DISTINGUISHING CHARITY AND POLITICS: THE JUDICIAL THINKING BEHIND THE DOCTRINE OF POLITICAL PURPOSES

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This article identifies and critiques the rationales articulated by courts in support of the doctrine of political purposes in charity law. The author argues that courts have failed to cogently account for the doctrine. The author traces the doctrine back to a judicial misstatement of the law in an early twentieth century decision. The author then points out the flaws and limitations with the various justifications that have since been developed in the Canadian and English jurisprudence in support of the doctrine. The article concludes with the observation that the shortcomings with the doctrine are symptomatic of a larger theoretical failing in the law of charity.

Cet article identifie et critique les justifications invoquées par les tribunaux pour appuyer la doctrine des motifs politiques dans le droit régissant les organismes de bienfaisance. L'auteur fait valoir que les tribunaux n'ont pas réussi à expliquer la doctrine de manière convaincante. L'auteur a réussi à retracer une fausse déclaration judiciaire de la loi dans une décision rendue au début du vingtième siècle. Il souligne ensuite les lacunes et limites au moyen des diverses justifications qui ont été développées depuis dans la jurisprudence canadienne et anglaise pour appuyer la doctrine. L'article conclut par une observation que les lacunes de la doctrine sont symptomatiques d'une plus grande faiblesse théorique du droit régissant les organismes de bienfaisance.

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I. INTRODUCTION

Charity law has a rule known as the doctrine of political purposes. According to this doctrine, institutions with political purposes are not eligible for charitable status. The doctrine has been applied to reach some ironic conclusions. For example, it is charitable to

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prevent cruelty to animals,[1] but political to seek the abolition of torture (of humans!).[2] It is charitable to operate an abortion clinic,[3] but political to promote a view on abortion.[4] It is charitable to educate the public towards the view that peace is preferable to war,[5] but political to help two societies find peaceful ways to live together.[6] This article explores the judicial thinking that is behind these cases and others like them.

Before proceeding, it is important to make clear what the aims of this article are, and equally important, what they are not. First and foremost, this article aims to provide a critical reflection on the jurisprudence dealing with the distinction between charity and politics. The focus of the critique is on the justifications articulated by courts in support of the doctrine of political purposes. The argument developed in the article is that courts have by and large failed to cogently justify why the law of charity distinguishes between charity and politics, and the manner in which it draws the distinction. Many of the cases in which the doctrine of political purposes has been applied to deny charitable status are seemingly inconsistent with cases in which charitable status has been granted. Moreover, the justifications articulated by courts for the doctrine are in some instances superficial, and in others, historically inaccurate. In addition, the tortured distinctions drawn in the cases invite unnecessary hair-splitting and perpetuate misconceptions about the prerequisites for charitable status.

That said, the aim of this article is not to argue that a restriction on the political activities of charities is incapable of justification. There is a distinction between that which has been unconvincingly justified, and that which is simply unjustifiable. The doctrine of political purposes is among the former, since there probably exists good reasons to distinguish between charity and politics. To take but a single example, the characterization of electioneering — that is, partisan participation in an election campaign — as political serves an income tax objective. If electioneering was considered charitable, then a taxpayer could claim income tax credits for campaign contributions beyond the intended limits by directly supporting a political party and indirectly supporting the same party through financial contributions to a sympathetic registered charity.[7] No doubt, there are other compelling justifications behind the doctrine of political purposes. The problem is that such justifications

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1 *Re Green's Will Trusts*, [1985] 3 All E.R. 455 (Ch.D.).

2 *McGovern v. Attorney-General*, [1982] 1 Ch. 321 [*McGovern*]; *Action by Christians for the Abolition of Torture v. Canada*, 2002 FCA 499, 225 D.L.R. (4th) 99 [*Abolition of Torture*]. The irony here is underscored by the following statement by Gray J. in *Jackson v. Phillips* (1867), 96 Mass. 539 at 567 [*Jackson*]: "To deliver men from a bondage which the law regards as contrary to natural right, humanity, justice and sound policy, is surely not less charitable than to lessen the sufferings of animals."

3 *Everywoman's Health Centre Society (1988) v. M.N.R.*, [1992] 2 F.C. 52 (C.A.) [*Everywoman*].

