 All E.R. 878, 879 (H.L. 1972). Under American tax law, a charitable class of beneficiaries must be large or

salter and alderman, Henry Smith, created a complicated series of trusts, including one of £10,000 for “the poorest of his kindred.” The trusts had invested in Kensington and Chelsea real estate, which were appreciating rapidly in the nineteenth century, so that the annual return for the poor kindred was £6800. By 1868, there were 412 claimants of varying distant descent to the founder. The trustees were overrun with requests from Smiths.¹³² Though the Charity Commissioners attempted to reform such trusts, not surprisingly the founder’s kin, who often multiplied rabbit-like over the generations, fought any changes to the trust’s original purposes.

C. *The Commission’s Powers or Lack Thereof*

Indeed, there was much for the Charity Commission to do, and it was readily criticized for moving too cautiously, merely gathering data, and paying too much attention to the wishes of the founders of the charities.¹³³ The Commission needed greater statutory authority and more political influence. It lacked some essential powers. To undertake any action reorganizing a charity (ranging from replacing trustees, to utilizing *cy pres*, to altering obsolete endowments), or, if *cy pres* would not suffice but a more sweeping restructuring was necessary and the charity had an income over £30 or was located in London, the Commissioners would have to apply to Chancery or develop a plan and present it to Parliament for enactment, which became almost impossible to achieve.¹³⁴

Though the Commissioners could inquire and certify matters to the Attorney General, they had little power to initiate anything themselves.¹³⁵ The Commission had no powers to audit. It could not direct charitable assets to more useful charitable purposes.¹³⁶ All actions were taken on the petitions of others, and most were under the jurisdiction of bankruptcy or county courts (for trusts of £30 or less income per year). As in the past, the Commission

indefinite enough that providing aid to its members benefits the community as a whole. Thus, a charity could not be organized or operated for the benefit of private interests such as the creator’s family. Treas. Reg. § 1.501(c)(3)-1(d)(ii) (2004). In the United States, trusts for poor relations would be organized as private trusts and subject to the applicable taxation.

132. OWEN, *supra* note 5, at 310. A larger sum was established to assist the poor on a national basis, and still exists.

133. *See infra* pp. 749–51.

134. OWEN, *supra* note 5, at 202, 205. During the first fifteen years of the Commission’s existence, only eighteen bills passed through Parliament. *Id.* at 207.

135. FEARON, *supra* note 37, at 53.

136. MITCHESON, *supra* note 10, at 11. The Commission obtained the power to audit educational charitable assets in 1874.

had difficulty in obtaining compliance with the filing requirements.¹³⁷ Whereas 40,000 charities had been expected to file accounts, it took a decade to reach 14,000.¹³⁸ Unlike modern administrative bodies, it had no powers of rulemaking. The Commissioners were understaffed, ignored, and isolated.¹³⁹

Reorganization schemes had to be presented to Parliament, and bills to reorganize charities with clerical trustees regularly were defeated in the House of Lords. The Commission soon discovered the limit of its powers when it attempted to reorganize charities that were governed by trustees with political influence. Christ's Hospital at Sherburn, near Durham, demonstrates the Commissioners' difficulties. The Hospital, established in the twelfth century for the relief of persons afflicted with leprosy, was headed by a Master, appointed by the Bishop of Durham. The original endowment provided for thirty brethren, half of whom were resident. The property of the Hospital, largely in land, mines, minerals, and tithes had increased in value substantially. By 1850, the income approached £4700 annually, and the surplus over expenses (£3000) accrued to the Master without, according to the Commissioners, "the obligation to perform any duty of importance."¹⁴⁰

The Master did not put the money in his pocket but contributed some to charities in the neighborhood. Still, this largesse was not the purpose of the original endowment. When the Master died, the Charity Commissioners proposed that the institution revert to its original intention by reestablishing the institution for the relief of chronic diseases, a modern analogue to leprosy, which was no longer prevalent in England. The Commissioners' scheme included the permanent augmentation of the vicarages of the Hospital, contributions to local institutions for the benefit of the poor, and annual contributions to the Durham County Hospital. As part of the reorganization, the Commissioners recommended abolishing the clerical mastership and implementing a more modern management structure.

This proposal managed to offend both clerical and lay interests. The Bishop of Durham opposed abolishing the Mastership. Contributions to the Durham County Hospital were opposed as an improper use of charitable funds or insufficiently generous, because they were not extended to other hospitals. The Commissioners brought their scheme to Parliament where objections by bishops in the House of Lords scuttled the proposal. Then, they

137. Not until 1860 could the Commission board issue orders without court approval. Thus, the mechanisms for promoting charitable efficiency and accountability were flawed. The Commission could not persuade charities to submit regular accounts.

138. TOMPSON, *supra* note 3, at 214.

139. *Id.* at 213.

140. OWEN, *supra* note 5, at 205-06 (quoting CHARITIES COMMISSION REPORT, SECOND ANNUAL REPORT, Supp. Rep. app., at 6 (1854)).

applied to Chancery in a *cy pres* proceeding, but the court would not agree to the proposed change.¹⁴¹ It quickly became apparent that the Commissioners had little real power.

The only way the Commission could reform a charity, since parliamentary approval of reorganization was nearly impossible to obtain, was to cast the proposed revision in the form of a *cy pres* proceeding and go to Chancery. To apply to Chancery, even to replace trustees, remained time consuming and expensive, particularly for smaller charities. The Commissioners had no power to authorize transfer of funds to the Official Trustees. The Commission needed a summary jurisdiction with similar powers to those exercised by Chancery. Until then, it only had powers of inquiry and suasion. Rarely had so little been gained after so long a struggle for reform.

D. *A Bad Press*

The legal authority of the Charity Commission was weak enough. Even more unfortunate, and somewhat inexplicable, was that the Commission received negative press almost from its beginning. The drumbeat of hostility began in the *Times* as early as June 1854. There were three continuing foci of criticism: the selection of the Commissioners, their perceived lack of aggressiveness, and the slow pace of reform.¹⁴² The *Times* decried the continued misappropriation of charitable assets, often by the trustees, and charged that the Commissioners lacked vision, decisiveness, and talent to cope with the array of abuses, and strictly construing their charge.¹⁴³ The *Times* doubted whether the Commissioners were “sufficiently qualified by their eminence in any pursuit.”¹⁴⁴ It may be that the newspaper’s true basis of criticism was the Commissioners’ middle-class origins and lack of political connections. The *Times* called on Parliament to investigate the shortcomings, always a welcome bone to legislators.

141. *Id.* at 206.

142. As noted in the newspaper at the time:

Abuses sleep as soundly as they did before the Commission was established, for the Commission has been too well bred to wake them. All that we have gained by our great legislative effort and the expenditure of many thousands a year is the making comfortable provision for several very respectable persons at the public expense, and the providing an ever ready answer to any one who shall be indiscreet enough to follow the path trod by Mr. Whiston and drag to light the misappropriation of charitable funds.

TIMES (London), June 22, 1854, at 8. Robert Whiston had uncovered a scandal at the Rochester Cathedral School whereby cathedral clergy had diverted to themselves the appreciation of scholarship funds. ROBERT WHISTON, *CATHEDRAL TRUSTS AND THEIR FULFILMENT* (5th ed. 1850).

143. *TIMES* (London), Mar. 14, 1855, at 9b.

144. *TIMES* (London), Oct. 26, 1853, at 6c.

The Times' attacks were not only harmful, but at least with regard to the qualifications of the Commissioners, demonstrably false. As David Owen has shown, the personnel of the Commission were highly qualified, though as lawyers, they leaned toward a heavily legalistic approach.¹⁴⁵ The problem was neither with the Commissioners nor the Commission, but with the enabling statute. This made the Commission's efforts largely persuasive and educational. The Commissioners received an increasing number of requests for technical advice, which they provided, though this was not the systematic reform the public, press, and Parliament expected.

E. *The Charitable Trusts Act of 1860*

The Charity Commission needed a procedure to circumvent Parliament and Chancery and to institute reorganization of malfunctioning charities.¹⁴⁶ It received such powers in 1860. The Charitable Trusts Act of that year¹⁴⁷ gave the Commission expansive *judicial* powers of their own for smaller charities and enabled it "to make such effectual Orders as may now be made by any Judge of the Court of Chancery sitting at Chambers, or by any County Court or District Court of Bankruptcy."¹⁴⁸

145. OWEN, *supra* note 5, at 203–04. The Chief Commissioner was Peter Erle, brother of the Lord Chief Justice of Common Pleas, and a conveyancer of great skill, who brought a heavily legal and judicial approach but was no slacker. As the statute required, one of his associates, James Hill, was another barrister of twelve years standing and the author of a book on trustees. The third, a clergyman, Richard Jones, had been a professor of political economy at King's College, London. One of the inspectors, Thomas Hare, was particularly talented. *Id.* at 203–09.

146. In 1855, Parliament passed some amendments that made some technical corrections and allowed charities to transfer funds to the Official Trustees without court order. Other provisions that would have shored up the Commission disappeared as the bill wended its way through Parliament. The official trustees of charitable funds were granted perpetual succession and their rights and duties defined. An Act to Amend the Charitable Trusts Act, 1853, 18 & 19 Vict., c. 124, §§ 17–28 (Eng.).

