CHARITY, POLITICS AND NEUTRALITY

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Part I: Introduction

Why has it proven so difficult for courts to distinguish charity from politics? There are a variety of explanations, many of which have been extensively explored in the literature.[1] The most obvious answer is that charity is a difficult concept to tightly define. The problems plaguing the charity law doctrine of political purposes are to some extent emanations of the usual problems complicating the task of distinguishing charity from non-charity. This is a body of law in which an internet café was found to be charitable on the farcical basis that the information superhighway is analogous to the charitable purpose of repairing roads and bridges.[2] With this baseline it stands to reason that the more difficult boundary drawing questions posed by the doctrine of political purposes will prove challenging. And yet the difficulties generally complicating the interpretation of charity only take us so far because the charity-politics distinction is a uniquely controversial facet of the distinction between charity and non-charity. I argue in this paper that the heightened controversy surrounding the doctrine of political purposes is attributable, at least in part, to the tendency of courts to defer to a neutrality principle when distinguishing charity from politics. In particular, I develop two points about the appeal to neutrality in the authorities dealing with political purposes.

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1 For a recent analysis of the extensive academic literature, see J Chia, M Harding and A O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 Melbourne University Law Review 353.

2 *Vancouver Regional Freenet Assn v Minister of National Revenue* [1996] 3 CTC 102 (FCA).

The first point is that the term 'political' is used in the authorities primarily as a label for purposes in relation to which 'no comment' is thought to be the appropriate response regarding the presence or absence of public benefit. That is, political purposes fail to qualify as charitable not because they are specifically found to lack the character of charitable purposes but rather because the assessment of one of the prerequisites for charitable status - public benefit - is intentionally left incomplete. This has more to do with maintaining a neutral stance in relation to political purposes than policing a substantive conception of what is charitable versus political. The second point is that this is a seriously flawed approach to distinguishing charity from politics. Neutrality has no useful role to play in the interpretation of charity generally or in the demarcation of charitable and political purposes specifically.

The paper is organised as follows. Part II develops the argument that the doctrine of political purposes has been rationalised around an appeal to neutrality. It identifies two distinct conceptions of neutrality evident in the authorities dealing with political purposes. The first is institutional neutrality, as in the neutrality of the judiciary. This conception of neutrality is concerned with ensuring that public benefit analysis does not result in courts intruding into the realm of the legislature. The second is subject matter neutrality. Here the concern is to ensure that charity law fails to locate public benefit in those purposes (or subject matters) in relation to which a neutral stance is viewed as appropriate.

Part III considers the first of these conceptions of neutrality. The idea that the doctrine of political purposes is a safeguard to prevent courts from intruding into the realm of the legislature has been widely criticised. Rather than repeat the by now familiar criticisms, I argue (with reference to human rights advocacy) that this rationale merely invites charities to frame their advocacy in ways that sidestep the perceived need for deference to Parliament. That the notion of deference to Parliament is incapable of sustaining a principled distinction between charity and politics is illustrated by the reasoning of the recent decision in *Human Dignity Trust v Charity Commission*.[3]

Part IV argues that the doctrine of political purposes can be linked with a particular camp of liberal political philosophy, namely liberal neutrality. Specifically, Part IV argues that the second of the above senses of neutrality - subject matter neutrality - reveals a concern over granting charitable status where a neutral justification for public benefit is absent. Charitable status is jeopardised if a court or regulator has to justify, without the aid of a neutral referent, that benefit inheres in whatever conception of 'the good' is implicit in a putative charitable purpose. In this sense, the restrictions imposed by the doctrine of political

3 [2014] FTTT 0013 B(GRC).

purposes bear a resemblance of sorts to the restrictions on the ideal liberal state advocated by proponents of liberal neutrality.

Building on Part IV, Part V contends that liberal neutrality represents a poor philosophical foundation for charity law generally and the doctrine of political purposes specifically. It is not that conforming charity law to a neutrality imperative would prove impossible. It is just that doing so would fundamentally alter the legal conception of charity, eviscerating some of the very characteristics – for example, diversity, pluralism and distinctiveness from government - that make charity worthy of its unique legal treatment to begin with.

Part VI concludes with the suggestion that a better approach would be to rationalise the doctrine of political purposes with reference to the defining characteristics of charity. The law should distinguish charity from politics not as a way of preserving neutrality but rather as a way of preserving 'charity'. One plausible way to reimagine the charity-politics distinction would be to premise it on the normative distinction between charity and government.

Part II: Two Senses of the Term 'Political'

The doctrine of political purposes is fundamentally concerned with policing the distinction between charity and politics. A logical starting point then is to take stock of how the terms charity and politics are used in the authorities. One might reasonably anticipate that the authorities would be primarily concerned with distinguishing charity from politics based on their disparate substantive characteristics. The authorities are, though, remarkable for just how little they seem to be concerned with drawing the distinction between charity and politics on a substantive basis. Little would be lost if we summarised the cases as establishing that political purposes are by definition purposes in relation to which courts conclude that they should remain neutral as to the presence *or absence* of public benefit. Since 'no comment' on the issue of public benefit is inadequate for charitable status, non-charitableness is more of a default stance than a substantive finding.[4]

The leading decision on political purposes is *McGovern v Attorney-General*.[5] Slade J famously reasoned that trusts for political purposes are non-charitable.

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4 The determination that a neutral stance is warranted in relation to a given purpose admittedly says something about the substance of that purpose - specifically, that it is the sort of purpose in relation to which a neutral stance is warranted. Beyond that, though, the charity-politics distinction tends to be drawn with remarkably little attention paid to the substantive difference between charity and politics.

5 [1982] Ch 321.

This includes trusts of which a 'direct and principal purpose' entails any of the following:[6]

(i) to further the interests of a particular political party;

(ii) to procure changes in the laws of this country;[7]

(iii) to procure changes in the laws of a foreign country;

(iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or,

(v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

Slade J described the first of these - trusts to further the interests of a political party - as 'plainly "political trusts"'.[8] While he did not elaborate on what he meant by this, the implication is that party politicking is by its very nature (*or substance*) political.[9] However, the balance of the *McGovern* classification uses the term 'political' as a label for purposes that courts have declined to substantively characterise as charitable or non-charitable. The end result - non-charitableness - is the same but the reasoning is different. Here the term political is not used to denote a determination that the purposes under review are non-charitable *because they are in substance political*. Instead, this sense of the term 'political' is short form for 'not specifically found on the merits to be either charitable or non-charitable'.

The charity law requirement for public benefit is at the centre of this logic. To qualify as charitable at common law, an institution must be established for exclusively charitable purposes and conform to a public benefit standard.[10] There is considerable debate surrounding what exactly 'public benefit' means and

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6 ibid 340.

7 On its face, this formulation implies that it might not be political to oppose changes to the law. Other cases have, though, clarified that it is political both to seek and oppose proposed changes to the law. See e.g. *Re Koeppler's Will Trusts* [1984] Ch 243, 260; *Re Hopkinson* [1949] 1 All ER 346, 350.

8 *McGovern* (n 5) 507.

9 In Canada, this idea is reflected in paragraphs 149.1(6.1)(c) and (6.2)(c) of the Income Tax Act RSC 1985, c 1 (5th Supp), as amended.

10 The leading common law authority regarding charitable purposes is *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531. Lord Macnaghten famously categorised charity as follows at 581: '"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.'

whether it is indeed a discrete requirement in the sense of a requirement above and beyond the necessity that a charity be established for exclusively charitable purposes.[11]

Two points are, though, clear. The first is that no purpose can qualify as charitable in the absence of public benefit. Whether public benefit analysis is performed separately or subsumed into the determination that an applicant is established for a charitable purpose, a grant of charitable status requires that public benefit be affirmed. The second is that public benefit analysis is non-neutral. Finding a given purpose to be of public benefit is to affirm the worthiness of that purpose. Therein lies the asserted discordance between charity and politics. Courts have reasoned that they should neither affirm nor deny the public benefit and thus the worthiness of political purposes. This translates into a failure to assess whether public benefit is present or absent in relation to such purposes, the consequence of which is that charitable status cannot be conferred. To use a scholastic metaphor, political purposes are assigned neither a passing nor a failing grade but rather an 'incomplete'.

To understand the doctrine of political purposes it is therefore necessary to reflect on why political purposes are thought to warrant a neutral stance. One idea (which is specific to the non-charitableness of law reform) is that the law should not countenance the possibility that it - the law - could possibly be improved. Certain judges have endorsed the statement from a nineteenth century charity law text - *Tyssen on Charitable Bequests* - that 'the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed'.[12] There is so little to commend this perspective that it is hardly worth taking seriously. The rationality of the law does not depend upon its refusal to merely acknowledge the possibility that reform might be beneficial. It is surprising that such embarrassingly superficial reasoning has managed to attract even meagre support in the authorities.

Another rationale is that there will tend to be absent an evidentiary foundation for courts ruling in favour of (or against) the public benefit of proposed changes to

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11 Benefit is not usually assessed as a discrete criterion for charitable status. An institution found to be established for the purpose of, say, relieving poverty, advancing education or advancing religion will normally be assumed to impliedly meet the benefit standard. This is because benefit is thought to inhere in these purposes.