4 *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202 (C.A.) [*Human Life*]; *Alliance for Life v. M.N.R.*, [1999] 3 F.C. 504 (C.A.) [*Alliance for Life*].

5 *Southwood v. Attorney-General*, [2000] EWCA Civ 204 [*Southwood*].

6 *Anglo-Swedish Society v. Commissioners of Inland Revenue* (1931), 45 T.L.R. 295 (K.B.) [*Anglo-Swedish Society*]; *Buxton v. Public Trustee* (1962), 41 T.C. 235 (Ch.D.) [*Buxton*].

7 The donation to the political party directly would give rise to a tax credit under s. 127(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*ITA*], and the donation to the charity would give rise to a tax credit under s. 118.1. For commentaries on the significance of income tax considerations to the doctrine of political purposes, see Stephen Swan, "Justifying the Ban on Politics in Charity" in Alison Dunn, ed., *The Voluntary Sector, the State and the Law* (Oxford: Hart, 2000) 161 at 166-67; Alison Dunn, "Charity Law as a Political Option for the Poor" in Charles Mitchell & Susan R. Moody, eds., *Foundations of Charity* (Oxford: Hart, 2000) 5 at 75 [Dunn, "Charity Law"]; C.E.F. Rickett, "Charity and Politics" (1982) 10 N.Z.U.L. Rev. 169 at 176; U.K., *Charities: A Framework for the Future*, Cm 694 (1989), c. 2.

make little to no explicit appearance in the reasons for judgment articulated by courts in the leading cases, which is the focus of this article.

Why restrict the article to what judges have actually said in support of the doctrine of political purposes if I am conceding from the outset that other more saleable and generally unarticulated justifications exist? Restricting the analysis in this fashion serves a subsidiary aim of the article, which is to use the cases dealing with political purposes to begin a dialogue over how the reasons for judgment in charity law cases shape (and sometimes misshape) the legal construction of charity. Two key questions are recurrent in charity law jurisprudence: (1) How does the law define charity?; and (2) How does the law privilege charity? One of the conclusions drawn at the end of the article is that the justifications offered by courts for the doctrine of political purposes reflect a tendency of courts to rigidly bifurcate between these two questions; that is, to treat the task of defining charity as being discrete from the issue of why charitable status is desirable in the first place. This way of proceeding, it is suggested in the conclusion to the article, accounts for some of the incoherence that is characteristic of the political purposes cases and of charity law jurisprudence more generally.

Part II of this article provides a brief descriptive account of the doctrine of political purposes. Part III identifies and critically reflects upon the four key rationales that have been offered by courts for the doctrine. Part IV concludes this article with the observation that the shortcomings with the cases dealing with political purposes are not unique to this doctrine but are instead symptomatic of some broader problems that currently plague charity law.

II. WHAT IS THE DOCTRINE OF POLITICAL PURPOSES?

A. IMPLICATIONS OF THE DOCTRINE

Charitable institutions are required to be established and operated for exclusively charitable purposes.[8] An institution established for a political purpose will therefore fail to qualify for charitable status. Similarly, a charitable institution that at some point takes on a political purpose will lose its charitable status. The loss of charitable status results in the loss of the associated legal advantages.

The key advantage of charitable status relates to income tax. Charities registered under the *Income Tax Act*[9] are generally exempt from federal and provincial income tax and gifts

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[8] This is sometimes described as the "exclusive charitability" rule. See e.g. the judgment of Iacobucci J. in *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.*, [1999] 1 S.C.R. 10 [*Vancouver Society*]; the judgment of Lord Denning in *British Launderers' Research Association v. Borough of Hendon Rating Authority*, [1949] 1 K.B. 434 (C.A.) [*British Launderers*]; and the definition of "charitable foundation" in s. 149.1(1) of the *ITA*, *ibid.* There are statutory rules that relieve against the strict application of the exclusive charitability rule to testamentary trusts, e.g., *The Trustee Act*, R.S.M. 1987, c. T160, s. 91; the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 47; the *Wills Act*, R.S.A. 2000, c. W-12, s. 32; the *Wills Act*, R.S.N.B. 1973, c. W-9, s. 30. There are also limited common law exceptions to the exclusive charitability requirement. See A.H. Oosterhoff *et al.*, *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004) at 402. A trust with a mix of charitable and political purposes could be saved by these exceptions.