147. An Act to Amend the Law Relating to the Administration of Endowed Charities, 23 & 24 Vict., c. 136 (1860) (Eng.).

148. *Id.* § 2; OWEN, *supra* note 5, at 207–08. These included orders for establishing schemes, appointing and renaming trustees, and authorizing financial transactions. The Commissioners' reorganization powers were applicable only to charities with an annual income of £50 or less, about ninety percent of all charities in number but only fifteen percent in terms of endowment assets. 23 & 24 Vict., c. 136, § 4; MITCHESON, *supra* note 10, at 13. For larger charities, proposals for reorganization required the consent of a majority of the organization's trustees, which could be difficult to obtain if the trustees were involved in the abuses. Power of appeal from Commission orders was by petition to the Court of Chancery, to be brought by the Attorney General, a person authorized by him, and in certain cases by any two inhabitants of the parish where the charity was applicable. 23 & 24 Vict., c. 136, § 8. Jurisdiction of the county courts and district courts of bankruptcy was extended to charities whose gross income was £50 or less. *Id.* § 11. This jurisdictional expansion was not much utilized. The jurisdiction of courts of bankruptcy in charity matters ceased with the abolition of those courts in 1869. An Act to Provide for the Winding-up of the Business of the Late Court for the Relief of Insolvent Debtors in England, and to Repeal Enactments Relating to Insolvency, Bankruptcy, Imprisonment for Debt, and Matters Connected Therewith, (Bankruptcy Repeal & Insolvent Court Act), 32 & 33 Vict., c. 83 (1869). For charities with income over £50, whose trustees did not wish to apply to the Commission, the old procedures of applications to the Master of the Rolls and Lord Chancellors, an information brought by the Attorney Gen-

The Act described the Commissioners' administrative powers as those of a "Judge of the Court of Chancery sitting at Chambers,"¹⁴⁹ which gave them a broad, albeit undefined, role. Though the Act giveth, it also tooketh away, stating that the Commissioners could not intervene against charities in contentious cases that properly belonged to a judicial tribunal.¹⁵⁰ One supposes trustees could use this clause to protest against Commission intervention. Nevertheless, from a regulatory perspective, the Commission was placed on a more secure footing and, at least for charities with smaller endowments, became "a kind of poor charity's Chancery" with the flexibility but few of the defects of the Chancery Court itself.¹⁵¹ Granting charitable trustees the option to apply to the Commission rather than Chancery had a significant impact on reducing judicial caseloads.¹⁵² This suggests charities' trustees had confidence in the Commission, at least compared to the judicial process.¹⁵³

From 1860, with the exception of educational and quasi-educational trusts, the powers of the Commissioners were not extended in any material way for one hundred years.¹⁵⁴ As summarized by the Nathan Report, an extensive review of the regulation of charitable trusts in 1952, the powers of the Charity Commission were: (1) advising: giving advice upon the application of the trustees or others concerned in the administration of a trust; (2) administrative: giving directions upon the application of trustees or others concerned in the administration of trusts; controlling dealings with the property of trusts; controlling legal proceedings by trustees; settling the compromise of claims by, or against, trustees; (3) supervisory: investigating the administration of charities, including their accounts, and taking any appropriate further action; and (4) quasi-judicial: appointing trustees or removing trustees or officers;

eral, or petition in equity court still applied. An Act for the Better Administration of Charitable Trusts, 16 & 17 Vict., c. 137, § 28 (1853) (Eng.).

149. 23 & 24 Vict., c. 136, § 2.

150. *Id.* § 5.

151. OWEN, *supra* note 5, at 208.

152. In the first three years, applicants to the Court of Chancery sank from 86 to 18 and applicants to the County Courts fell from 146 to 1. The Commission proved an economically efficient and speedier alternative. *TIMES* (London), June 20, 1864, at 8f.

153. Many smaller matters were referred to the Commission. In the first eleven years following the 1860 act, the Commission made 3,404 orders appointing trustees and establishing schemes. It held a total of £4,772,792 in assets, divided into 6,224 separate accounts, and it transferred £413,934 to charities. *TIMES* (London), Apr. 29, 1872, at 11c. Prior to the 1860 amendments, the Commissioners had referred over 200 applicants to Chancery or other courts. Afterwards they sent only 19, but made 280 orders that allowed the Commission to appoint and remove trustees or establish schemes for governance of charities. *TIMES* (London), May 4, 1863, at 9e. The Commission's orders allowed avoidance of going to Chancery.

154. Change came with The Charities Act of 1960. 8 & 9 Eliz. 2, c. 58 (Eng.).

establishing or making schemes within the limits of the *cy pres* doctrine, subject to appeal to the Chancery Division of the High Court.¹⁵⁵

F. *The Charities of London*

Certain societal needs in the 1880s led to a temporary increase of the Charity Commission's powers. Two groups of charitable endowments occupied much of its energies in the nineteenth century: the parochial charities of the City of London and the anarchic accumulation of endowments for educational purposes.¹⁵⁶ Parochial charities were those charities administered by London's parishes.¹⁵⁷ To reform these endowments the Charity Commission was granted extraordinary powers that avoided the inefficiency of *cy pres*, enabling the Commission to reform charities on a plenary basis. This was one area where the Charity Commission was successful under any standard.

The charities of London included some of the richest, least effective, and most obsolescent in England. Because of their political influence and the changing demographics of the City, they presented particular challenges to reformers. The two main types of London charities were the livery companies¹⁵⁸ and the parochial charities.

155. NATHAN REPORT, *supra* note 94, ¶ 97, at 25.

156. OWEN, *supra* note 5, at 213.

157. The City refers to the square mile around the Bank of England, located on Threadneedle Street. In the third quarter of the nineteenth century, this area changed from a residential to a financial services area.

158. Livery companies were founded as trade societies (successors to the medieval craft guilds) to protect consumers or employers against incompetency or fraud from a dealer or artisan. Later they served as guilds and controlled the number of new members, fixed prices of their products, and regulated the trade of their members. They formed domestic tribunals and benefit societies. The name "Livery Company" derived from the custom of each company having a distinguishing dress. J.F.B. FIRTH, REFORM OF LONDON GOVERNMENT AND OF CITY GUILDS 97-104 (1888); OWEN, *supra* note 5, at 276. By the 1870s, the livery charities were ripe for reform. They had an estimated income of not less than £800,000 at their disposal, divided into corporate income under their discretion and trust income devoted to specific charitable purposes. FIRTH, *supra*, at 107. The Mercer's Company had an income of £82,758 in 1880. The companies ran a substantial philanthropic network of almshouses, schools, and other charitable activities but maintained they were private bodies and could spend as they saw fit. OWEN, *supra* note 5, at 287. As with other charitable assets in the nineteenth century, the Livery Companies' endowments had increased enormously and the money was not always put to efficient use. They held the most luxurious banquets. A dinner and ball to commemorate the return of the Prince of Wales from India cost £26,760 15s 6c. FIRTH, *supra*, app. I, tbl. 13, at 148. As early as 1873, Gladstone suggested that the assets of the Livery Companies be appropriated for City of London purposes. The main result of this challenge was that Livery men, formerly supporters of the Liberal Party, moved to the Conservatives. In 1880, the Liberal government created a Royal Commission on the Livery Companies, which, in a split decision, viewed the companies as semipublic and concluded thereby some public control would be appropriate. OWEN, *supra* note 5, at 287-88. The inquiry led to little, and the companies continued as before. However, they were politically astute enough to realize that if they did not reform themselves, others would do it for them and take away their huge endowments. *Id.*

G. *The Parochial Charities*

The parochial charities were much more venal and vulnerable than the livery companies. Most of the 1300 parochial trusts predated 1700.¹⁵⁹ Many supported anachronistic purposes: funds for ransoming Christian captives from the Turks or Barbary pirates; for the poor fishmongers in Old Fish Street, there being no fishmongers there anymore; or for killing lady-birds on Cornhill.¹⁶⁰ Many such trusts were too small to support the costs of a *cy pres* action in Chancery. However, because their annual revenues exceeded £50, the Charity Commissioners could not intervene without an invitation from the trustees, which they rarely received.

Even trusts less arcane and obsolescent became irrelevant as the City of London became a place of work, not residence.¹⁶¹ As the population of the City shrank, its charitable endowments increased by fifty percent.¹⁶² In London's financial district, urban renewal replaced working class quarters with offices, leaving many endowments for the poor but an absence of beneficiaries. There was a superabundance of churches stuffed with clergy. They were shepherds without flocks, but the parishes had considerable endowments that were growing because of real estate's appreciation. Furthermore, these endowments were poorly managed—not corruptly, but incompetently. The per capita of charity funds was £4 a head, though pauperism was greater than in some other areas of London. Churches, with endowments far larger than necessary and with miniscule congregations, created a spoils system to expend the income.¹⁶³ Most of the funds were spent for ecclesiastical purposes, such as for repairs. Since many of the churches had no congregations, the greater part of the money was wasted or spent for services for which a fee was paid. The minister and clerk made their appearances, and after waiting a due period of time and finding that no person attended, they went away and collected their stipend. There were endowments for sermons to be preached in acknowledgement of the deliv-

159. See W.K. JORDAN, *THE CHARITIES OF LONDON 1480–1660* (1960).

160. 261 PARL. DEB. (3d ser.) (1881) 1295.

161. The City of London was about a square mile in area. It contained 108 civil parishes and 61 ecclesiastical parishes. The population had steadily decreased from 112,000 in 1861 to 76,000 in 1871 and to 52,000 a decade later. The parishes were of two classes. Approximately eight toward the outskirts had in 1871 a population of more than 6,000 each. 261 PARL. DEB. at 1291 (statement of James Bryce). There were 109 parishes in the City whose total population in 1871 was only 74,897 altogether. The Bank of England, standing astride Threadneedle and Princess Street, occupied one whole parish. *TIMES* (London), Mar. 23, 1880, at 9d. Other parishes had populations which could be counted in the tens.

162. OWEN, *supra* note 5, at 277.

163. *Id.* at 278–79.

erance of England from the Spanish Armada and a sermon of thanksgiving for deliverance from the Gunpowder Plot.¹⁶⁴

Parochial endowments consisted of two categories, ecclesiastical and general. The former were for the upkeep of the churches and their functionaries. Nonecclesiastical charities were of two kinds: those created for education and a much larger number with funds for general charitable purposes, principally the relief of the poor through doles—the giving of money, food, coats, or blankets.¹⁶⁵ Some of the noneducational endowments were outrageous, such as Werk's Charity, established in the fifteenth century to provide faggots for the burning of heretics.¹⁶⁶ The distribution of doles was harshly criticized, for clever dole candidates would go from parish to parish seeking relief.¹⁶⁷ Because of the dearth of bona fide poor residents, eligibility was interpreted loosely.¹⁶⁸

Some of these trusts engaged in "self-help" *cy pres* by using their endowments to provide relief to ratepayers by making a contribution to the poor rate, thereby reducing taxes.¹⁶⁹ Other funds were used to provide food and drink for clergy and parishioners.¹⁷⁰ These were such obvious abuses and so long standing that reformers with more clout than the Charity Commission raised alarm.¹⁷¹

In the 1870s, reform of city charities became tied to the broader issue of municipal reform. In the latter part of the decade, some Liberal members of Parliament picked up the cry, and a Royal Commission on the Parochial Charities was appointed, which after hearings merely proposed that only

164. 261 PARL. DEB. at 1292–93.

165. *Id.* at 1293; OWEN, *supra* note 5, at 279.

166. OWEN, *supra* note 5, at 279 (citing REPORT OF THE ROYAL CITY PAROCHIAL CHARITIES COMMISSION, FIRST REPORT, 8, Q. 262 (1880) [hereinafter PAROCHIAL CHARITIES]). There is no indication that funds were ever used for their intended purposes. *Id.* at 279 n.14.