12 AD Tyssen, *The Law of Charitable Bequests: With an Account of the Mortmain and Charitable Uses Act, 1888* (Williams Clowes and Sons 1888) 177. This reasoning was e.g. endorsed in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 62 per Lord Simonds; 50 per Lord Wright.

law or policy.[13] Again, though, little credence should be given to this reasoning. Courts have gone on to specify that a neutral stance remains appropriate even where there is no lack of evidence as to the presence or absence of public benefit. In the words of Slade J in *McGovern*:[14]

> [E]ven if the evidence suffices to enable it [the court] to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would be to usurp the functions of the legislature.

In this resort to the conventions of parliamentary supremacy, we find a more concrete explanation for the non-charitableness of law and policy reform. On this view, courts should refrain from ruling on the presence or absence of public benefit in relation to purposes necessitating reform to law, policy or decisions of government so as to avoid inappropriately injecting themselves in any way into what is the exclusive domain of Parliament. The idea is to preserve the institutional neutrality of the judiciary vis-à-vis Parliament.[15]

However, the resort to neutrality in *McGovern* was not solely framed as a concession to the conventions of parliamentary supremacy. At one point Slade J rationalised the doctrine of political purposes by referring to 'the dangers of the court encroaching on the functions of the legislature *or* of subjecting its political impartiality to question'.[16] The disjunctive 'or' seems to juxtapose two *separate* bases upon which a court should decline to comment (either in favour of or against) the public benefit of political purposes: (1) doing so would violate the conventions of parliamentary supremacy; or (2) doing so would compromise impartiality.

While both of these rationales ground the doctrine of political purposes in the ideal of neutrality, they arguably contemplate two distinct kinds of neutrality. The first kind of neutrality - *institutional neutrality* - is solely concerned with parliamentary supremacy, that is the institutional neutrality of the judiciary vis-à-vis Parliament. The second kind of neutrality - *subject matter neutrality* - is concerned with

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13 In *McGovern* (n 5) 506, Slade J observed that 'the court will ordinarily have no sufficient means of judging, as a matter of evidence, whether the proposed change will or will not be for the public benefit'.

14 ibid.

15 This is further explained in A Parachin, 'Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes' (2008) 45 Alberta Law Review 871, 882ff.

16 *McGovern* (n 5) 507 (emphasis added). Likewise, Slade J referred to the risks of courts 'encroaching on the functions of the legislature and prejudicing its reputation for political impartiality'.

neutrality in relation to the subject matter of a charitable trust. The latter frames neutrality as a discrete and independent consideration. It treats impartiality (and by extension neutrality) as something that is intrinsically important and not just the means to the end of parliamentary supremacy.

In saying this I could be accused of attaching too much significance to Slade J's use of the disjunctive 'or' when he cautioned against 'the dangers of the court encroaching on the functions of the legislature *or* of subjecting its political impartiality to question'.[17] Another - admittedly plausible - interpretation is that Slade J was merely using varied language to conjure the ideals of parliamentary supremacy. However, I think this interpretation is too narrow. Viewing the jurisprudence holistically, it is evident from the authorities dealing with political purposes that neutrality is not confined to the conventions of parliamentary supremacy - that neutrality is also viewed as an independently important benchmark.

My contention in this regard reflects, at least to some extent, a disbelief on my part that courts take the 'deference to Parliament' rationale very seriously. This rationale lacks rigour and cannot inform a thoughtful understanding of the doctrine of political purposes. It rests on the dubious premise that merely commenting on the plausible benefit of a change to the law or policy somehow amounts to an inappropriate intrusion into the domain of the legislature. But courts routinely comment on the desirability of law reform. Ironically, courts have even commented on the desirability of Parliament reforming the doctrine of political purposes itself.[18]

Even accepting for the sake of argument that finding public benefit in law reform initiatives entails an intrusion of some sort into the exclusive domain of Parliament, that intrusion is - to put it generously - slight. It is not as though courts would be imposing on Parliament any particular law reform. Parliament would be reserved the exclusive say on whether any given law reform initiative was ultimately adopted. Parliamentary deference does not even arise as a consideration where the reform proposal entails a change to common law. Further, if deference to Parliament is all that is at stake here, then the doctrine is vulnerable to a potentially sweeping exception for human rights advocacy in relation to which deference is not a categorical imperative.[19] These factors suggest that maintaining the neutrality of the judiciary vis-à-vis Parliament is not really

17 ibid 507.

18 See *Human Life International In Canada Inc v Minister of National Revenue* [1998] 3 FC 202 (FCA) [19].

19 See the discussion below in Part III.

what is at stake, or is at least not all that is at stake, with the doctrine of political purposes.

I think the doctrine also rests on a principled belief in the importance of neutrality for its own sake. In one of the leading Canadian cases, *Human Life International v Minister of National Revenue*,[20] Strayer JA declined to comment on whether a pro-life organisation did or did not satisfy the public benefit standard. He explained his non-committal stance as follows:[21]

> [T]his kind of advocacy of opinions on various important social issues can never be determined by a court to be for a purpose beneficial to the community. Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially political views: namely what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community?

Like Slade J's comments in *McGovern*, this statement could be read as merely channeling concerns about parliamentary supremacy.[22] Again, though, this seems to be too narrow an interpretation. In the above quote, Strayer JA articulated the need for neutrality in relation to 'social issues' and 'proper forms of conduct'. Parliamentary supremacy lacks plausible relevance in connection with these sorts of issues. If neutrality matters here it is because it is important in its own right.

That the doctrine of political purposes rests on an acceptance of the intrinsic importance of neutrality is also evident in numerous other subtle ways. For example, one of the factors sometimes qualifying a purpose as a political purpose is the lack of a neutral referent for public benefit. Courts have not explicitly said this but it is evident in the reasoning of the decisions. A neutral referent is an independent point of reference allowing a decision maker (court or regulator) to verify that public benefit is present without having to form and express a non-neutral value judgment about the worthiness of the purpose. Applicants for charitable status are in a superior position to avoid the political label if they can point to such a neutral referent. The reverse is true for applicants who cannot establish public benefit by pointing to a neutral referent.

But why would this be the case? The premium attached to neutral referents is consistent with the thesis that the charity-politics distinction is fundamentally concerned with preserving neutrality, not just for the sake of parliamentary

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20 n 18.

21 ibid [13].

22 This interpretation is strengthened by the fact that Strayer JA emphasised the extent to which the charity before the court was involved in advocacy for law and policy reform. See n 18 [3].

deference but also for the independent sake of neutrality. The primary reason a neutral referent would be desirable from the perspective of a court or regulator is that it relieves against having to make a non-neutral value judgment as to the public benefit (or lack thereof) inhering in a given cause. That is, it supplies a neutral basis upon which to reach the non-neutral conclusion that public benefit is present.

It is probably no coincidence then that advocacy causes resting on unprovable moral perspectives feature prominently in the authorities. The leading Canadian authorities deal with institutions advancing moral positions on such topics as abortion,[23] pornography[24] and torture.[25] It seems difficult to believe that concerns over neutrality in these cases were solely attributable to the ideals of parliamentary supremacy. Concerns over neutrality in these cases were accentuated, if not animated, by the nature of the positions advocated by the institutions under review, all of which promoted highly particularised and controversial moral conceptions of 'the good' for which there was no readily discernable neutral referent.

The resort to neutral referents is evident in numerous other ways as well. Consider the published guidance of the Canada Revenue Agency (the 'CRA') on the doctrine of political purposes.[26] The CRA takes the position that communications, either to the public at large or to government officials, can be charitable provided those communications are (among other things) 'well-reasoned'.[27] The guidance defines well-reasoned to mean:[28]

> A position based on factual information that is methodically, objectively, fully, and fairly analyzed. In addition, a well-reasoned position should present/address serious arguments and relevant facts to the contrary.

The requirement for 'factual information' serves the obvious goal of supplying a neutral referent for public benefit. Advocacy resting on factual information has a readily discernible neutral referent - the facts. This is not to deny that facts can be controversial. But there is a difference: disputes over facts do not directly play

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23 See e.g. *Human Life* (n 18); *Alliance for Life v Minister of National Revenue* [1999] 3 FC 504.

24 *Positive Action against Pornography v Minister of National Revenue* [1988] 2 FC 340.

25 *Action by Christians for the Abolition of Torture (ACAT) v Minister of National Revenue* [2002] FCA 499. See also *McGovern* (n 5).

26 Canada Revenue Agency, 'Political Activities' (Policy Statement CPS–022, 2 September 2003).

27 ibid ss 7.1 and 7.3.

28 ibid appendix I.

out, as do competing moral claims, as a competition between differing conceptions of the good.

A similar point applies to the CRA's stipulation that well-reasoned positions acknowledge and address relevant counter-arguments. This requirement distances public benefit analysis from non-neutral normative analysis. Consciously or otherwise, it uses methodological rigour as a neutral proxy for public benefit so that benefit need not be located, or at least not solely located, in the ideals and values implicit in the specific position being advocated.