[9] *Supra* note 7.

to such charities are tax-assisted.[10] In addition, charitable institutions enjoy a privileged position in relation to onerous rules of property and trust law. For example, charitable trusts are exempt from the general prohibition against purpose trusts and the trust law requirement for certainty of objects.[11] In addition, the rules against perpetuities and accumulations are applied with great leniency to charities.[12]

B. SOURCES

Since the legal meaning of charity derives from the common law, judicial pronouncements constitute the primary source of the doctrine of political purposes. The *ITA* also contains provisions on point, but these provisions more or less codify the common law.[13] In addition, there are various published commentaries by the Charities Directorate of the Canada Revenue Agency (CRA) that speak to the limitations imposed by the doctrine of political purposes.[14] Although these published commentaries do not have the force of law, they are authoritative in the sense that they reflect the interpretation of the law applied by the CRA. Whether this interpretation actually reflects the better view of the law will prove practically irrelevant to charities lacking the requisite resources to advance an alternative view.

C. CATEGORIES OF CHARITABLE AND POLITICAL PURPOSES

The key to the doctrine of political purposes lies in the distinction between "charity" and "politics." Rather than define these terms, charity law provides a system of categorization whereby some purposes are categorized as charitable and others are categorized as political.

In terms of charitable purposes, there are three basic requirements that must be met in order for a purpose to be characterized as "charitable" at law.[15] First, the purpose must fall into one or more of the categories recognized by the law as charitable. The following oft-quoted excerpt from the judgment of Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel*[16] provides an exhaustive description of the categories currently considered by the law to be charitable: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education;

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10 Corporations and individual donors who make gifts to registered charities are entitled to a charitable tax deduction and charitable tax credit under ss. 110.1 and 118.1, respectively, of the *ITA*, *ibid.*

11 The beneficiary principle of trust law provides that a trust must be for the benefit of a person or group of persons rather than for a purpose. The certainty of objects requirement provides that the beneficiary or beneficiaries of a trust must be described with sufficient clarity. The beneficiary principle does not apply to charitable trusts. In addition, while the objects of a charitable trust must be exclusively charitable, they need not satisfy the certainty of objects requirement, since courts will remedy uncertainty in the objects of a charitable trust.

12 See Adam Parachin, "Charities and the Rule Against Perpetuities" (2008) 21:3 The Philanthropist 256.

13 *Supra* note 7, ss. 149.1(6.1)-(6.2).

14 The key Canada Revenue Agency (CRA) policy statement dealing with the doctrine of political purposes is CPS-022: Canada Revenue Agency, *Policy Statement*, CPS-022 (2 September 2003), online: CRA <http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html> [CRA, *Policy Statement*].

15 Note that these three requirements do not always appear in the jurisprudence as discrete requirements that are analyzed separately. As a practical matter, the three requirements are generally assumed to be satisfied if an analogy may be drawn between the purpose in question and a purpose previously considered to be charitable.

16 [1891] A.C. 531 (H.L.) [*Pemsel*].

trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."[17] These categories are often variously described as the *Pemsel* categories or as the four "heads" of charity.

Second, the purpose must be found to be of "public benefit."[18] There are two components to the requirement of public benefit. Emphasis is placed on the *public* component of the test. The intention is to ensure that a sufficient number of persons benefit from the purpose and that the class of such persons is not defined on the basis of personal relationships.[19] However, the test is more than simply a numerical requirement. Charitable status requires that an institution actually confer a *benefit* on the public.[20]

Third, a purpose must be exclusively charitable. A purpose will not qualify as charitable if attaining it will serve to achieve both charitable and non-charitable ends.[21]

In terms of political purposes, the leading case is *McGovern*.[22] In this case, Slade J. provided the following oft-quoted framework for categorizing purposes as being political in nature:

> (1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes...can never be regarded as being for the public benefit in the manner which the law regards as charitable. (2) Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular

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17 *Ibid.* at 583. This categorization was generally based upon the purposes identified as charitable in the preamble to the *Statute of Charitable Uses, 1601 (Statute of Elizabeth)* (U.K.), 43 Eliz. 1, c. 4. Lord Macnaghten's classification of charitable purposes in *Pemsel* appears to have been adopted – without recognition — from the arguments advanced by Lord Romilly (as counsel) in *Morice v. Bishop of Durham* (1805), 32 E.R. 947 at 951 (Ch.).