167. See HOBHOUSE, *supra* note 126, at 30–32.

168. PAROCHIAL CHARITIES, *supra* note 166, at 143, 152, 194, 226, Q. 4805, 5064, 6388–92, 7401. Many recipients used false addresses to obtain coal tickets. They sold the tickets at a reduction to retailers of coal. 261 PARL. DEB. at 1294; see also TIMES (London), Jan. 26, 1870, at 9c.

169. A parish in Lombard Street contributed out of its charities endowment £700 per year to the poor rate, a charge which otherwise would be paid by the great banking-houses which were situated there. Another parish spent £1,300 in the payment of poor rates and then borrowed money to repair the church. 261 PARL. DEB. at 1294. In Allhallows, Barking, it was found that "the distribution of doles on New Year's-day did not tend to the sobriety of the district." TIMES (London), Mar. 23, 1880, at 9d. In one case the sum of five shillings was left some 400 years before to defray the cost of a "love-feast" at which parties at variance should meet and be reconciled. The feast had been supplemented by charitable funds of the parish, now expanded into an annual dinner at Richmond costing about £60, while a modest bequest of £1 6s 8d, dedicated to the maintenance of some godly, virtuous, and well-disposed scholar at Oxford or Cambridge, received no addition at all. *Id.*

170. OWEN, *supra* note 5, at 280; 261 PARL. DEB. at 1295.

171. Sir Charles Trevelyan was the primary critic. See his letters to the Times from 1870. TIMES (London), Jan. 26, 1870, at 7b; TIMES (London), Feb. 4, 1870, at 4e.

surplus parochial funds should be placed in a common pool.¹⁷² This was too little for reformers such as James Bryce who introduced more radical bills in 1881 and 1882 that would give Commissioners of parochial funds enormous powers and would free London endowments from parochial and founder's restrictions.¹⁷³ Bryce's proposals were opposed by the parishes, who argued they should be in charge of any reform.¹⁷⁴

The Parochial Charities Act of 1883¹⁷⁵ appointed additional Charity Commissioners to act as a temporary commission and to examine all City charities and categorize them as "ecclesiastical" or "general." If a charity had both qualities, the Commission would prorate the endowment between the two categories.¹⁷⁶ The statute distinguished between live or active parishes on the circumference of the City and a second category of parishes with substantial endowments but little population. The former parishes would continue to administer their own charities, though in conformity with new schemes framed by the Charity Commissioners.¹⁷⁷

In the large parishes of the first schedule, small trusts were amalgamated and old funds were put to new uses, such as providing for libraries. Not everything went smoothly. Aldgate, with a charity income of £10,000 annually, was controlled by a small group of opportunistic fiduciaries who used the endowments for themselves. To forestall the Commissioners, the ring leased three of the most valuable parish sites to themselves or confederates. This was reported to Commissioners, who turned the matter over to the Attorney General for criminal prosecution. The Commissioners amalgamated three dozen trusts into one foundation and redesignated the beneficiaries.¹⁷⁸

The Parochial Charities Act granted the Commissioners enormous powers that they could never obtain from Parliament for their regular responsibilities. They could reorganize charitable endowments without the

172. 1 PAROCHIAL CHARITIES, *supra* note 166, at 10–11; OWEN, *supra* note 5, at 281–82.

173. 261 PARL. DEB. at 1296–97; OWEN, *supra* note 5, at 282. James Bryce (1838–1922) was a scholar and statesman. Educated at Glasgow and Trinity College, Oxford, Bryce studied law at Heidelberg and was called to the Bar in 1867. He was Regius Professor of Civil Law at Oxford from 1870–1893. Bryce's *American Commonwealth* (1888), based on extensive travels in North America, was a principal political science textbook in the United States for decades. He entered Parliament as a liberal in 1882, and later served in the cabinet. Bryce served as Ambassador to the U.S. from 1907–1913. He became Viscount Bryce of Dechmont in 1914. BIOGRAPHICAL DICTIONARY OF THE COMMON LAW, *supra* note 99, at 84–85.

174. TIMES (London), May 5, 1881, at 10f. The parishes had a bill introduced on their behalf.

175. An Act to Provide for the Better Application and Management of the Parochial Charities of the City of London (City of London Parochial Charities Act), 46 & 47 Vict., c. 36 (1883) (Eng.).

176. *Id.* §§ 3, 5–6.

177. OWEN, *supra* note 5, at 284.

178. *Id.*

necessity of a *cy pres* action. The myriad trusts were amalgamated and substantial sums were allocated to useful charitable purposes. The Commissioners completed their first task of classification of charitable property by 1887. The endowments in the first schedule were to be applied by the parishes according to schemes proposed by the Commissioners for the purposes specified in the endowment statutes.¹⁷⁹ For the charities in the second schedule, assets initially would be applied by the Commissioners, and thereafter by a special new governing body for the management of charity funds for the benefit of the city generally as directed under the schemes prepared by the Commissioners.¹⁸⁰ The ecclesiastical endowments in the second schedule were applied to the restoration and support of churches that lacked sufficient funds.¹⁸¹ Any surplus would be paid to the Ecclesiastical Commissioners.

The decision on the ecclesiastical funds aroused little controversy. The Commissioners aggregated nonecclesiastical purposes of about £50,000. The biggest object of the Commissioners' largesse was contributions to the new polytechnic (vocational) institutions, which provided technical training for the lower-middle and working classes. Furthermore, they invaded capital to make additional grants to the polytechnics and directed that the new City Parochial Foundation should pay these institutions in perpetuity approximately £22,500.¹⁸² This was doubly ironic, for the Commissioners were supporting a new and yet unproven educational approach for the working classes after heavy criticism that their educational endowment reforms were biased toward the middle classes.¹⁸³ And, as the organization that was supposed to reorganize trusts with fixed and outmoded purposes, it bound the new foundation forever to support a purpose that might itself become inefficient or obsolescent.

179. In parishes of the first schedule, ecclesiastical property produced £2400 annually; general charitable property produced £10,500. In the parishes in the second schedule, ecclesiastical property yielded £37,000, and general charity property produced £57,000. See *TIMES* (London), Oct. 4, 1887, at 4a.

180. 46 & 47 Vict., c. 136, § 48. The new governing body, "The Trustees of the London Parochial Charities," consisted of twenty-one members, five appointed by the crown, four by the Corporation of London, two by the London County Council, two—later reduce to one—by the University of London, two by the council of University College, two by the council of King's College London, two by the Ecclesiastical Commissioners, and one each by governors of the Bishopsgate and Cripplegate Foundations which had the largest number of charities taken in by the Commissioners' schemes. See *TIMES* (London), Sept. 4, 1889, at 10e.

181. OWEN, *supra* note 5, at 295. About half of the funds were to maintain the fabric and services of fifty-five churches. Other grants were for the repair and restoration of churches. *Id.*

182. *Id.* at 294. Many of the livery companies also contributed to the Polytechnics.

183. See *infra* p. 765.

Their support of the polytechnics again served to agitate powerful interests. A foundation has been described as “a large body of money completely surrounded by people who want some.”¹⁸⁴ The second part of the Commissioners charge, determining how to allocate the common parochial pool, proved this aphorism. Some, including Arthur Hobhouse, former charity commissioner, desired the funds allocated for open spaces. Others wanted the assets devoted to charity. The Commissioners were besieged by suitors, particularly the London School Board and supporters of open spaces. To their subsequent credit, the Commissioners allocated, with the approval of Parliament, £50,000 to save Hampstead Heath. Other funds were expended on open spaces. These grants served as seed money and as a catalyst for other donors.¹⁸⁵

Fortunately, the Foundation’s assets increased because of the appreciation of real estate prices. The City Parochial Foundation later was able to make grants for a variety of community institutions from gardens to the arts that would reflect well on the modern community foundation in many American cities.

The reform of the City of London Charities was one notable area of success in comparison to the Commission’s more general record of frustration and receipt of criticism. The abuses and waste occurring among the parochial charities were outrageous. There was little argument against reform of these trusts. Few lived in the areas where these charities were located. The parochial charities effort was part of a broader campaign for municipal reform. The ability to use *cy pres* powers meant change could occur efficiently. The Commission, however, never could build on its past successes; its efforts at educational reform generated substantial opposition.

H. Charity Administration and Educational Reform

In the nineteenth century, the Charity Commission was linked to educational reform. In 1873, it assumed the responsibilities of a separate body, the Endowed Schools Commission. The Commission became involved in educational reform because of a chimerical belief that there were sufficient charitable assets to be tapped to pay for a widespread modernization of public education. The new responsibilities increased its powers with regard to educational matters but generated unattainable expectations that hurt the Commission’s reputation. Educational reform was controversial by nature,

184. This is attributed to Dwight MacDonald. See JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 604 (2d ed. 2000).

185. OWEN, *supra* note 5, at 291–92. As we see from modern matching grant campaigns, the Commissioners’ grants encouraged successful fundraising campaigns by individual polytechnics.

difficult to implement, and appropriated resources in possession of one group in society and reallocated them to another, a combustible alignment.

In the mid-nineteenth century, all political parties wanted to restrict state activity within narrow limits. Yet, even within that limited political framework, it was recognized that a democratic people no longer could remain democratic and uneducated. Without state compulsion, control, and adequate resources, the democracy would not become educated.¹⁸⁶ British education in the nineteenth century served as a means of control and security by the ruling class and as an instrument for securing freedom on the part of the ruled.¹⁸⁷ The state first connected itself with education in 1833 with a parliamentary grant of £20,000 in aid of charitable subscriptions for the education of the poor.¹⁸⁸ In 1839, with the establishment of the Committee of Council on Education,¹⁸⁹ the state took the first steps toward assuming educational control. The need for state intercession originally was recognized for primary education. Without state support, the masses would remain uneducated.¹⁹⁰ When Brougham became interested in the subject in the second decade of the century, the assumption was that the upper middle classes would pay for their education, save where endowments had been established for their benefit. Private benevolence would give the poor training suitable to their station in life.¹⁹¹

Educational reform initially focused upon the antiquated governing statutes of universities, public schools, and smaller endowed schools. At midcentury, royal commissions investigated different types of educational institutions and proposed reforms of the existing governing statutes, alterations that were resisted by the schools.¹⁹² Thereafter, a series of statutes im-

186. R.L. ARCHER, *SECONDARY EDUCATION IN THE NINETEENTH CENTURY* 147-48 (1921).

187. HELEN M. LYND, *ENGLAND IN THE EIGHTEEN-EIGHTIES* 349 (1945).

188. 14 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 125 (A.L. Goodhart & H.G. Hanbury eds., 1964) [hereinafter 14 HOLDSWORTH].