Consider also the techniques courts have developed to deal with controversial purposes. The controversial nature of any given purpose does not automatically qualify that purpose as a political purpose.[29] Controversy can, though, become a bar to charitable status - and this is key to understanding the doctrine of political purposes - when the controversy inhering in any given purpose cannot be diffused by appealing to some neutral referent. One technique for locating a neutral referent is to abstract controversial purposes to a level of non-controversy so that benefit may be found in a more neutral conception of those purposes.

For example, in *Everywoman's Health Centre v Minister of National Revenue*,[30] a clinic providing abortion services, including elective abortions, was upheld as charitable. The court abstracted and reframed the clinic's abortion services as 'health care' services so that benefit could be located in the uncontroversial purpose of providing health care.[31] As to whether the clinic was political in nature, Décary JA reasoned as follows:[32]

> [T]he 'trust' is for dispensation of health care to women who want or need an abortion; it is not a 'trust' for alteration of the law with respect to abortion, nor is it a 'trust' for the political purpose of promoting the 'pro-choice' view.

The authorities approach the highly controversial topic of religion in a similar fashion. Rather than vet each doctrine of a religion for public benefit, they simply accept that there is benefit in that which qualifies as religion. This way the assumed benefit of religion supplies a neutral (or at least comparatively less

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29 See e.g. *Everywoman's Health Centre Society (1988) v Canada* [1991] FCJ 1162, [19]; *Re Greenpeace* [2014] NZSC 105, [2015] 1 NZLR 169, [99].

30 *Everywoman's Health* (n 29).

31 The outcome is not neutral on the issue of abortion. Framing elective abortion services as health care masks a non-neutral view on abortion. Nevertheless, doing so enabled the court to appeal, even if only superficially, to neutral referent.

32 *Everywoman's Health* (n 29) [19].

controversial) basis on which to find benefit in any specific expression of religious belief.

Using a similar technique, the High Court of Australia concluded in *Aid/Watch Incorporated v Commissioner of Taxation* that an institution organised and operated for the purpose of generating public debate as to how best to deliver foreign aid was charitable.[33] The majority reasoned that agitation for legislative and policy changes through public debate could be considered beneficial without any need to vet the specific positions being advocated for public benefit. This reasoning locates public benefit not in the specific lines of debate being advanced but rather in the good of public debate.[34] This reasoning only follows if specific and controversial lines of debate are abstracted to a level of non-controversy - the good of public debate.

This is not to suggest that abstracting controversial purposes to a level of non-controversy actually achieves neutrality. To the contrary, this technique does more to foster a perception of neutrality than it does to actually achieve neutrality. Whatever else might be said of the holding in *Everywoman's Health*, it is not possible to reason that elective abortion services are simply health care (and thus unquestionably of public benefit) while maintaining total neutrality on the issue of abortion. Likewise, the determination that any given belief system is religious in nature (and thus automatically of public benefit) only goes so far in distancing individual religious doctrines from public benefit analysis.[35]

The fact of the matter is that a determined court can abstract practically any controversial purpose to a level of non-controversy. This is why the appeal to a neutral referent often rings hollow. Very often the decision to abstract

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33 [2010] HCA 42, (2010) 241 CLR 539.

34 ibid [45].

35 This helps to explain the controversial reasoning of the House of Lords in *Gilmour v Coats* [1949] AC 426. After affirming at 459 that a 'religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true', the House of Lords went on to conclude against the charitableness of a contemplative order of nuns on the theory that the law could not accept the theological premise of the convent. The convent operated in the religious belief that contemplation and prayer by secluded nuns would bring spiritual improvement to the outside world. Charitable status was denied on the basis that the House of Lords could not accept that the prayers of secluded nuns would be efficacious. It could have simply been accepted, as is usually done in the context of religious charities, that the convent was religious and thus of public benefit. Why did the House of Lords not follow this traditional practice? The Court evidently perceived that locating the public benefit of the convent in the good of religion generally would not have achieved a neutral stance in relation to the convent's particular beliefs. For whatever reason - perhaps because it perceived the religious beliefs of the convent as idiosyncratic - it was not willing to bless them in this fashion.

controversial purposes to a level of non-controversy simply masks non-neutrality. Nevertheless, the fact that courts use this technique (and others) reveals a commitment of some sort to the importance of neutrality, or at least the optics of it.

Standing back then it seems apparent that the doctrine of political purposes is not solely (or even primarily) concerned with the substance of the charity-politics distinction. The doctrine appears to be primarily responsive to concerns over preserving neutrality, as in (1) the institutional neutrality of the judiciary vis-à-vis Parliament and (2) subject matter neutrality in relation to moral or controversial purposes lacking a neutral referent for public benefit. The question, to which I turn to next, is whether this is a proper foundation for the doctrine. These two distinct senses of neutrality will be considered in turn.

Part III: Political Purposes and the Institutional Neutrality of Courts

The conventions of parliamentary supremacy provide a seriously flawed underpinning for the doctrine of political purposes. Previous studies have itemised the frailty of this rationale.[36] Rather than repeat what has been previously said, I will highlight a defect that has not attracted much attention to date.

Grounding the doctrine of political purposes in the conventions of parliamentary supremacy potentially leaves it vulnerable to gaming. This rationale incentivises charities to frame their advocacy in ways that strategically sidestep the perceived need for deference to Parliament. One obvious strategy is to frame advocacy as human rights claims. It would strain credulity to the breaking point for a court to cite the conventions of parliamentary supremacy as a plausible reason why it was duty bound to remain neutral on the merits of a given interpretation of constitutionally protected human rights. It is presupposed, at least in jurisdictions with entrenched charters of rights, that courts have a legitimate role to play in the interpretation and enforcement of human rights. And so basing the doctrine of political purposes on the conventions of parliamentary supremacy simply leads to questions about when human rights work is charitable versus politics by other means. The ideal of neutrality has little to nothing to contribute to the resolution of this issue.

This very issue recently came before the First-Tier Tribunal in England and Wales in *Human Dignity Trust v Charity Commission*.[37] At issue in this case was the

36 See e.g. Chia, Harding and O'Connell (n 1) 363 and Parachin (n 15) 881ff.

37 n 3. Debra Morris also discusses this case in this volume. See Debra Morris, 'Charities and Political Activity in England and Wales: Mixed Messages'.

charitableness of a trust - the Human Dignity Trust ('HDT') - established and operated to engage in constitutional human rights litigation. Specifically, HDT brought constitutional challenges against laws criminalising same-sex relationships in various jurisdictions around the world. The Charity Commission took the position that HDT (among other things) had a political purpose. HDT maintained that it was established for the charitable purpose of advancing human rights.[38] The First-Tier Tribunal concluded that HDT was charitable at law. On the charity-politics distinction, the Tribunal reasoned as follows:[39]

> It seems to us that the constitutional process involved in interpreting and/or enforcing superior constitutional rights might, on one analysis, be seen as upholding the law of the state concerned rather than changing it …

The premise for this reasoning was that the usual concerns over preserving neutrality do not apply in the context of human rights advocacy because there is a 'legitimate role for the court in interpreting and enforcing superior constitutional rights'.[40] In the view of the Tribunal, the concerns over the institutional neutrality of courts identified in *McGovern* are 'limited to the consideration of a specific constitutional context in which there is a separation of powers with Parliamentary supremacy'.[41]

The Tribunal was undoubtedly correct in its finding that courts need not maintain a neutral stance in relation to the content of human rights. But there remains an important question: What specifically does the role that courts play in the interpretation and enforcement of human rights establish about the public benefit (and thus the charitableness) of human rights advocacy? Recognising that courts have a role to play in the interpretation and enforcement of human rights merely removes one of the impediments - the need for institutional neutrality - to the charitableness of law reform identified in *McGovern*. It still remains to be considered whether any given human rights organisation actually possesses the character of a charity. It is in relation to this issue that the absence of a substantive basis for distinguishing charity from politics has now become readily apparent. Having merely emphasised a procedural impediment - the need for neutrality - to the charitableness of political purposes, the authorities have not provided much, if any, guidance for those advocacy organisations (such as human

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38 In the UK, the advancement of human rights is a charitable purpose under Charities Act 2011, s 3(1)(h). Similarly, upholding human rights is recognised as charitable in Canada. See Canada Revenue Agency, 'Upholding Human Rights and Charitable Registration' (CG–001, 15 May 2010).

39 *Human Dignity* (n 3) [99] (emphasis added).

40 ibid [96].

41 ibid.

rights institutions) in relation to which the need for neutrality is either altogether absent or muted.