18 See G.H.L. Fridman, "Charities and Public Benefit" (1953) 31 Can. Bar Rev. 537 at 539 where he describes the relevant jurisprudence as "capricious," arbitrary, and "sometimes impossible to reconcile." For a good introductory discussion of "public benefit," see Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1996), c. 6 [OLRC].

19 Courts have allowed a closer degree of connection between donors to a charitable purpose and the persons to benefit from the purpose in the context of the first head of charity, the relief of poverty. See *Re Scarisbrick, Cockshott v. Public Trustee*, [1951] 1 Ch. 622 (C.A.), for an exception for "poor relations"; *Jones v. T. Eaton Co.*, [1973] S.C.R. 635, for an exception for "poor employees."

20 The dual aspects of the public benefit test were summarized by Gonthier J. in *Vancouver Society*, *supra* note 8 at para. 41 [emphasis added] as follows:

> The public benefit requirement has two distinct components. There must be an objectively measurable and socially useful *benefit* conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a *public* benefit.

21 This reflects the orthodox view of what "exclusive charitability" requires. However, this overstates the matter, since non-charitable ends are always achieved as a necessary consequence of undertaking charitable work. Persons who contract with a charity as employees or agents personally benefit from their association with that charity. Even soup kitchens must buy soup from some person who thereby personally benefits. The real issue is whether the non-charitable end is a mere consequence of attaining a purpose as opposed to the purpose itself.

22 *Supra* note 2.

> 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.[23]

Justice Slade explicitly noted that this categorization was "not intended to be an exhaustive one."[24] Additional purposes that have been held to be political include promoting a point of view[25] or attitude of mind,[26] advocating in favour of one side of a controversial social issue[27] and creating a climate of opinion.[28] Purposes that fall offside the doctrine of political purposes generally do so because they fall into one of these categories of political purposes.

III. RATIONALES FOR THE DOCTRINE OF POLITICAL PURPOSES

Four key claims (implicit and explicit) recur in the authorities as rationalizations for the doctrine of political purposes: (1) the claim that charity law has *always* distinguished between charity and politics; (2) the claim that the law must assume its own perfection and thus deny that there could ever be public benefit in purposes necessitating a change to the law; (3) the claim that judges lack the capacity to rule on the public benefit of political purposes; and (4) the claim that charity and politics are "just different."

Each of these claims is illuminated and critically reflected upon below. It is argued that these claims are problematic as justifications for the doctrine of political purposes inasmuch as they are historically inaccurate, unpersuasive, and/or inconsistent with cases in which charitable status has been granted.

A. RATIONALE ONE — TIME-HONOURED PRACTICE

The twentieth century cases dealing with the doctrine of political purposes reflect a notable judicial willingness to reflexively conform with earlier decisions on point. In fact, many of the leading cases dealing with the doctrine of political purposes suggest a judicial willingness to apply the doctrine if for no other reason than because courts appear to have consistently done so in the past.[29] The problem with this is that the doctrine of political purposes appears to have evolved out of a judicial misstatement uttered as *obiter* by Lord

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23 *Ibid.* at 340.

24 *Ibid.*

25 In *Vancouver Society*, *supra* note 8 at para. 171, Iacobucci J. held that it was not charitable to "[educate] people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination."

26 *Anglo-Swedish Society*, *supra* note 6.

27 *Human Life*, *supra* note 4; *Positive Action Against Pornography v. M.N.R.*, [1988] 2 F.C. 340 (C.A.) [*Positive Action Against Pornography*]; *Alliance for Life*, *supra* note 4.

28 *Buxton*, *supra* note 6.

29 In the leading decision of *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406 (H.L.) at 442 [emphasis added] [*Bowman*], Lord Parker held that "a trust for the attainment of political objects has *always* been held invalid." Similarly, in *N.D.G. Neighbourhood Assn. v. Canada (Revenue, Taxation Department)*, [1988] 2 C.T.C. 14 (F.C.A.) at 18, MacGuigan J. held that the "authorities have consistently held that the presence of political objectives negatives an organization's claim to benefit the community as a charity." In *Alliance for Life*, *supra* note 4 at para. 35, Stone J.A. held that "[a]lthough a 'moving subject' the law of charity has not looked particularly kindly upon political purposes."