189. *Id.* This was a committee of the Privy Council and administered the educational grants.

190. ARCHER, *supra* note 186, at 149. Elementary education for working class children was hazardous at best. The "Dame" schools were run by elderly ladies who charged a small amount for instruction in reading, writing, arithmetic, and the Bible. These institutions gave some education to a few children. There were some charity schools established by private subscribers. In many industrial areas there were no schools for the poor at all. In 1815, the monitorial system was introduced whereby a master taught older children, monitors, who then taught younger children. Private societies of a religious nature provided some schooling. These associations, the British and Foreign School Society and the National Society for Education of the Children of the Poor in the Principles of the Established Church, reflected a religious divide that was to bedevil educational reform through the century. It was to them the government made its initial grant in 1833. HERBERT L. PEACOCK, *A HISTORY OF MODERN BRITAIN 1815 to 1968*, at 51-52 (1968). For a growing population, voluntary private organizations could not hope to meet the educational needs of the times. LYND, *supra* note 187, at 356-59.

191. OWEN, *supra* note 5, at 247.

192. ARCHER, *supra* note 186, at 151-52.

plemented the recommended reforms.¹⁹³ Although school endowments came under the authority of the Charity Commission under its initial legislation, it could not undertake major educational reforms.¹⁹⁴ Nor could it deal with schools in relation to each other, or look at the broader educational canvas, or attack the need for administrative rationalization and curricular reform.¹⁹⁵ In the mid-1860s, a Schools Inquiry Commission, the Taunton Commission, under the chairmanship of Lord Taunton, investigated the conditions of the nation's endowed schools.

I. Endowed School Reform

The existing endowed schools were of three categories or grades. At the top were the great public schools, whose students graduated at eighteen or nineteen. A second grade of endowed schools, larger in number, graduated students at sixteen or seventeen who went into professions or trades. The sciences and modern languages, the most necessary tools for these students, were neglected. A third category, catering to the largest number of students, who left school at thirteen or fourteen, educated the sons of farmers, small tradespeople, and shopkeepers.¹⁹⁶ The problems of the endowed schools were many. Though the highest level of schools offered an excellent classics curriculum, the schools were deficient in the sciences in contrast to similar institutions in France and Germany, and were monopolized by the rich.¹⁹⁷ For schools of the next rank, a classical education was of little use.

There were enormous disparities in schools' endowments, in their location, and in the abilities of their masters. The endowed schools' foundations dated usually from the sixteenth or seventeenth centuries. While the value of the endowments had risen, the governing documents had not been altered and were ill adapted for the modern educational needs of an industrializing society.¹⁹⁸ For example, the endowments might provide that poor children

193. An Act to Make Further Provision for the Good Government and Extension of the University of Oxford, of the Colleges therein, and of the College of Saint Mary Winchester (Oxford University Act), 17 & 18 Vict., c. 81 (1854) (Eng.); An Act to Make Further Provision for the Good Government and Extension of the University of Cambridge, of the Colleges Therein, and of the College of King Henry the Sixth at Eton (Cambridge University Act), 19 & 20 Vict., c. 88 (1856) (Eng.); An Act to Make Further Provision for the Good Government and Extension of Certain Public Schools in England (Public Schools Act), 31 & 32 Vict., c. 118 (1868) (Eng.).

194. If the situation at a school was *in extremis*—there were no trustees or master, or more likely, no students—the Charity Commissioners could frame plans *cy pres* and alter the governing statutes. Such action was an extreme remedy. OWEN, *supra* note 5, at 249.

195. *Id.*

196. 194 PARL. DEB. (3d ser.) (1869) 1356–58 (statement of W.E. Forster, Vice President, Council on Committee of Education).

197. K. THEODORE HOPPEN, *THE MID-VICTORIAN GENERATION: 1846–1886*, at 307–09 (1998).

198. OWEN, *supra* note 5, at 248.

from the parish were to receive a free classical education, a boon if one was to go on to the university or into the clergy, but otherwise useless. It proved impossible to reform archaic foundation regulations through a *cy pres* proceeding in Chancery, because of the 1805 Leeds Grammar School case that prohibited teaching a modern curriculum if the schools' statutes provided for a classical education.¹⁹⁹ One consequence of the case was that schools with small endowments that were unable to support a master equipped to teach Latin and Greek could not apply their endowments to humbler uses such as the "three r's" or commercial subjects.²⁰⁰

Another common problem was that some schools, founded for the poor of the parish, became the preserve of the upper classes. Harrow, the ancient public school whose alumni include Winston Churchill, was intended by its founder to teach elementary classics to any boy in the parish whose parents wished such an education. By the mid-nineteenth century, its current income was many times more than would suffice if every Harrovian parish parent had desired his son to learn classics. However, since the beginning of the eighteenth century, it had become an aristocratic school.²⁰¹

J. Report of the Schools Inquiry (Taunton) Commission

The Schools Inquiry or Taunton Commission issued a report in 1868 on the bleak condition of secondary education.²⁰² The Commission's aim was to secure an efficient education for the middle classes, one which made due

199. *Attorney-General v. Whitely*, 32 Eng. Rep. 1080, 1081-84 (1805). The trustees of the Leeds Grammar School proposed to use its endowment to teach arithmetic, writing, and modern languages in addition to classics. Lord Eldon held that the Leeds Foundation statutes stated that it was intended to support instruction in the classics and nothing else. To introduce other subjects was a breach of trust. For an analysis of the impact of the case and a critique of Eldon's reasoning, see OWEN, *supra* note 5, at 248-49; BRIAN SIMON, *STUDIES IN THE HISTORY OF EDUCATION 1780-1870*, at 105-08 (1960). The Charity Commission was of no help in such situations, because its limited mandate was confined to trusts that could not be carried out. Only Parliament could make it possible to alter a charitable trust whose purposes were not frustrated by creating by statute a variance power for the trustees. As we have seen, this was extremely difficult to accomplish.

200. OWEN, *supra* note 5, at 249.

201. ARCHER, *supra* note 186, at 150. Churchill, for instance, was the grandson of the Duke of Marlborough. The solution of Brougham and the Whigs to this problem would be to alter the governing instruments so that all residents of Harrow could receive an education, but the surplus income would be spent on the school rather than taken for broader educational purposes. *Id.* at 150-51.

202. Of some 3,000 endowed schools, approximately 800 offered education beyond the elementary level. Most sent no boys on to the universities, and of those that did, only forty sent as many as thirty students annually. Endowments ranged widely in value, and fewer than half could claim an annual income of £100. The endowed schools were not distributed in areas where there had been population growth, but in accordance with the wealth and population of the country in the reign of Elizabeth I. This meant that the North and the Midlands, the new industrialized areas, and impoverished areas, such as Wales, were underserved. Less than half taught any Greek or Latin, a prerequisite for entry to a university, despite their founding statutes. Owen, *supra* note 5, at 250-51.

provision for class distinctions while allowing for a controlled degree of upward mobility.²⁰³ Its primary recommendation suggested that existing endowments be used more efficiently to expand the supply of secondary schools. This only could be accomplished by a revision of existing charity law.²⁰⁴

The Taunton Commission advocated putting a liberal education within the reach of all classes. What this meant in fact was that the free places would be largely abolished and replaced by a more limited number of exhibitions awarded solely on merit.²⁰⁵ For the rest, a fee of about £2 would provide entry to a local elementary school if it remained open. The extension of education for all classes was achieved by imposing fees on all nonscholarship winners, ending the free schools and imposing costs that the poor could not afford.²⁰⁶ Other endowed funds would be used to allow the elementary graduate to attend a grammar school.²⁰⁷ These latter exhibitions were worth approximately £25. Exhibitions based upon merit would come from the existing endowments. In effect, the Commission proposed that the middle classes gain a mass education at the expense of the poor.

203. SIMON, *supra* note 199, at 332–35.

204. The Charity Commission and Chancery were limited to trusts in need of *cy pres* reform, i.e., trusts that could not be carried out. Trusts that were merely inefficient, or had outmoded purposes but could still be carried out, could only be altered by Parliament, a long, expensive, and often fruitless effort, because such change might be resisted by the trustees. OWEN, *supra* note 5, at 251–52 (citing Report of the Royal Commission Known as the Schools Inquiry Commission (The Taunton Report) 463–69 (1868)). Additionally, the report urged that endowed schools be treated as a group, rather than as isolated units.

205. At the time of the Taunton Commission, education for the lower classes in England was a matter of luck. A bright boy from a modest background might catch the eye of a local cleric who controlled “exhibitions” or free admissions to an endowed school, established by a founder centuries before. An exhibition is a fixed sum of pecuniary assistance given for a term of years from the endowment of a school. Oxford English Dictionary, *Exhibition*, available at http://dictionary.oed.com/cgi/entry/50080032?single=1&query_type=word&queryword=exhibition&first=1&max_t_o_show=10 (last visited Mar. 24, 2005). The student might be able to earn a further exhibition to a grammar school or the University, thereupon entering the church or the law. For others, opportunity did not beckon. Scholarships were on the basis of favor rather than merit, though some local schools offered a free elementary education to all children in the area whose parents desired to send them. Even after the Education Act of 1870, 33 & 34 Vict., c. 75 (Eng.), whereby the state promised to fund primary education, school attendance was not compulsory.

206. SIMON, *supra* note 199, at 329–32. One is reminded of the writer Anatole France’s comment: “[The poor] must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets and to steal their bread.” ANATOLE FRANCE, *LE LYS ROUGE* ch. 7 (1894).

207. A grammar school is a secondary school equivalent to an American high school in which, at that time, Latin and Greek were taught.

K. *The Endowed Schools Act of 1869*²⁰⁸

The government utilized reform approaches similar to those used in the Universities²⁰⁹ and Public Schools Acts.²¹⁰ A special commission, an Endowed Schools Commission, was established to approve new schemes for all of the foundations not covered by the Public Schools Act.²¹¹ The primary responsibility of the Endowed Schools Commissioners was to suggest how existing endowments could be utilized to expand the supply of education. The simplest approach was to use existing endowments more efficiently to provide the basis for a national system.²¹² However, even if all educational endowments were reformed, the funds would be insufficient to create a complete national system of secondary education.²¹³

The authority of the Endowed School Commissioners far exceeded that of their counterparts at the Charity Commission. They could alter the purposes of an educational endowment, incorporate any governing body or establish a new one, supercede the powers of visitors save at cathedral schools, reorganize, provide for, and advance the education of boys and girls. In theory, they could convert a boys' school to a coed or female institution or move

208. An Act to Amend the Law Relating to Endowed Schools and Other Educational Endowments in England, and Otherwise to Provide for the Advancement of Education (Endowed Schools Act of 1869), 32 & 33 Vict., c. 56 (Eng.).