Just as charity law needs a substantive basis for distinguishing charity from politics generally, it presumably also needs a substantive basis for distinguishing charitable human rights advocacy from human rights advocacy undertaken as a form of politics by other means. This is not to suggest that human rights are themselves political. It would, though, be naïve to ignore that political demands can easily be framed as specious or exploratory human rights claims. We can agree that apolitical conceptions of human rights are possible without having to thereby rule out the possibility of politically motivated conceptions of human rights. One might say that the craft of rights interpretation draws on the ability to distinguish between the two. So if the charitableness of all advocacy couched as a defence of human rights is uncritically accepted, human rights advocacy will enable a sweeping exception to the doctrine of political purposes. The law cannot simultaneously accept that purposes necessitating law reform are political but human rights advocacy is unquestionably charitable.

Human Dignity Trust is notable for just how little the Tribunal appeared to be concerned with distinguishing charitable human rights advocacy from politics. The Tribunal referred to the testimony of an expert witness lending credence to HDT's human rights advocacy.[42] Beyond that, though, the Tribunal had little to say on the substance of HDT's rights advocacy. There are a few likely explanations for this. First, HDT's human rights advocacy was concerned with de-criminalising same-sex relationships between consenting adults. Given the fundamental nature of the rights at stake here, concerns over mere policy preferences masquerading as fundamental human rights claims were muted. Secondly, since tribunal decisions are confined to their facts (formally lacking the weight of binding precedents), the Tribunal had the luxury of not having to tightly frame its reasoning so as to properly constrain the precedential value of the decision.

But even when these factors are taken into account, the Tribunal's reasoning still appears to have contemplated a rather low threshold for what qualifies as 'human rights' for purposes of charity law. To be sure, the Tribunal reasoned that 'interpreting *and/or* enforcing' human rights is charitable.[43] While 'enforcing' human rights confines this kind of advocacy to well-established understandings of rights (and thus has the potential to filter out political agitators), the same cannot be said of merely 'interpreting' human rights. That the Tribunal accepted the charitableness of 'interpreting' human rights contemplates that it is charitable to

42 ibid [41], [98].

43 ibid [99].

participate in the interpretive process through which the content of human rights is discovered. On this view, the particular interpretations of human rights advanced by applicants for charitable status are irrelevant. Such an 'all-comers' strategy for assessing the charitableness of human rights advocacy undermines the general principle that law reform is a political purpose.

Likewise, it is noteworthy that the Tribunal only used highly vague generalities to describe what 'human rights' means for purposes of charity law. For example, it was determined that the phrase 'human rights' has no particular meaning under English charity law,[44] that human rights are 'axiomatically trans-national' and 'rapidly evolving'.[45] Human rights were found to include those rights set out in the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the European Convention on Human Rights.[46] This was noted to include the 'rights to human dignity, to be free from cruel, inhuman or degrading treatment or punishment' and 'the right to privacy and to personal and social development'.[47] Given the breadth of claims that such a broad conception of human rights enables, the reasoning of *Human Dignity Trust* contemplates an extremely broad (arguably too broad) exception for human rights advocacy.

Human Dignity Trust leaves a future court with the unenviable task of determining when human rights advocacy is political rather than charitable (and vice versa). This problem is the direct product of courts not having articulated a substantive distinction between charity and politics in the first place. If parliamentary supremacy was the impediment to recognising law reform as charitable, then how (if at all) do we draw the distinction between charity and politics once that impediment is removed? Superficial appeals to the legitimate role that courts play in the interpretation and enforcement of human rights leave this question unanswered. Whatever the path forward consists of, one point is clear: - the ideal of neutrality has nothing to offer this debate.

Part IV: Political Purposes and Liberal Neutrality:

It was suggested in Part II above that the resort to neutrality in the authorities is not confined to the kind of institutional neutrality mandated by the conventions of parliamentary supremacy. The authorities also appear to view neutrality as being important in its own right. While the authorities have not gone so far as to

44 ibid [42].

45 ibid [44].

46 ibid [45].

47 ibid [53].

explicitly establish that charity law should confine itself to a neutral conception of public benefit, those dealing with political purposes reveal a discomfort with the sort of non-neutral reasoning that public benefit analysis necessarily entails. Standing back, it is possible to discern traces of liberal neutrality, or versions of it, in the authorities distinguishing charity from politics.[48]

Identifying the link with liberal neutrality

Liberal neutrality is a broad camp of liberal thought appealing to the principle of neutrality as a central feature of the ideal liberal state. Given that there exist diverse interpretations of liberal neutrality, a succinct formulation of this perspective is apt to gloss over significant points of contention among neutralists.[49] Likewise, any attempt to link the doctrine of political purposes with the precepts of liberal neutrality will inevitably raise the objection that the doctrine is inconsistent with some particular interpretation of liberal neutrality. But neutralists share an essential insight, which is that the state ought to maintain neutrality between different conceptions of 'the good', more literally between *persons* subscribing to differing conceptions of the good.[50] On this view, the neutral state allows citizens to identify and pursue for themselves their own conception of the good life unassisted and unimpeded by the state. Beyond this essential insight, neutralists disagree on many fundamental issues.[51] Given the diversity of views within the broad camp of liberal neutrality, the comments here will not apply with like force to all strains of liberal neutrality.

The basic insight behind liberal neutrality - that the state should remain neutral as between competing conceptions of the good - finds a parallel in the cases distinguishing charity from politics. Institutions promoting a given conception of the good as more worthy than other competing conceptions are prime candidates to

48 On the topic of charity and liberal neutrality, see N Martin, 'Liberal Neutrality and Charitable Purposes' (2012) 60 Political Studies 936.

49 On the diversity of thought without the camp of liberal neutrality, see GF Gaus, 'Liberal Neutrality: A Compelling and Radical Principle' in S Wall and G Klosko (eds), *Perfectionism and Neutrality* (Rowman & Littlefield 2003) 137.

50 See GF Gaus, 'The Moral Foundations of Liberal Neutrality' in T Christiano and J Christman (eds), *Debates in Contemporary Political Philosophy* (Blackwell 2009) 81.

51 For example, there are competing views on the justification for state neutrality (does neutrality require a neutral or non-neutral justification?), the scope of state neutrality (is the requirement for neutrality narrow in scope, such that it is confined to the constitution or like issues relating to the basic framework of the polity, or does it extend to a much wider array of political decisions?) and whether neutrality is required in relation to the aim, effect or justification of state action. All of these debates reveal a tremendous diversity of views among neutralists. See e.g. Martin (n 48) and Gaus (n 49).

be labelled political and thus non-charitable.[52] As discussed above in Part II, some of the leading political purposes cases deal with institutions advancing moral positions on controversial issues such as abortion, pornography and torture.[53] One of the apparent reasons for not recognising such purposes as charitable is to preserve neutrality in relation to these kinds of purposes and by extension in relation to competing conceptions of the good underlying them. Liberal neutralists, or at least those advocating in favour of a broad scope of neutrality, would presumably have something to say in support of the idea that the political order, of which courts are a part, should refrain from promoting these sorts of purposes through grants of charitable status. At the very least, neutralists would not object to this reasoning. Grants of charitable status bring with them access to numerous state-supplied advantages ranging from the nominal, for example, exemptions from mundane regulatory requirements, to the momentous, for example, income tax concessions.[54] By withholding from political purposes the state promotion and subsidisation implicit in charitable status, courts seem to be conforming precisely to what neutralists endorse. And in so doing they are defending their position with specific reference to the value of neutrality.

One objection to linking the doctrine of political purposes with liberal neutrality is that doing so overstates what the charity law authorities say about neutrality. Whereas liberal neutrality frames neutrality as a benchmark for the ideal state, the concept of neutrality under the doctrine of political purposes is significantly more modest. The neutral stance mandated by the doctrine of political purposes is not extended to 'the state' but rather confined to one doctrine administered by one branch of government - the judiciary. However, this does not discredit my contention that the common law of charity has internalised reasoning reminiscent of liberal neutrality. True, the doctrine of political purposes is unlike liberal neutrality in that it confines its neutrality principle to the judiciary. But a restriction on the judiciary translates into a restriction on the common law. To reason that courts should be neutral in relation to the public benefit of political purposes is necessarily to reason that the common law, a system of judge-made law, must be neutral in relation to those purposes. So even though the prescription

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52 This explanation for the doctrine of political purposes might immediately attract scepticism. The promotion of some conception of the good is also a characteristic shared by charitable purposes, most obviously the advancement of religion. How then can this furnish a basis on which to distinguish charity from politics? Of course, noting the contradiction merely reveals that the influence of liberal neutrality on charity law has been sporadic and incomplete. It does not disprove that courts have drawn (consciously or otherwise) on certain of the essential insights of liberal neutrality in the elaboration of the doctrine of political purposes.

53 See *Human Life* (n 18) 23, 24 and 25 and related text.

54 See e.g. A Parachin, 'Legal Privilege as a Defining Characteristic of Charity' (2009) 48 Canadian Business Law Journal 36.

for neutrality found in the cases dealing with political purposes is not as far-reaching as that contemplated by proponents of liberal neutrality, we still seem to be left here with an instance in which a common law doctrine draws, however imperfectly or incompletely, on a fundamental insight of liberal neutrality.