209. See An Act to Make Further Provision for the Good Government and Extension of the University of Oxford, of the Colleges therein, and of the College of Saint Mary Winchester (Oxford University Act), 17 & 18 Vict., c. 81 (1854) (Eng.); An Act to Make Further Provision for the Good Government and Extension of the University of Cambridge, of the Colleges Therein, and of the College of King Henry the Sixth at Eton (Cambridge University Act), 19 & 20 Vict., c. 88 (1856) (Eng.).

210. An Act to Make Further Provision for the Good Government and Extension of Certain Public Schools in England (Public Schools Act), 31 & 32 Vict., c. 118 (1868) (Eng.).

211. The government's rationale was that the Charity Commission, whose services were little acknowledged, had been acting persistently and laboriously but was overworked and had insufficient powers. Only in the smaller charities did the Commission have jurisdiction and neither it nor Chancery could consider one school in relation to another or to attempt any system of distribution without submitting a bill to Parliament, which was difficult to carry through. 194 PARL. DEB. (3rd ser.) (1869) 1369.

212. OWEN, *supra* note 5, at 247; ARCHER, *supra* note 186, at 169.

213. State support of elementary education was achieved with the Education Act of 1870, 33 & 34 Vict., c. 75, but the creation of a complete state secondary system did not occur until 1902 after another commission had been formed in 1895. ARCHER, *supra* note 186, at 169. The Education Act of 1870 was justified as an attempt to preserve education as primarily a private sector responsibility. The government's spokesman on education stated:

Our object is to complete the present voluntary system, to fill up gaps, sparing the public money where it can be done without, procuring as much as we can the assistance of the parents, and welcoming . . . the co-operation and aid of those benevolent men who desire to assist their neighbors.

199 PARL. DEB. (3d ser.) (1870) 443-44. The voluntary sector could apply for additional building grants. In districts with insufficient schools, elected boards were established to run schools funded out of the rates. Voluntary schools continued to receive Treasury grants to cover a proportion of their costs. The cost of the 1870 act was only £1.6 million, 4.1% of government expenditures excluding debt charges. HOPPEN, *supra* note 197, at 598-600.

an existing school to a new location.²¹⁴ The reorganizational initiative lay with the Commissioners.²¹⁵ Perhaps the most extraordinary innovation was the commissioners' ability, with the consent of the charity's governing body, to evade the swamp of Chancery in pursuit of a *cy pres* ruling. They could take any noneducational endowment created before 1802 that had arcane and obsolescent purposes "which [had] failed altogether or [had] become insignificant in comparison with the magnitude of the endowment" and convert it to educational purposes.²¹⁶ In summation, the Endowed Schools Commission offered a speedy and inexpensive approach to the reform of secondary education.²¹⁷

Compared to the feeble powers of the Charity Commission, which germinated over twenty years, the authority granted to the Endowed Schools Commission was extraordinary. Timing in politics and administrative reform are as important as in private life. Educational reform was on the political agenda, and the approach of the statute seemed the most expeditious, cost-effective, and politically feasible approach. Unfortunately, the Endowed Schools Act proved far ahead of public opinion.

The Commission ran into criticism as soon as the first Commissioners were announced.²¹⁸ Though the fire power was there, the Commissioners

214. An Act to Amend the Law Relating to Endowed Schools and Other Educational Endowments in England, and Otherwise to Provide for the Advancement of Education (Endowed Schools Act of 1869), 32 & 33 Vict., c. 56, §§ 9–10, 20 (Eng.).

215. Their schemes would go into effect after they were submitted to the Committee of Council on Education. *Id.* § 37. If trustees or others were opposed to a scheme, an appeal would lie to the Privy Council, *id.* § 39, or could be laid before Parliament. *Id.* § 41. The Commissioners could not interfere with endowments less than fifty years old or with religious schools or colleges. *Id.* § 14.

216. *Id.* § 30. The obsolete purposes included doles in money or kind, marriage portions, redemption of prisoners and captives, relief of poor prisoners for debt, loans, apprenticeship fees, or advancement in life. *Id.* Due regard had to be given to "the educational interests of persons of the same class in life or resident within the same particular area as that of the persons who at the commencement of the Act [were] benefited," clauses later breached. No open spaces could be enclosed. *Id.*

217. Endowed elementary schools were excluded from the act. Under the Education Act of 1870, 33 & 34 Vict., c. 75, it became the statutory obligation of the parishes to provide for elementary education. The Endowed Schools Commissioners would prepare schemes, forward them to the governing body of the particular school, and publish the scheme in the local press. Two months were allowed during which the Commissioners received suggestions and objections. The Commissioners could visit the locality where the school was situated or send an assistant commissioner and make an inquiry. The scheme was then submitted to the educational department of the government—the Committee of Council of Education. The Committee would approve or disapprove the scheme. If it was approved it would become law within forty days. If not, it would be returned to the Commission. 194 PARL. DEB. (3d ser.) (1869) 1371. The government ignored the School Inquiry Commission's recommendations of provincial school boards, and the power of investigation for the supervisory body. Nor did it grant the Commission the power to impose a tax rate for building schools.

218. OWEN, *supra* note 5, at 255. The Chief Commissioner was Lord Lyttleton, Gladstone's brother-in-law, who one year previously had publicly disclaimed unquestioning deference toward founder's wills. He had been a member of the Taunton Commission. The second commissioner, Arthur Hobhouse, later a distinguished charity commissioner, was the author of *The Dead Hand* (1880), which recommended strong medicine in dealing with charitable endowments. Both Lyttleton and Hobhouse

were not happy choices and a strong public reaction arose against them. The reorganization of endowed schools proceeded at a slower pace than the Commissioners had expected.²¹⁹ Foundation trustees often “fought to retain their abuses; and, even when a scheme had been drawn up, there was no inspection powers to see that it was properly carried out.”²²⁰ Sectarian fears were voiced, because the remodeling of governing bodies of the schools touched the interests of the church, dissenting groups, and parents.²²¹ The Commissioners aroused considerable resentment. A lack of political savvy and prudence also undermined their effectiveness. They were outspoken, impolitic, and overzealous.²²² Reorganizations that were needed the most were successfully resisted, which affected the Commissioners’ authority.²²³ There arose sharp differences, and the Endowed Schools Commissioners were criticized for taking from the poor by using endowments for free schooling at the elementary level to aid the middle classes, who were more likely to attend grammar schools.²²⁴ The Commissioners also were accused of interceding into the affairs of good as well as bad schools.

When the endowed schools legislation was about to expire in 1872, Gladstone’s Liberal government attempted to renew the commission for

were viewed as loose cannons. The third commissioner, a real canon, was H.G. Robinson, a less controversial choice. *Id.* at 256 n.35.

219. After three years, only twenty-four schemes passed into law. Thirty-four had been sent to the Education Department and eighty-four published. Owen, *supra* note 5, at 259 (citing REPORT OF THE ENDOWED SCHOOLS COMMISSIONERS 12 (1872)). At this rate, the Brougham Commission would seem positively efficient.

220. MARY STURT, THE EDUCATION OF THE PEOPLE: A HISTORY OF PRIMARY EDUCATION IN ENGLAND AND WALES IN THE NINETEENTH CENTURY 385 (1967).

221. Hoppen wrote:

Schooling in England and Wales was not only a matter of deep religious and sectarian significance but one of directly local concern to the bulk of [Members of Parliament] and peers. [Since the 1830s] a modest system of state aid for what were essentially denominational schools had grown up, though under it many children still received no instruction at all.

HOPPEN, *supra* note 197, at 597. Denominational lines were sharpened by the almost simultaneous founding in 1869 of a National Education Union, supporting the existing denominational system of schools affiliated with the Anglican Church, and a National Education League, favoring universal and secular schools. *Id.* at 598.

222. SIMON, *supra* note 199, at 328.

223. See OWEN, *supra* note 5, at 249. Many of the endowed schools had been founded as secondary institutions but over time had become elementary schools. Often, it was difficult for the Endowed School Commissioners to determine into which category an endowment belonged. They usually favored the secondary level over elementary institutions and restored endowments to the grammar school level, an act which outraged local residents who favored the latter. *Id.* at 256. Under the Education Act of 1870, it became the statutory responsibility of the parishes to provide for elementary education. 33 & 34 Vict., c. 75. School board expenses were to be raised from school fees voted by Parliament, money raised by loan, or received from other sources. Any deficiency was to be raised from the rates. *Id.* §§ 53–56. For the Commissioners the statute reaffirmed their tilt toward secondary education. For local authorities the existing endowments were looked upon as a method of tax relief.

224. OWEN, *supra* note 5, at 256. A grammar school is a secondary school equivalent to an American high school in which at that time Latin and Greek were taught.

three years, but because of Conservative opposition, had to accept only a one year extension. Then, the Conservatives under Disraeli took office. The new government introduced an Endowed Schools Act in 1873²²⁵ which replaced the Endowed Schools Commission with the Charity Commission,²²⁶ whom it was thought would be less proactive.²²⁷ The Charity Commissioners were able to exercise all of the powers under the Endowed Schools Act on their own motion.²²⁸ At last, after so many years the Charity Commission had sufficient powers to reorganize decayed educational trusts. It was to prove a pyrrhic victory. The criticism heaped on the Endowed School Commissioners was eventually transferred to the Charity Commission, but that lay a decade ahead.

For the first few years, the Charity Commission pursued its work without controversy. The Commissioners seemed to pull their punches, focusing on charitable trusts where there was no objection to reform. The bundling of educational and legal issues proved efficient. In the first decade of their expanded authority, the Commission framed five hundred schemes, none of which were rejected by Parliament. There was still nagging criticism of their work, but it was not until the changed economic and political climate of the 1880s that the Charity Commission became a widespread target of criticism.

L. A Changing Landscape: The 1880s

The 1880s were a time of political, economic, and social crisis and of enormous change. In 1906, a sometime journalist and biographer wrote of the period:

It was the end of an epoch. The long dominion of the middle classes which had begun in 1832, had come to its close and with it the almost equal reign of Liberalism. The great victories had been won. All sorts of lumbering tyrannies had been toppled over. Authority was everywhere broken. Slaves were free. Conscience was free. Trade was free. But hunger and squalor and cold were also free; and the people demanded something more than liberty.²²⁹

For much of the decade, England was in a depression. There was an erosion of international economic dominance and increasing consolidation and monopolization within industry. Poverty was seen as permanent, and a

225. An Act to Amend the Endowed Schools Acts, 37 & 38 Vict., c. 87 (1874) (Eng.).

226. *Id.* § 1.

227. OWEN, *supra* note 5, at 260.

228. 37 & 38 Vict., c. 87, § 4. These expanded powers only concerned educational endowments, and when such assets had been reorganized, the Commission's powers would remain what they were before assuming the mantle of the Endowed Schools Commission.

229. 1 WINSTON SPENCER CHURCHILL, LORD RANDOLPH CHURCHILL 268–69 (1906).

working class with political and economic demands of its own emerged. The middle and upper classes were determined to keep their privileges but became more aware of the plight of the poor. Social justice emerged as a concern, and the reigning ideologies of liberalism and laissez-faire gave way to the modern concept of the welfare state.²³⁰ In the midst of these eddies crewed the Charity Commission, against the current of the times.

The ideology of philanthropy and the role of private charity also changed. In midcentury, as in the past, the main responsibility for social welfare lay with voluntary agencies. The state's efforts were complementary, to fill urgent gaps and relieve the destitute. During the 1880s, this belief was called into question. The principal source of assistance would now fall on the state to alleviate burdens that were far more serious, expensive, and permanent than previously imagined.²³¹ These larger contours of society had an impact on the work, reputation, and effectiveness of the Charity Commission.

M. Local Control of Charitable Endowments

The British public's response to issues of social justice was related to the movement for political democracy, which had triumphed in the boroughs in 1832 and 1867 and was extended to the counties in 1884 and 1885.²³² Reform of local government accompanied the parliamentary reform of 1832. In 1830, there were 250 municipal corporations in England and Wales, varying in size, constitution, probity, and democratic propen-

230. LYND, *supra* note 187, at 17, 28, 44, 156.

231. OWEN, *supra* note 5, at 211–12. Over thirty percent of people in London lived in the state of poverty. 2 CHARLES BOOTH, *LIFE AND LABOUR OF THE PEOPLE IN LONDON* 21 (AMS Press 1970) (1892). This poverty was found to be a permanent by-product of capitalism.

232. OWEN, *supra* note 5, at 262. The Reform Acts were a series of statutes that brought full democracy to England. An Act to Settle and Describe the Divisions of Counties, and the Limits of Cities and Boroughs, in England and Wales, in so far as Respects the Election of Members to Serve in Parliament (The Act of 1832), 2 & 3 Will. 4, c. 64. (Eng.), introduced the franchise in parliamentary elections to £10 householders, that is to occupants of buildings that had £10 in annual rental value, and to tenants-at-will in the counties who owned leaseholds to the value of £250 per year. For the first time, cities such as Birmingham, Manchester, Leeds, and Sheffield received representation in Parliament, as did other towns. MICHAEL BENTLEY, *POLITICS WITHOUT DEMOCRACY 1815–1914*, at 54 (2d ed. 1996). The middle classes were the beneficiaries of the 1832 statute. *Id.* An Act Further to Amend the Laws Relating to the Representation of the People in England and Wales (The Representation of the People Act, 1867), 30 & 31 Vict., c. 102 (Eng.), extended the franchise to working-class urban electors on the basis of household suffrage, that is anyone who paid tax rates on their dwelling was entitled to vote. In the counties the occupation franchise was lowered to a £12 limit. This meant all who resided in a property with an annual rental value of at least £12 could vote. Lodgers, subject to a property qualification of £10, also could vote. BENTLEY, *supra*, at 133–35. An Act to Amend the Law Relating to the Representation of the People of the United Kingdom (The Representation of the People Act, 1884), 48 & 49 Vict., c. 3 (Eng.), expanded the franchise to a majority of adult males, particularly agricultural workers.

sity.²³³ For much of the nineteenth century, the only nationwide scheme of local authorities was that of the boards of guardians administering the 1834 Poor Law.²³⁴ For the rest, counties were still ruled by unelected justices of the peace; in the urban areas responsibility for basic services devolved on the municipal corporations, local improvement commissions, local boards, a London vestry, or some combination of the above.²³⁵ Other ad hoc bodies, such as school boards were established under the 1870 education act.²³⁶ At the central government level there was little coordination between the agencies dealing with the poor (Poor Law Board) and those responsible for public health (Medical Department of the Privy Council).

After the 1832 parliamentary reform, municipal bodies' corruption could be no longer justified. The Municipal Corporations Act of 1835 affected 178 boroughs with a total population of 2,000,000 and created standardized governance structures with councils, mayors, aldermen, and councilors elected by ratepayers.²³⁷ These local governments had little authority of their own, and a gaggle of separate bodies dealt with such things as sanitation and urban renewal.²³⁸

The parish remained the unit of rate assessment but no longer continued as a unit of local government. Parishes meant different things in different contexts.²³⁹ The Local Government Act of 1888²⁴⁰ created elected county councils and removed power from justices of the peace and city

233. WOODWARD, *supra* note 2, at 459–60. In rural areas was a county and parish system of nonelected justices of the peace.

234. An Act for the Amendment and Better Administration of the Laws Relating to the Poor in England and Wales, 4 & 5 Will. 4, c. 76 (1834) (Eng.). The Poor Law took the form of putting an end to the almost absolute control over the poor exercised by the justices, overseers, and boards of guardians and gave control to a body of Poor Law Commissioners. The commissions were dissolved in 1847 and a Poor Law Board substituted. Their powers were transferred in 1871 to a Local Government Board. An Act for Constituting a Local Government Board and Vesting Therein Certain Functions of the Secretary of State and Privy Council Concerning the Public Health and Local Government, Together with the Powers and Duties of the Poor Law Board (Local Government Board Act, 1871), 34 & 35 Vict., c. 70, § 2 (Eng.).

235. R.C.K. ENSOR, *ENGLAND 1870–1914*, at 125 (1936).

236. Education Act of 1870, 33 & 34 Vict., c. 75 (Eng.).

237. An Act to Provide for the Regulation of Municipal Corporations in England and Wales (Municipal Corporations Act, 1835), 5 & 6 Will. 4, c. 76 (Eng.). The Act is described in 14 HOLDSWORTH, *supra* note 188, at 235–37.

238. Birmingham, under the leadership of Joseph Chamberlain, led the way in local planning and municipal ownership. The Municipal Corporations Act of 1882, which enabled local authorities to issue stock, gave them enormous economic power. LYND, *supra* note 187, at 167–68 (citing An Act for Consolidating, with Amendments, Enactments Relating to Municipal Corporations in England and Wales (The Municipal Corporations Act, 1882), 45 & 46 Vict., c. 50 (Eng.)). Local municipalities began to attack local problems.

239. 14 HOLDSWORTH, *supra* note 188, at 206–07.

240. An Act to Amend the Laws Relating to Local Government in England and Wales, and for Other Purposes Connected Therewith (Local Government Act, 1888), 51 & 52 Vict., c. 41 (Eng.).

council functions from the boroughs.²⁴¹ The Local Government Act of 1894, generally known as the Parish Councils Bill,²⁴² detached the civil parish from the ecclesiastical parish. The former was instituted as the humblest unit in a new scheme of local government.²⁴³ Nearly 7,000 parish or district councils were established with widespread power but little ability to raise financial resources.²⁴⁴ However, they were representative bodies under the County Councils. The progress of democratic ideas in the sphere of local government was now reflected in the creation of representative bodies at different levels of government. The emergence of local political initiatives and locally elected authorities was soon followed by demands for the community's voice in the management of charitable endowments.

The Charity Commission responded to these developments. Local control meant, in practice, more eyes examining endowments. Public scrutiny could serve to protect against misfeasance. The Commission then broadened trustee participation by conferring with local representative bodies and agencies—town councils, vestries, boards of guardians.²⁴⁵ After the passage of the Local Government Act of 1888 and the Parish Councils Bill in 1894, there were local bodies who could appoint trustees and, more importantly, could stand between often hostile trustees and the Commission. This created problems in and of itself as local bodies tried to create empires and control appointments as spoils.²⁴⁶

The County Councils created a substantial amount of new business for the Commission, because they sought information on charities in their jurisdiction and requested the Commission to undertake a Brougham-type survey in their county. The Commission lacked the resources for such an effort, but with the passage of the Charity Inquiries (Expenses) Act of 1892,²⁴⁷ if a county desired a survey, a county could contribute toward the expenses of any inquiries for trusts in their county. Several counties in

241. Sixty-two county councils were created in England and Wales. Sixty-one towns over 50,000 inhabitants were given county borough status. London was given its own County Council. ENSOR, *supra* note 235, at 203.

242. An Act to Make Further Provision for Local Government in England and Wales, 56 & 57 Vict., c. 73 (1894) (Eng.).

243. 14 HOLDSWORTH, *supra* note 188, at 207.

244. ENSOR, *supra* note 235, at 214.

245. OWEN, *supra* note 5, at 316 (citing Report from the Select Committee on Charity Commission, together with the Proceedings of the Committee app. no. 10, at 340 (1894)).

246. The local bodies appointed political supporters, whereas the Commission's choice would be based on merit.

247. An Act to Authorise the Councils of Counties and County Boroughs to Contribute to the Expenses of Inquiries into Certain Charities (Charities Inquiries (Expenses) Act, 1892), 55 & 56 Vict., c. 15 (Eng.).

England and Wales were surveyed, but the effort ended with the outbreak of war in 1914.²⁴⁸

N. *Public Relations Problems and Political Ineptitude*

The awakening of working class consciousness in the 1880s revived the criticism of the Commissioners' labors under the Endowed Schools Acts. Their actions in ending free education in the grammar schools and substituting places on the basis of merit resulted in a bias against the poor and a favoring of the middle classes. Though the Charity Commissioners primarily focused on the grammar schools, their policies also affected endowed elementary schools.²⁴⁹ In the politically charged atmosphere of the decade, this led to substantial criticism of the Charity Commissioners.²⁵⁰ A Select Committee on Endowed Schools during 1886–1887 provided a forum for critics to vent their grievances. The Commissioners refused to accept the conclusions of their critics. They claimed they were following the charge of the Endowed School Commission and the resulting statute, but that was a political generation ago.²⁵¹

The Commissioners were politically inept and became a foil for critics of educational reform, an issue that affected all parties, religions, locations, and classes. They angered Parliament with their legalistic approach and literal interpretation of the Endowed Schools legislation. The Commissioners were accused of being too Tory for the Radicals and too Radical for the Tories.²⁵² However, the criticisms were not solely political in nature. Members of the working classes were outraged that they lost their limited right to free education. Many boroughs were angered that the Commission prevented the use of educational endowments to reduce parish rates. The Commissioners did not educate the public of their tasks or inform them of

248. OWEN, *supra* note 5, at 318.

249. Many smaller endowments, over 100 in the first sixteen years, were continued. Most times, but not always, they faced no opposition. Select Committee on Endowed Schools Act, app 7, at 488–94 (1886).