It would be inadequate, though, to simply observe that liberal neutrality and the doctrine of political purposes share in common a concern over neutrality. It must also be considered whether they share in common a similar conception of neutrality. Liberal neutrality contemplates three conceptions of neutrality: neutrality of aim, neutrality of effect and neutrality of justification. Each of these is considered below.[55] I argue that the kind of neutrality contemplated by the doctrine of political purposes most closely approximates neutrality of justification.

Three conceptions of neutrality

Neutrality of aim

This conception of neutrality is solely concerned with the goals of state action. It requires that the state aims neither to promote nor hinder any particular conception of the good. State action might inadvertently have this effect but the aim should be neutral.[56] While there is much that could be said about this conception of neutrality, doing so would not advance the analysis here because the doctrine of political purposes does not appear to be concerned with this kind of neutrality. It is admittedly possible that a policy preference for neutral aims has somehow flavoured the doctrine of political purposes. The aims of charity law are manifestly non-neutral (a point developed in Part V below). A scepticism over charity law's non-neutral aims could therefore predispose courts to narrowly define charity (through the doctrine of political purposes) as a way of containing this non-neutrality. However, it would be idle conjecture to suggest that this is what is going on here. Taken at face value, the authorities dealing with political purposes do not call into question the appropriateness of charity law's non-neutral aims. They are instead expressly concerned with whether political purposes are the kinds of purposes that should benefit from those non-neutral aims. In other words, they are concerned with whether political purposes are the kinds of purposes that should benefit from the selective state promotion and subsidisation represented by charitable status. Whatever else might be said of this concern, it does not appear to be directly driven by the imperative for preserving neutral aims.

55 The analysis draws on that of Martin (n 48).

56 See e.g. ibid 940.

Neutrality of effect

This conception of neutrality is concerned not with the aim of state action but rather with its effect on competing conceptions of the good.[57] Neutrality of effect requires that state action, leaving aside its aims, has neutral effects, meaning it does not disparately privilege or hinder some conceptions of the good relative to others. As with neutrality of aim, it does not appear that neutrality of effect is the particular conception of neutrality driving the doctrine of political purposes. This is because the doctrine does not achieve neutral effects but rather non-neutral effects.

The doctrine of political purposes does not formally discriminate between charities based on which particular conception of the good informs the charitable mission being pursued. The requirement that a charity must not be established for a political purpose formally applies to every charity regardless of which conception of the good underlies its mission. In practice, however, some conceptions of the good are more likely than others to disqualify an institution for charitable status on the basis of the doctrine of political purposes.

We have already seen in Part III above that human rights advocacy is privileged relative to law reform sought on more traditional bases in that the former can be framed (on the authority of *Human Dignity Trust*) as an attempt to uphold rather than change the law. Further, the CRA's use of the 'well-reasoned' criterion to distinguish charity from politics privileges charities basing their advocacy on factual claims relative to those basing them on purely moral claims. In addition, a criticism of the doctrine of political purposes is that it privileges - whether by design or not - those conceptions of the good aligned with the status quo over those that can only be fulfilled through change of some sort. Since supporters of the status quo need not change the law or promote views on controversial social issues to achieve their purposes, they are immune to the doctrine. The exact opposite is true of conceptions of the good seeking change to the status quo.

Given the evident non-neutral effects achieved by the doctrine of political purposes, it would be difficult to sustain the argument that neutrality of effect is the kind of neutrality to which the doctrine aspires. At the very least, neutrality of effect is not a standard that the doctrine of political purposes appears to take very seriously.

57 See e.g ibid 944 and the materials cited therein.

Neutrality of justification

While neutrality of aim and neutrality of effect specifically restrict the kinds of state policies that may be supported by the ideal liberal state - those with neutral aims and effects - neutrality of justification is less concerned with *what* is being justified than with *how* it is being justified.[58] Under this conception of neutrality, state policies with non-neutral aims and/or effects are permissible, provided at least that they avail themselves of a neutral justification. This is not to deny that the requirement for a neutral justification impacts upon the kinds of policies the state may pursue but rather to recognise that the immediate focus here is on the justificatory process rather than aims or effects.

A neutral justification can be defined negatively in terms of what it is not - it is not a justification that rests on an acceptance or rejection of any particular conception of the good. The justification must instead be neutral as between alternative conceptions of the good.[59] The nature of the exercise can be illustrated by considering what neutrality of justification would require in the specific context of charity law. Charity law is unavoidably non-neutral in the sense that it is fundamentally concerned with providing benefit. No plausible conception of charity could decouple charity from benefit and it is difficult to sustain a fully neutral conception of benefit. To conclude that a given purpose is beneficial is to broadcast a non-neutral conclusion about the character of that purpose and its worth relative to other purposes. While the requirement for a neutral justification does not necessarily forbid such non-neutrality, it limits the referents that may be drawn upon to locate benefit in any particular purpose.

From the vantage of liberal neutrality, a neutral justification is absent - and by extension, permissible non-neutrality is absent - where the putative benefit of a given purpose can *only* be appreciated when the purpose is viewed from the vantage of a specific conception of the good. On the other hand, benefit of any sort is altogether absent if the alleged benefit cannot be perceived from the vantage of *any* conception of the good. I understand this to mean that a neutral justification for charitable status is only possible where the alleged benefit is accepted by all relevant conceptions of the good or at least not denied by any of them. It is only here, it would seem, where both (1) the positive requirement for a benefit and (2) the negative prohibition against having to draw on any particular conception of the good to discern that benefit are *both* satisfied.

58 See e.g. ibid 946.

59 See e.g. ibid 948.

Neutrality of justification seems to be the kind of neutrality that the cases dealing with political purposes are principally concerned with. As discussed above in Part II, one of the things qualifying a purpose as a political purpose is the absence (or perceived absence) of a neutral referent capable of enabling a neutral justification for a finding of public benefit. This helps to explain why the leading Canadian authorities dealing with political purposes involve institutions advancing moral positions on such topics as abortion, pornography and torture.[60] These institutions frustrate the preference for neutral justifications because public benefit is most easily perceived when their charitable missions are evaluated from the vantage of specific conceptions of the good.

Likewise, neutrality of justification explains why courts (as discussed in Part II above) sometimes abstract controversial purposes to a level of non-controversy, i.e., to a level at which all rival conceptions of the good accept that benefit is present. Doing so relieves against having to justify public benefit with reference to any particular conception of the good. This technique has a direct parallel in the liberal neutrality literature.[61]

A similar point applies to the CRA's use (also discussed in Part II above) of the 'well-reasoned' criterion to distinguish charity from politics. The well-reasoned criterion is defined in such a way - i.e., based on factual information and responsive to contrary perspectives - so as to enable a neutral justification for the conclusion that well-reasoned positions possess benefit. Positions based on demonstrable facts can be viewed as neutral as between competing conceptions of the good. It is possible to find benefit in such positions by appealing to a neutral referent - the facts - rather than any particular conception of the good. Likewise, where competing perspectives are acknowledged and methodically refuted, it is possible to ground benefit in the rigorous methodology underlying the position being advocated rather than in the conception of the good informing that position. All of this studiously avoids finding benefit in causes the benefit of which is a matter of contest among rival conceptions of the good.

In sum, there is a similarity between the reasoning of the cases distinguishing charity from politics and liberal neutrality. Both appear to share in common a concern over neutral justifications. The question to which I turn next is whether this illuminates or distorts the law of charity.

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60 See nn 18, 23, 24 and 25 and related text.

61 See e.g. Brian Barry's notion of a neutral description of controversial goods in B Barry, *Justice as Impartiality* (Oxford University Press 1995) 83. This is discussed with reference to charitable purposes by Martin (n 48) 947.

Part V: Neutrality: An Ill-Suited Referent for Defining Charity

I consider in this Part whether liberal neutrality is compatible with the common law understanding of charity.[62] If it is not, then the doctrine of political purposes, to the extent that it channels the commitments of liberal neutrality, rests on a philosophical fault line. Before considering the three conceptions of neutrality - neutrality of aim, neutrality of effect and neutrality of justification - I will begin with some general observations on the discordance between the ideal of neutrality and the common law understanding of charity.

General

Liberal neutrality - regardless of whether it is understood as neutrality of aim, effect or justification - arguably provides a poor philosophical foundation for charity law. This is not because charity law fails to raise any of the philosophical questions of concern to neutralists. To the contrary, the extent to which charity law implicates the state in non-neutrality is so pronounced it is surprising that neutralists have not had more to say about this area of law. It is instead because the manifestly non-neutral nature of charity law is not easily reconciled with the aspirations of liberal neutrality. As Matthew Harding notes, 'in promoting charitable purposes, the state is non-neutral in every relevant sense towards different conceptions of the good'.[63]

In its ground-breaking study of the law of charity, the Ontario Law Reform Commission (the 'OLRC') premised many of its conclusions on the foundational insight that charity means 'doing good for others'.[64] On this view, all cases dealing with the legal meaning of charity are centred on whether the goals of the putative charity qualify as 'doing good' and/or whether the putative charity's target population consists of 'others'. Since this formulation was merely a useful starting point, much detail is obscured if the questions are left at this level of generality. Nevertheless, the OLRC's starting point for analysis is helpful for present purposes because it sheds light on the nature of the exercise that courts engage in when defining charity. Courts defining charity are engaging in an exercise - elaborating on what it means to do good for others - that is overtly and deliberately non-neutral. From the outset then, the doctrine of political purposes, at least to the extent that it is concerned with preserving neutrality, seems to be at odds with the overtly non-neutral nature of charity law.