250. The Charity Commission was investigated by Parliament in 1884, 1886, and 1887. The Select Committee on the Charitable Trusts Acts stated in its report that such dissatisfaction as existed with the action of the Charity Commission seemed to have arisen mainly in carrying out the policy of the Endowed Schools Act especially with respect to the Commission's declining to appropriate funds to the direct support of elementary schools, and to maintain or institute a system of free education. LEONARD SYER BRISTOWE & WALTER IVIMEY COOK, *TUDOR'S CHARITABLE TRUSTS* 457 (3d ed. 1889). Parliament raised these criticisms as well. See *TIMES* (London), May 23, 1884, at 7c; *TIMES* (London), Aug. 14, 1890, at 5c.

251. OWEN, *supra* note 5, at 264–65. The cause of the lower classes was taken up by major politicians, such as James Bryce, which added to the Commission's problems.

252. *TIMES* (London), Apr. 24, 1895, at 7c.

their accomplishments.²⁵³ They antagonized their natural allies, trustees, who felt the Commissioners were interfering even when trustees were doing their job.²⁵⁴ Local bodies and representatives thought *they* knew the best method of reform and reorganization for *their* charitable trusts.

The Commission was criticized with some justification for its complicated procedures, an arrogant and legalistic attitude, and as a wholly unpopular body lacking political support. In a period of emerging local devolution, the Commission was seen as a central agency imposing its will without regard for local sensibilities. The Commission could not get parliamentary support to defend its policies, in part because of an anomalous constitutional position. The Commission functioned under no minister of government. As an independent agency, and one that had generated controversy from a variety of sources, the Commission could rely on few in Parliament or the government. Its lack of political support made it difficult to carry out its work.²⁵⁵

The constitutional position of the Charity Commission was investigated during the 1884–1887 investigations and in 1894 by a Select Committee. In 1895, it was unsuccessfully moved that it become reconstituted as a government department.²⁵⁶ In each of the investigations by Select Committees of Parliament, the Committees generally supported the Commission and its desire for additional powers. However, the Commission

253. OWEN, *supra* note 5, at 316; TIMES (London), May 23, 1884; TIMES (London), June 8, 1894, at 14e; TIMES (London), Aug. 14, 1890, at 5a.

254. The relationship of the Charity Commissioners to charity trustees was described by Lord Lyndhurst. The Commissioners were “public officers invested with public powers and public duties.” 85 PARL. DEB. (3d ser.) (1846) 155. Only where trustees overlooked a trust’s interests, or deviated from the terms of their trust, did any real antagonism exist between the two authorities. Trustees are the sole and responsible administrators of the income of the charity within the limits prescribed by the founder. They have no power to deal with capital or vary the prescribed mode of applications. Commissioners do not administer, but they are constituted the judges of all dealings with capital, as well as of all varieties of prescribed mode of giving effort to the objects of charity. *Id.*

255. See TIMES (London), Apr. 24, 1895, at 7c. For its link with Parliament, an unpaid Fourth Commissioner, who was a member of the House of Commons, was the official liaison. The government of the day designated one of its members as the Fourth Commissioner. Given the responsibilities of government ministers, it should not surprise that the Fourth Commissioner was noted only by his absence of any participation with the Charity Commission. From 1887 the Fourth Commissioner was to be a member of the House without a government portfolio. This may have been a mere sensible arrangement, but it did not resolve the constitutional issue nor the public relations problems. The issue was unresolved until 1960 when the Charity Commission came under the portfolio of the Home Secretary, where it remains today.

256. The advantages of governmental control, depending on one’s view of the Commission, were that Parliament would better control it, particularly its expenses which were seen as too large. As a ministry of the state it would be more responsive to local political bodies, more representative, less unpopular, and more accountable. Additionally, it would be more likely to attain the additional powers it sought. The arguments against were that the Commission would become politicized and its quasi-judicial role was inappropriate for a government agency. See TIMES (London), Apr. 24, 1895, at 7c.

was never able to persuade Parliament to grant the powers received under the Endowed Schools or Parochial Charities legislation.

There were three powers the Commission lacked that would have enabled it to reorganize the most egregiously run trusts: (1) the ability to eliminate or raise the fifty pound annual income limitation on charities so that the Commission could proactively investigate, (2) an audit function, and (3) the power to unilaterally reform trusts.

1. The Fifty Pound Limitation

The £50 annual income limitation on charities that the Commission could investigate on its own initiative was never raised, so they could not take the initiative to reform larger charities. This meant that larger charities in need of restructuring could not be touched, absent trustee invitation, which in the most egregious situations would not be forthcoming. An example was Brown's Hospital at Stamford, a charity with £1200 annual income and twelve almsmen. The warder was paid £375 and a confrater £200. An agricultural depression reduced the annual income, so that the almsmen could not be maintained by the trustees. Nevertheless, they appointed a new confrater at the regular stipend.²⁵⁷ The income limitation also hindered the Commission's efforts to consolidate several charities to make the philanthropic effort more efficient or timely. Larger charities typically would refuse to cooperate. This often occurred with dole charities that often were of modest size with separate trustees. The clever poor would make the rounds of endowments, collecting from several charities. Despite such abuses, the unpopularity of the Commission was such that it could not obtain a lifting of the £50 limit. Critics felt it would give too much power over charitable endowments and would allow it to override local control.

2. The Audit Function

A second power, the audit function, the heart of modern administrative and regulatory scrutiny, was first recommended in the report of a Select Committee in 1835 as a necessary supplement to the Charity Commission's power to require accounts from charities' trustees.²⁵⁸ This power, never granted to the Commission, meant there was no way short of an action of equity to examine the books of a charitable trust that would

257. 344 PARL. DEB. (3d ser.) (1890) 355, 371.

258. MITCHESON, *supra* note 10, at 20.

have enabled the Charity Commission to publicize misdealing, which may have led to a quicker resolution of a problem.

3. *Cy Pres* and the Extent of the Commissioners' Power to Reform Trusts

The law has always favored charitable trusts. Unlike private trusts, charitable trusts may exist in perpetuity. The courts can use their equitable powers to prevent a trust from failure or to reform it so as to accomplish its general purposes by applying the doctrine of *cy pres*.²⁵⁹ Thus, *cy pres* is a savings device that permits a court to keep assets in the charitable stream to benefit the public. *Cy pres* permits a court to direct a charitable purpose different from the specific one of the donor, but this right of modification is strictly construed and closely circumscribed. The modification must be as near as possible to the donor's original purpose. The degree of frustration of the original purpose must be great; the donor must have at least implicitly consented to the change in the original trust instrument; and the degree of change must be relatively small.²⁶⁰ The primary duty of a court is to give effect to the donor's intentions. The Charity Commission never had a general power to change the purposes of a charitable trust. It was bound by the limits of the *cy pres* doctrine, as interpreted by Chancery, in its reorganizing schemes, because it had concurrent jurisdiction with Chancery. The Endowed Schools and Parochial Charities Acts gave the Commission authority to exceed the parameters of the *cy pres* doctrine, but this only applied to those specific types of endowments. This created particular problems when dealing with charities in areas other than education where the original uses might be fanciful or outmoded, but the Commission was limited in the modifications it could order.

Perhaps the most significant factor relating to the use of the *cy pres* doctrine is how will a court interpret whether circumstances are *inexpedient* or *impracticable*? If *cy pres* is interpreted liberally, then charitable trusts can be reformed or consolidated more easily. Generally, courts have applied the doctrine very conservatively. Recall the *Leeds School Case*²⁶¹ where Lord Chancellor Eldon interpreted the doctrine so strictly that it was difficult to reform charitable trusts at all. A problem of *cy pres* is that it is governed by an ambiguous standard. When is a trust's purpose *inexpedient*? Depending upon how one answers determines the use of the doctrine

259. For a definition of *cy pres*, see *supra* note 52. *Cy pres* applies to the modification of the trust's purposes. A related concept of deviation applies to a trust's administration, but the distinction may be difficult to draw.

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

261. OWEN, *supra* note 5, at 248-49.

as a tool to reform charitable trusts. For the Charity Commission, Chancery's position on the use of *cy pres* and the standard to be applied were critical. The Commission's orders were subject to appeal, and if it exceeded Chancery's application of the doctrine, it might be overturned. A restrictive *cy pres* doctrine had a chilling effect on the actions of the Charity Commission.²⁶²

Around the third quarter of the century, the courts began applying *cy pres* in a more flexible manner, which allowed the Commissioners to reorganize and consolidate charitable trusts to carry out their founders' intentions more efficiently.²⁶³ This expansive approach continued in the important decision of *Campden Charities*.²⁶⁴ Viscountess Campden created a trust in the seventeenth century that contained land sufficient to yield £10 annually, half for the poor and needy and the other half for apprenticeship fees for boys from Kensington, a small village about one and a half miles from Hyde Park Corner. By the latter nineteenth century, the village had become a thickly inhabited, affluent suburb of London. The property had become extraordinarily valuable, and the trust found itself with an annual income of £2200. The trustees applied to the Charity Commissioners for a scheme. The Commissioners devised a plan whereby the income would be used for existing purposes but also included sums for educational purposes as a *cy pres* application of some of the apprenticeship income. The residents of Kensington objected to admitting education as one of the trust's purposes. The Vice Chancellor agreed, but the case was overturned on appeal by Sir George Jessel, Master of the Rolls, applying the *cy pres* doctrine.²⁶⁵ The court looked at the principal object of the trust, which was to

262. There was the possibility of a parliamentary bill to affirm a scheme that was inappropriate for *cy pres* treatment or beyond the scope of the doctrine, but it was a useless tool as the Commission could not obtain parliamentary approval.

263. In *Clephane v. Lord Provost of Edinburgh*, the House of Lords applied the deviation doctrine to distinguish between the charity itself and the mode prescribed for its accomplishment. In this case an almshouse was demolished when a railway's route ran through it. The railroad gave £10,000 compensation. The House of Lords concluded that the funds could be better spent on pensions and other forms of outdoor relief:

[While] one charity will not be substituted for another charity; nor will a charity intended for one purpose be applied to a purpose altogether different; but in the progress of society a change of mode may become desirable, and the Courts have sanctioned such change of mode to secure more effectually the benefits intended.

1 L.R.-Sc. & Div. 417 HL (1869) (Lord Westbury).

264. *In re Campden Charities*, 18 Ch. D. 310 (C.A. 1881).

265. The rationale behind the use of the doctrine was as follows: at the time of her gift, apprenticeship was compulsory under the Statute of Artificers. An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices, 5 Eliz. 1, c. 4, § 33 (1563) (Eng.). No one could enter a trade unless he had been apprenticed for seven years. *Id.* Viscountess Campden's gift enabled the poor of the parish to enter trades specified in the statute. The legislation was later repealed, and apprenticeships were becoming obsolete. See An Act to Amend an Act, passed in the Fifth Year of Queen Elizabeth, Entitled An Act Containing Divers Orders for Artificers, Labourers, Servants of

provide for the poor. To use it according to the original purpose would defeat the spirit of the donor's gift, which was to assist in part the poor in obtaining work, something that education, rather than apprenticeships, could accomplish. The Commissioners' diversion to educational purposes was appropriate. The *Campden Charities* case was a high water mark in the direction of diverting charities from purposes unsuitable to the times and was welcomed by the Commission, because it offered greater flexibility and lessened the possibility of a court challenge to their schemes.²⁶⁶

Professor Owen doubted that even if the Commission had received general powers to reform trusts more expansive than the *cy pres* doctrine that they would have undertaken a wholesale revision of charitable endowments.²⁶⁷ The Commission lacked the resources to undertake such a task. The number of new charities formed each year strained its capacity. Additionally, opposition would arise if the Commission, hardly a popular body, attempted to use its powers for a broad revamping. Then, as now, the belief of adhering to "founders' wishes" resonated strongly.²⁶⁸ Even if the Commissioners exercised *cy pres* powers broadly, their decisions could be appealed to Chancery.

CONCLUSIONS

The work of the Charity Commission in the nineteenth century may be summed up as frustration and disappointment combined with substantial achievements. The body never was granted sufficient authority or resources to rationalize all charitable endowments in need of reform. Nor could it ever garner public or parliamentary support. The Commission's efforts were resisted by trustees of charities. It became a symbol of meddling government. By the end of the century, the office seemed to lose vigor and initiative, demonstrated when it attempted to carry out the Endowed Schools and Parochial Charities acts,²⁶⁹ and was viewed as a government bureaucracy doing routine things in a routine way.

Husbandry, and Apprentices, 54 Geo. 3, c. 96 (1814) (Eng.). Not all the apprenticeship funds were diverted, but the trustees were not required to devote all the charity's resources to the obsolescent purpose.

266. In 1910, the *cy pres* tide shifted in the other direction in the *Weir Hospital Case*, 2 Ch. 124 (C.A. 1910) and the Commissioners had to trim their sails in response. In this case the Commissioners approved a scheme whereby the funds of two inadequately endowed medical charities in adjoining London boroughs could be administered together for joint objects. The Court of Appeal held the Commissioners had exceeded their powers.

267. OWEN, *supra* note 5, at 311.

268. See *In re Estate of Beryl H. Buck*, No. 23259 (Cal. Super. Ct. 1986), reprinted in John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F.L. REV. 641, 691 (1987).

269. OWEN, *supra* note 5, at 213, 329.

The Nathan Report summarized the problems of the Charities Commission that remained for a century until the 1960 revision: the need for a relaxation of *cy pres*; a chronic shortage of staff, which was exacerbated over the decades as the number of trusts increased; an increasing need for the revision of thousands of trusts; the lack of amending legislation; the declining effort by the Commissioners to foster change; and the lack of any parliamentary champion of their cause.²⁷⁰ The work of the Commission did not fall within the province of any minister. Because of the pressures on parliamentary time, this meant Charity Commission issues were ignored. By the end of the nineteenth century, the Commission, sensing a lack of public interest in its work, stopped renewing pressures for change.²⁷¹

Nevertheless, the Commission had achieved much in reforming the charities of the City of London and rationalizing educational endowments.²⁷² It raised the profile of fiduciaries who misused charitable assets. Charities' activities were more public, and the devolution of authority to local agencies created a new community interest in charitable endowments. One of its most important accomplishments was the rationalization of the investment and management of charity funds.²⁷³

Requiring the submission of annual accounts and the consent of the Commissioners for trustees to engage in self-dealing created more transparency of charitable assets. The Nathan Report concluded that dishonest administration of charitable trusts was nonexistent and many were saved from trustee nonfeasance.²⁷⁴

The reform of educational trusts, where much good work was accomplished, was a political albatross shed at the end of the century.²⁷⁵ The Charity Commissioners had exercised their responsibilities to reform edu-

270. NATHAN REPORT, *supra* note 94, ¶¶ 101–10, at 26–28, ¶ 375, at 96.

271. *Id.* ¶ 107, at 28.

272. By the end of the 1880s, 4,000 educational schemes had been framed, mostly involving smaller charities. During the 1870s it was issuing about 400 orders annually for appointing trustees or establishing schools. OWEN, *supra* note 5, at 304.

273. In the first twenty-five years it managed £8 million. TWENTY-FIFTH REPORT OF THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES A2 (1877).

274. NATHAN REPORT, *supra* note 94, ¶ 101, at 26.

275. In 1899, the Commission's educational responsibilities were shifted to a national board of education, *An Act to Provide for the Establishment of a Board of Education for England and Wales, and for Matters Connected Therewith* (Board of Education Act, 1899), 62 & 63 Vict., c. 33, § 2(2) (Eng), which henceforth would frame and establish schemes for educational endowments in England and Wales. Responsibility for management of educational endowments was also transferred. OWEN, *supra* note 5, at 270–73. The Education Act of 1902, established a system of secondary education and made the County and County Borough Councils acting through their Educational Committees, the local educational authority for all classes of school. *An Act to Make Further Provision with Respect to Education in England and Wales* (Education Act, 1902), 2 Edw. 7, c. 42 (Eng.). They took the place of the county governing bodies. ARCHER, *supra* note 186, at 300. This statute symbolized the assumption by the state of an overall educational policy.

cational trusts effectively but with perhaps too legalistic a focus. Their qualifications were as lawyers, not educators, a fact which they, and all too often their critics, recognized.

Some, but not all, of the Commission's problems were not of its own doing. The Charity Commission had enormous responsibilities but inadequate resources, a common complaint of governmental agencies. Its scope under the enabling legislation and its successors were uncertain. The inability to issue binding regulations, a necessary power and function of administrative agencies today, hindered the influence of its work. The schemes it developed for a particular charity were ad hoc, whereas a regulation usually is binding on all under an agency's jurisdiction, or at least provides guidance. The Commission never received the powers or resources it thought it needed. The various Select Committees that examined its work agreed with this, but additional resources were not forthcoming, even though the Commission's workload increased. Though Parliament regularly criticized its budget and staffing, the growth of the charitable sector far outpaced new resources.²⁷⁶ As its workload increased, the staff did not, which resulted in delays in responding to inquiries that reinforced a reputation for inefficiency and unresponsiveness. Charities refused to comply with the Commission's demand that they file their accounts.

The Charity Commission never achieved its expectations because they were unrealistic. Fundamentally, the purpose of the Commission was to take assets from unused or neglected charities and to transfer them to needed modern uses: education and poor relief. The ideological grounding of the Commission's belief that private resources were available to meet society's ills proved wrong. At most, private philanthropy was a complement, and a decreasing one, to the state's responsibility for improving public welfare. The failure of the Charity Commission in some sense reflected the failure of nineteenth-century liberalism and its replacement by the modern welfare state.

In the second and third decades of the nineteenth century, the Brougham Commission conclusively demonstrated that some permanent vehicle for the supervision of charities was needed to assure the proper disposition of charitable assets. Nevertheless, it took twenty years before such a body was created, and the resulting commission lacked necessary powers. It was weak, ineffective, and subject to criticism. Most governmental agencies fall short of the aspirations of their original proponents, yet they escape the criticism and abuse visited upon the Charity Commission.

276. This is a situation that exists today for the United States Revenue Service.

Why is it so difficult to carry out effective institutional change? Why did the principle of charitable accountability, a nearly unanimously supported norm in the abstract, ring so hollow in practice?

The Charity Commission had two very different functions: one was to combat fraud. The second role was educational: to bring a sense of order and responsibility to the charitable sector. The Commission's lack of statutory authority hindered its enforcement role. Its resources were consumed by the second. The scope and the difficulty of the Commission's task were not realized by Parliament, the press, or the public. As expectations went unmet, criticism followed. Perhaps the Commission's fatal mistake was to outrun its natural allies in Parliament as well as charitable trustees. The Commission engaged in vigorous efforts at reform when allowed but never built a reservoir of support over time. Its primary supporters might have been beneficiaries of reformed trusts, but they were usually among the more powerless in society.

The social class perceptions of an institution may affect its reputation and influence. A factor in the Commission's lack of support in Parliament was the perceived lack of ability of the Commissioners. This may have been a code word for their middle class origins, a mark against them. The Charity Commission later was taken to task for being anti-working class. Many of the trustees of charitable trusts in need of reformation, particularly those controlled by religious interests, were of a higher social standing and could garner support or tolerance against change.

Finally, charitable accountability is not of central importance to government or politics and is marginal to the overall health of society. Because of its relative unimportance to economic well-being compared to monetary or fiscal policy, foreign affairs, or national defense, politicians were reluctant to use political capital to support the Commission. The Commission itself did not attempt to nurture political capital and, particularly in its efforts to reform educational trusts, seemed to have no sense as to which way the political winds were blowing. It adopted a highly legalistic approach, based completely on its original charge from the Endowed Schools Act. It could not and seemed not to try to placate anyone. Its response to criticism seemed to cause the body to turn inward, to bury itself in the legalistic aspects of its charge. Its accomplishments were not recognized. It was to take nearly another century, and several other reports and select committees for the Charity Commission, to become closer to the ideal of an effective guardian of charitable accountability. Many of the problems the Charity Commission faced: lack of resources, inadequate legislative support, too

broad a mandate with too many organizations to oversee, face American regulators today.