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62 See also Martin (n 48).

63 M Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) 48.

64 Ontario Law Reform Commission, *Report on the Law of Charities* (1997) Chapter 6.

The non-neutrality of charity is most obviously reflected in charitable purposes but it is not confined to them. Practically every feature of a charitable mission is inescapably non-neutral. Charitable missions are a complex amalgam of charitable purposes (the end served by the charitable mission), the means chosen for attaining those purposes (how the charitable end is being pursued) and the identified target population (who benefits from the charitable mission). The non-neutrality inhering in the identification of a charitable purpose is compounded at the stages of determining how that charitable purpose should be pursued and how the target population should be delimited. Scholarship funds, for example, do not merely rest on value judgments surrounding the good of education. Such funds also draw on controversial ideas about the sorts of criteria that should be used to identify meritorious scholarship candidates (for example, gender, religion, financial need, geographic residence, disadvantaged ancestry, military service, etc),[65] the sorts of athletic and academic pursuits worthy of financial support and so on. Even something as seemingly uncontentious as a poverty relief charity requires a conception of who is 'poor'. This requires a value judgment regarding the basic standards of living below which no one should be left to languish. Once that determination is made charities still enjoy a broad discretion to target their services at a sub-population, for example, a particular category of poor person, and to determine how best to relieve against the poverty experienced by that population.[66] None of this is easy to reconcile with the ideal of neutral in any of its conceivable conceptions.

Further, conforming the common law understanding of charity to the precepts of liberal neutrality would undermine an essential characteristic of charity - its distinctiveness from government. Liberal neutrality is a theory solely concerned with the ideal of a neutral state. The fundamental insight liberal neutrality has to offer charity law is that the state cannot be non-neutral through its promotion of charitable purposes. Such an approach to charity law will presumably seek to confine charitable purposes to those purposes appropriate to the ideal neutral state. To be sure, liberal neutrality's prescription for neutrality appears to be immune to whether the state is being non-neutral through direct government programming versus the promotion and/or subsidisation of programming supplied by non-state

65 All of these have been upheld as permissible bases on which to condition charitable scholarship funds. See e.g. *Re The Esther G Castanera Scholarship Fund* [2015] MBQB 28 (upheld a scholarship exclusive to women), *Ramsden Estate* [1996] PEI No 96 (upheld a scholarship fund for Protestants), *University of Victoria v British Columbia (AG)* [2000] BCJ No 520 (upheld a scholarship fund for Roman Catholics) and *Canada Trust Co v Ontario Human Rights* Commission (1990) 69 DLR (4th) 321 (struck eligibility criteria relating to race, gender and religion while leaving those pertaining to parental occupation).

66 Perhaps surprisingly, the common law has never formalised a rule against discriminatorily targeted charitable trusts. See A Parachin, 'Public Benefit, Discrimination and the Definition of Charity' in K Barker and D Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013) 171.

actors (such as charities). What appears to be problematic from the vantage of liberal neutrality is the fact of non-neutrality by the state rather than the specific way (directly providing versus indirectly subsidising) in which such non-neutrality manifests.[67] If correct, this means that the very conception of neutrality that neutralists draw upon to constrain direct state programming will similarly be drawn upon by them to constrain the definition of charity. It seems inevitable that such an approach to the definition of charity will translate into a reluctance to recognise as charitable any purpose outside of those purposes that liberal neutrality considers appropriate for the ideal neutral state.

For example, Nick Martin draws on John Rawls' list of 'primary goods', which list is meant to define the parameters of the ideal neutral state, as a source for informing what a neutral conception of charity might look like.[68] While Martin evidently does not believe that a neutral conception of charity need be confined to Rawls' primary goods,[69] the purposes currently qualifying as charitable that Martin acknowledges pose difficulties from the perspective of liberal neutrality happen to be those that veer from Rawls' list of primary goods.[70] This should not be surprising. Liberal neutrality lacks the normative resources to make any prescriptions for charity law unrelated to the ideal of a neutral state. The only impact liberal neutrality could possibly have on charity law then would be to align the legal meaning of charity - and by extension the permissible pursuits of charities - with the permissible pursuits of a neutral state.

In this sense, liberal neutrality points charity law in a direction running directly contrary to the idea that charity and government are and should remain distinct. Admittedly, the distinction between charity and government has in some respects become blurred through time. Certain charitable purposes overlap with purposes now widely regarded as governmental in nature. Governments sometimes recruit charities as surrogate service providers. In addition, charity law has been

67 Otherwise, the state could easily defeat the prescription for neutrality by simply confining its non-neutrality to instances of indirect promotion and subsidisation.

68 Martin (n 48) 948; J Rawls, *A Theory of Justice* (rev ed Harvard University Press 1999) 54–55; J Rawls, *Political Liberalism* (Columbia University Press 2005) 308–309.

69 Martin explicitly addresses this point (n 48) 950. Also, drawing on Norman Daniels, Martin also contemplates a neutral justification for the charitableness of health care: (n 48) 948 citing N Daniels, *Just Health Care* (Cambridge University Press 1985) 42–48.

70 Drawing on the English understanding of charity, Martin identifies the following charitable purposes as problematic from the vantage of neutrality of justification: the promotion of the arts, amateur sport, animal welfare moral improvement and spiritual welfare: Martin (n 48) 949.

theorised as a remedy for governmental failure, which suggests that charity would not even exist in the context of an ideal government.[71]

However, there remains a strong 'separate from government' theme in the scholarly literature. David Stevens takes issue with the implication that charity can be understood as a mere remedy for imperfect governments.[72] Likewise, Evelyn Brody's sovereignty justification for charity tax concessions characterises the charitable sector as a separate sovereign.[73] Whereas liberality neutrality would operate to harmonise charitable and governmental purposes, Brody's sovereignty perspective rationalises those concessions as a policy instrument for keeping 'government out of the charities' day-to-day business'. Likewise, David Brennen, again from the perspective that charity and government are distinct, argues against extending to charities anti-discrimination rules devised for governments.[74] Similarly, Matthew Harding recognises that, although charity and government are 'in the same business', at least in the sense that they share a regard for the 'common good', and that there is an overlap of charitable and governmental purposes, the two are nonetheless distinguishable.[75] Liberal neutrality, to the extent that it would indeed harmonise charity and government, is at odds with all of these perspectives highlighting the normative distinctiveness of the two.

The three conceptions of neutrality - neutrality of aim, neutrality of effect and neutrality of justification - will now be vetted for their compatibility with the common law understanding of charity. Neutrality of justification will receive the most attention as it appears to be the conception of neutrality underlying the doctrine of political purposes.

Neutrality of aim

To the extent that liberal neutrality is concerned with neutrality of aim, it is irreconcilable with charity law. The overt objective of charity law is not only to reach but to also broadcast the conclusion that certain pursuits - those qualifying as

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71 See e.g. H Hansmann, 'Economic Theories of Nonprofit Organization' in WW Powell (ed), *The Nonprofit Sector: A Research Handbook* (1st ed Yale University Press 1987).

72 D Stevens, 'Rescuing Charity' in C Mitchell and S Moody (eds), *Foundations of Charity* (Hart Publishing 2000) 29.

73 E Brody, 'Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption' (1998) 23 Journal of Corporation Law 585.

74 DA Brennen, 'Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities' (2002) 5 Florida Tax Review 779, 847.

75 M Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 Sydney Law Review 559, 559–560.

charitable - are more worthy than others, i.e., to signal that certain pursuits are intrinsically superior in the sense that they are uniquely aligned with some conception of the 'the good'. Again, as Harding notes, 'a central feature of charity law is that the state uses it to promote charitable purposes'.[76] Value judgments are not formed in this context as a reluctant concession to the inevitably of such judgments. To the contrary, they are a celebrated feature of charity law. These value judgments are the very point - in fact, the *only* point - of the exercise. The sole policy function served by the legal definition of charity is to determine which purposes - i.e., which conceptions of the good - should enjoy the tremendous advantages exclusive to charitable status. In fact, the definition of charity serves the deliberate non-neutral purpose of rationing those advantages. In no context does the law distinguish charity from non-charity other than to deliberately confer some advantage on charitable purposes and by extension to deliberately withhold those advantages from non-charitable purposes. The express goal here is to be openly non-neutral by affirming certain pursuits with a preferred legal and social status - charitable at law - and to lend to those pursuits the imprimatur of the state.[77]

For these reasons, approaching the definition of charity with a view to preserving neutrality of aim would contradict the overtly non-neutral ambitions of charity law. The point is not worth developing further here, though, because of the conclusion drawn above that the neutrality of aim does not appear to be the conception of neutrality informing the doctrine of political purposes.

Neutrality of effect

As with neutrality of aim, charity law, at least as currently constituted, is irreconcilable with neutrality of effect. It is well-established that not all purposes of conceivable public benefit currently qualify as charitable for that reason alone.[78] That is, charity law is openly selective in its approach to determining which conceptions of the good can qualify as charitable notwithstanding that this ensures - indeed, *deliberately* ensures - non-neutral effects. Neutral effects *could* be achieved if charity law ceased to be the means through which the state advantages certain conceptions of the good over others. There are at least three options for achieving this. Whatever else might be said of these options, they reveal a radical

76 Harding (n 63) 44.

77 Harding makes a similar point when he refers to the 'facilitative, incentive and expressive' strategies employed by charity law to promote the institution of charity: ibid 48.

78 For example, writing for the majority of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women* [1999] 1 SCR 10, [182], Iacobucci J reasoned that a finding of public benefit is a 'necessary but not a sufficient condition' for a grant of charitable status.

incompatibility between charity law as currently constituted and the imperative for neutral effects.[79]

The first option is to define charity broadly so that charitable status is extended to all competing conceptions of the good. This could be achieved through an 'all-comers' approach to defining charity under which all conceptions of the good meet the standard (except perhaps for those that are harmful according to some agreed upon metric.) Such an approach would achieve neutral effects because it would preclude charitable status (and the associated advantages) from being selectively available to some conceptions of the good but not others. Leaving aside whether an all-comers strategy for defining charity is practicable, it is a radically different test to the one applied under current law. It runs directly contrary to the practice under current charity law of discriminating between rival conceptions of the good.

Currently, public benefit is necessary but not sufficient for charitable status.[80] As courts have confusingly said, a purpose will be charitable only if it is beneficial *in the way the law regards as charitable*. This often amounts to circular reasoning whereby courts essentially posit without meaningful explanation that some conceptions of the good are not charitable *because they are not charitable*.[81] However, for present purposes, determining what exactly this means (a task that has proven to be one of the central challenges of charity law) is secondary to identifying what it signifies. Charity law, as currently constituted, privileges some conceptions of the good - those providing benefit *in the way the law regards as charitable* - over others that are not recognised as charitable notwithstanding they provide benefit of some sort. The current definition of charity is in this sense not compatible with the imperative of neutral effects.

The second option for achieving neutral effects is to reject definitional reform and instead eliminate the advantages associated with charitable status, i.e., to make charitable status a neutral status.[82] The problem with this option, of course, is that it eliminates charity law's non-neutral effects by essentially repealing charity law.[83]

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79 Martin (n 48) 944–946.

80 *Vancouver Society* (n 78).

81 This reasoning usually takes expression as a considered conclusion that the purpose under review is not analogous to an established charitable purpose. However, the circularity of the reasoning was noted by the Supreme Court of Canada in ibid by both the majority at [200] and the minority at [45].

82 See Martin (n 48) 945.

83 ibid.

Literally the only purpose served by charitable status is to advantage 'charity'.[84] There is no context in which the law seeks to distinguish charity from non-charity other than to thereby advantage charity. That is, there is no charity law, at least not as we know it, without the various advantages exclusive to charities. But even if those advantages were repealed, we would still be left with the 'problem' that charitable status is itself a signal of worthiness and thus not a neutral designation. As a result, even if the sole advantage was the halo effect of charitable status, neutrality of effect would be violated if the state allowed some conceptions of the good but not others to be recognised as charitable.[85] And so truly neutral effects would require that the law go so far as to cease conferring charitable status. Such a radical departure from the status quo reveals an insoluble tension between neutrality of effects and charity law as we know it.

The third option would be to extend compensation to those conceptions of the good denied charitable status and its associated advantages.[86] That is, the non-neutral effects of charity law would be remedied through some mechanism external to charity law. The idea that non-neutral state action could be remedied through a system of compensation has been attacked as unworkable.[87] But even accepting that such a system is plausible, it seems incoherent that the law would, on the one hand, advantage charitable purposes and then, on the other hand, selectively offset those advantages by extending an equalising form of compensation to select non-charitable purposes. Through its acceptance that there is a wrong of some sort to remedy, the system of compensation presupposes that charity law's initial determination of which purposes do and do not qualify for the benefits of charitable status is somehow flawed. This is why charity law is at some level irreconcilable with a system of compensation for non-charitable purposes: such a system flatly contradicts the conclusion drawn by charity law regarding which purposes the state should and should not promote.

But leave these critiques for the moment and return to the doctrine of political purposes. The distinction between charity and politics is first and foremost a matter of definition. How, if at all, does the imperative for neutral effects inform

84 This has not always been the case. For example, under the now repealed Mortmain Act 1736 (9 Geo II c 36) devises of land to charitable purposes were statutorily deemed invalid. The Mortmain Act gave expression to concerns that perpetual charitable trusts - if left unchecked - could 'garner in all the land of the kingdom'. See G Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press 1969) 109; E Brody, 'Charitable Endowments and the Democratization of Dynasty' (1997) 39 Arizona Law Review 873, 902–906 and Harding (n 63) 38. Mortmain legislation was, though, a temporary departure from the overwhelming orientation of the law in favour of charitable trusts.

85 Martin (n 48) 945.

86 ibid.

87 ibid.

the ideal definition of charity? Aspiring to neutral effects, it would seem, is not a useful strategy for defining charity. Notably, only the first of the above options for achieving neutral effects through charity law supplies courts with any insights as to how charity ought to be defined. Even at that, the prescription under the first option is to significantly depart from the current approach to defining charity. The second option, inasmuch as it seeks to make charitable status - and by extension the legal definition of charity - legally irrelevant, offers literally no insights on the ideal definition of charity. The third option operates as nothing more than an external check and balance on charity law. As such, there are no prescriptive insights to be gleaned here relevant to the definition of charity (or, for that matter, any other internal feature of charity law). If anything, the system of compensation contemplated under the third option dilutes the definition of charity of policy significance by ensuring that the definition of charity is no longer the exclusive gateway to the advantages of charitable status. Its tendency is therefore not to illuminate the ideal definition of charity but rather to make the definitional issue moot.

For these reasons, if the aspiration for neutrality underlying the doctrine of political purposes is informed by the ideal of neutral effects, it is a misguided strategy for defining charity. But as with neutrality of intent, it was suggested above that neutrality of effect does not appear to be the particular conception of neutrality driving the doctrine of political purposes. This leaves us with neutrality of justification.

Neutrality of justification

Charity law could confine itself to neutral justifications for charitable status. However, in so doing it would sacrifice key characteristics of charities. For example, defining charity with a view to neutrality of justification would undermine the diversity and pluralism of the charitable sector. We have already seen that one way to achieve neutrality of justification is to express charitable purposes in abstracted terms that are neutral as between competing conceptions of the good. To some extent, the common law already achieves this through the four categories of charitable purposes enunciated in *Commissioners for Special Purposes of the Income Tax v Pemsel*:[88] relief of poverty, advancement of religion, advancement of education and other purposes of public benefit. Except for religion, the benefit of which is not accepted by all conceptions of the good, these purposes are framed in terms that tend to be uncontroversial as between alternative conceptions of the good. However, individual charities are not established and operated to achieve neutral conceptions of the *Pemsel* categories. To the contrary, specific charities are established for specific non-neutral conceptions of these

88 n 10.

categories. So even if the advancement of religion could be reframed so that it was situated within a more neutral category – for example, spirituality - each individual religious charity would nevertheless be established to advance a specific non-neutral religious dogma.

Neutrality therefore seems to require more than a neutral categorisation of charitable purposes. It also seems to require that specific charities be established for neutral conceptions of these neutral categories. In practice, then, neutrality of justification would require that charities do good but prohibit them from aligning their missions with any non-neutral conception of what 'good' means. While such an approach would achieve neutrality of justification, it would do so at the expense of diversity and pluralism. A charitable sector confined to neutral conceptions of neutral goods would neither be diverse nor pluralistic. This is no small problem as the diversity and pluralism of the charitable sector helps to explain why charities are worthy of state promotion to begin with. If both diversity and pluralism have to be sacrificed to enable a neutral justification of the state's promotion of charity, then what would be the point?

Further, neutrality may work at cross purposes with what Matthew Harding identifies as one of the core features of legal charity - voluntarism.[89] According to Harding, 'the gist of voluntarism is choice'.[90] There is no charity without the voluntary and autonomous choice to give. It seems reasonable to posit that neutrality and voluntarism have an inverse relationship, i.e., that the *non-neutrality* of charitable purposes is one of the things that inspires voluntarism. The very fact that the charitable sector organises itself as a collection of individual institutions established to pursue specific (and, I would add, non-neutral) conceptions of charitable purposes is consistent with this hypothesis. So too is survey data revealing that 'belief in the cause' is one of the leading reasons people choose to share their time and money with charities.[91] Neutral charitable causes, precisely because they are unobjectionable when viewed from the vantage of competing conceptions of the good, could conceivably attract broad support (and thus voluntarism). However, believing in a cause presumably requires a stronger point of reference than the detached conclusion that the cause is unobjectionable. That is why there is the genuine potential for neutrality to conflict with voluntarism - a neutral definition of charity is deliberately sanitised of the idealism that arguably inspires charitable activity in the first place.

89 Harding (n 75) 570ff.

90 ibid 572.

91 See M Turcotte, *Charitable Giving by Canadians* (Statistics Canada, 16 April 2012) 33.

The point is illustrated by the holding in *Southwood v Attorney-General*.[92] This case decided against the charitableness of a pacifist trust. The court reasoned that excessively biased curricula will fail to qualify as educational for purposes of charity law. While there is something to be said in support of this position, the court contemplated a rather low threshold for permissible bias in education. It was reasoned that a curriculum can be charitable notwithstanding that it proceeds from the premise that peace is preferable to war. However, charitableness is spent if the curriculum goes too far in taking for granted any particular conception of how best to achieve peace. The curriculum under review in *Southwood* did just that - it presupposed that disarmament is the ideal path to peace. The Court reasoned it could not find public benefit here because it was obliged to remain neutral on the question of how best to achieve peace. Deference to Parliament could conceivably account for this neutral stance.[93] However, the Court also seemed to attribute the need for neutrality to the value-laden nature of the curriculum.[94] A neutrality imperative so demanding that it prohibits courts from going any further than acceding to the trite proposition that peace is preferable to war risks confining charities to excessively benign charitable missions.

It is perhaps not surprising then that charity law has been inconsistent on the issue of neutrality. The strong stance on neutrality evident in some of the cases is nowhere to be found in others. Notwithstanding the position on pacifist trusts in *Southwood*, trusts for the promotion of the armed forces,[95] including trusts for teaching shooting[96] have been upheld as charitable. It is difficult to reconcile these cases with the suggestion that charity law must maintain total neutrality on the issue of how best to attain peace. Likewise, notwithstanding the non-committal stance taken on whether abolishing human torture is of public benefit,[97] trusts against cruelty to animals have been upheld as charitable.[98] There is a perverse

92 [2000] EWCA Civ 204.

93 It was found in [16] that the ultimate purpose of the trust was to achieve a change in foreign policy, i.e., 'education' was not the end but rather the means to that end.

94 In [17], it was contemplated that public benefit in this case was incapable of proof. By this it was presumably meant that the curriculum rested on value laden ideals rather than demonstrable facts.

95 See H Picarda, *The Law and Practice Relating to Charities* (4th ed Bloomsbury Professional Ltd 2010) 199–201.

96 *Re Stephens, Giles v Stephens* (1892) 8 TLR 792.

97 *McGovern* (n 5); *Action by Christians* (n 25).

98 See *Re Herrick, Colohan v Attorney-General* (1918) 52 ILT 213, upholding as charitable a trust rewarding police for bring justice to perpetrators of cruelty to animals, and *Swifte v Attorney-General for Ireland (No 2)* [1912] 1IR 133, upholding as charitable a trust to protect 'starving and forsaken cats'.

irony in charity law having found benefit in protecting animals from cruelty but not humans from torture. Critiques of inconsistency admittedly have their limits. Coherence is always a work in progress rather than an attained reality. Perhaps all that these inconsistencies reveal is that courts have not been especially effective in their attempts to discover neutral justifications for charitable status. But that strikes me as being an excessively optimistic explanation. There seems to be a bigger problem here - a fundamental incompatibility between the ideal of neutrality and the ideal of charity.

The resort to neutrality has also inspired impracticable hair-splitting distinctions. For example, in an apparent recognition that education is rarely, if ever, fully neutral, the Federal Court of Appeal for Canada acknowledged in *Challenge Team v Canada* that educating people 'from a particular political or moral perspective may be educational in the charitable sense'.[99] However, the Court went on to observe that charitableness has been spent at the point where educating from a perspective becomes the promotion of that perspective.[100] To the extent that predictability and certainty are hallmarks of good law, this kind of imprecise line-drawing exercise has little to commend itself.

Taking stock, neutrality - in any of its plausible senses - is a poor referent for the meaning of charity and by extension the distinction between charity and politics. Neutrality of aim would directly contradict the non-neutral ambitions of charity law. Neutrality of effect would either require a radically different approach to defining charity and/or an abandonment of a signature characteristic of charitable status, the numerous legal privileges and exemptions exclusive to charities. Neutrality of justification, the sense in which the cases dealing with political purposes appear to conceive of neutrality, is likewise problematic. Fully realising on the ambition for neutrality of justification in charity law would undermine key features of charity, including its distinctiveness from government, diversity, pluralism and voluntarism. Experience to date with this reasoning has resulted in inconsistent decisions, excessively broad formulations of the principles and impracticable hair-splitting distinctions.

Part VI: Conclusion

If, as I have argued, neutrality is a poor referent for the meaning of charity, and by extension the distinction between charity and politics, it falls to consider how this area of law could be improved. One of the fundamental problems with premising charity law doctrines on neutrality is that this is discordant with the non-

99 *Challenge Team v Canada* [2000] FCJ No 433 (FCA) [1] (per Sharlow J).

100 ibid [1].

neutral nature of charity law. A better approach would be to rationalise the distinction between charity and politics on the basis of some normative characteristic of charity. At least then the doctrine of political purposes could be understood as a defence of charity rather than an artificial restraint on it.

To my mind, a critical feature of charity is its distinctiveness and independence from government. I have previously drawn on this feature of charity to make prescriptive insights regarding the design features of the ideal charitable donation tax incentive.[101] The same feature of charity might also be consulted to sketch some very general - though possibly helpful - observations about the distinction between charity and politics. Government and charity, though they sometimes pursue similar goals, are properly thought of as distinct from one another. A common mistake is to think of charity solely in terms of the ends pursued. Focusing on charitable purposes, some of which have long since overlapped with those of the welfare state, ignores a defining feature of charity. Charity is as much about how charitable ends are pursued as it is with the ends themselves. Charity is a private (in the sense of non-governmental) voluntary institution. On this view, charity is not simply concerned with the attainment of ends qualifying as charitable. It is concerned with attaining those ends other than through government.

Admittedly, the state promotion of charity clouds the neat boundary I am sketching between charity and government. But the state promotion of charity does not displace the private voluntary nature of charity or compromise its normative separateness from government. Charitable donation tax incentives are only activated where a taxpayer forms the voluntary choice to share. Likewise, exemptions from the rule against perpetual trusts and the rule that trusts must be for persons rather than purposes only apply where a settlor voluntary chooses to settle a charitable purpose trust. In all of these (and other) contexts where the state promotes and advantages charity we can understand the state as merely promoting a desirable form of private and voluntary action. In none of these contexts does charity ever arise or sustain itself but for the voluntary choice of private citizens to autonomously pursue charitable ends.

The distinctiveness of charity from government finds support in the scholarly literature.[102] The distinctiveness of charity and government also helps to explain the position of the Charity Commission of England and Wales that charitable trusts must be independent from government.[103] In the view of the Charity Commission,

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101 A Parachin, 'Reflections on the First-Time Donor Credit - The Link Between Donation Incentives and the Regulation of Legal Charity' (2013) 61 Canadian Tax Journal 1109.

102 See nn 72, 73, 74 and 75 and the related text.

103 Charity Commission, *The Independence of Charities from the State* (RR7, 2001).

if the purpose of a trust is ultimately to implement the policies of government, or if the trust operates such that it merely carries out the directions of government, then it will not qualify as charitable.

The Charity Commission's position is particularly instructive. It establishes that governments cannot 'do government' through charities. The only exception is if the goal of government in supporting charity is to 'do charity'. Of course, this is not really an exception to the rule since it merely reveals that governments are just like everybody else in the sense that they are able to support (though neither direct nor control) the work of charities. The doctrine of political purposes can be understood as simply applying this principle in reverse. When courts say that electioneering and lobbying for law and regulatory reform are non-charitable we can understand them as saying the following: Just like governments cannot 'do government' through charities, charities cannot 'do charity' through governments. Since government and charity are separate and distinct, government cannot be the means for charitable ends any more than charity can be the means for governmental ends. Even accepting that electing a particular government or enacting a particular law reform will contribute to a charitable end, these activities only very indirectly contribute to that end. The most proximate cause is governmental action and not the actions contributing to the government action. The doctrine of political purposes is therefore perhaps misnamed. Properly understood, it is arguably less concerned with the non-charitableness of politics than it is with the non-charitableness of government.[104]

Future analyses of the doctrine of political purposes might therefore benefit from understanding the charity-politics distinction as a way of respecting the distinctiveness of charity and government. The ideal of neutrality should be eschewed. It has little of value to offer this area of law and has in fact simply confused matters.

104 Darryn Jensen makes a similar point in this volume. See Darryn Jensen, 'Charitable Purposes and Political Purposes (Or Voluntarism and Coercion)' for the argument that political purposes are distinct from charitable purposes in that the former pursue benefit through the coercive means of government and thus lack a hallmark of charity - voluntarism.