Parker in *Bowman*.[30] This misstatement has been given the force of law as court after court has relied upon it without serious critical reflection.

All leading decisions dealing with the doctrine of political purposes can be traced back to *Bowman*. In this case, a testamentary residuary gift to an institution named "The Secular Society Limited" was challenged by the testator's next of kin.[31] The House of Lords upheld the gift. Certain judges elaborated in *obiter* on what the result would have been if the Society received the residue in the capacity of a trustee rather than as the donee of an absolute gift. Characterizing the matter in this way required that consideration be given to whether the objects of the Society were charitable.[32] One member of the court, Lord Parker, characterized the objects of the Society as being "purely political."[33] This led Lord Parker to reject the possibility that the Society's objects were charitable at law with the observation that "a trust for the attainment of political objects has *always* been held invalid."[34]

As it turns out, Lord Parker was a poor historian, since no decision prior to *Bowman* had clearly established this principle.[35] In fact, it is widely noted that the doctrine of political purposes lacks the pedigree that has been ascribed to it.[36] The observation of Lord Parker has been criticized as "inaccurate,"[37] "not one which is established with any certainty by high authority in England,"[38] "difficult to reconcile with certain decided cases,"[39] based upon a

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30 *Ibid.*

31 The next of kin argued that the gift to The Secular Society could not be upheld by the laws of England, since its objects, which involved furthering secularization, were contrary to the Christian faith.

32 The argument in favour of the view that the Society took as a trustee was that the testator had intended to gift the residue for the purposes of the Society rather than to the Society itself. On this interpretation, the gift could be considered as the settlement of a purpose trust. Since the only purpose trusts generally recognized by the law are *charitable* purpose trusts, this required that consideration be given to whether the purposes of the Society were charitable at law.

33 *Bowman, supra* note 29 at 442.

34 *Ibid.* [emphasis added].

35 Michael Chesterman has observed that an earlier decision, *Re Scowcroft, Ormrod v. Wilkinson*, [1898] 2 Ch. 638 [*Scowcroft*], is supportive of the doctrine of political purposes. Chesterman contends that "if a trust for 'religious and mental improvement' was also substantially intermingled with furtherance of the principles of the Conservative Party, this would debar it from charitable status": Michael Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) at 182. In reply, it may be noted that although the Court in *Scowcroft* declined to comment on whether a trust for the furtherance of Conservative principles was charitable, it explicitly held at 641-42 that a trust "for the furtherance of Conservative principles and religious and mental improvement in combination" qualified as charitable.

36 See e.g. Neil Brooks, *Charities: The Legal Framework* (Ottawa: Secretary of State, 1983) at 135-43; Paul Michell, "The Political Purposes Doctrine in Canadian Charities Law" (1995) 12:4 The Philanthropist 3; Cecil A. Wright, "Case and Comment" (1937) 15 Can. Bar Rev. 566; Kernaghan Webb, *Cinderella's Slippers? The Role of Charitable Tax Status in Financing Canadian Interest Groups* (Vancouver: SFU-UBC Centre for the Study of Government and Business, 2000); *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] 1 A.C. 31 (H.L.) at 54, 63 [*National Anti-Vivisection Society*].

37 Michell, *ibid.* at 4.

38 Wright, *supra* note 36 at 568.

39 H.G. Carter & F.M. Crawshaw, *Tudor on Charities: a Practical Treatise on the Law Relating to Gifts and Trusts for Charitable Purposes*, 5th ed. (London: Sweet & Maxwell, 1929) at 41, cited by Wright, *supra* note 36 at 567.

"paucity of judicial authority,"[40] "clearly [wrong],"[41] "considerably overstated,"[42] "not supportable by an examination of reported cases,"[43] and "unconvincing."[44]

Contrary to Lord Parker's holding in *Bowman*, courts of the nineteenth century upheld charities with "political" purposes.[45] Examples include charities whose purposes included promoting temperance legislation,[46] securing the abolition of vivisection,[47] and establishing a new bishopric.[48]

In addition, there are numerous instances in this era where the political involvement of charities went unchallenged. Commonly cited examples include the Church Missionary Society, the Anti-Slavery Society, the John Howard League for Penal Reform, the Lord's Day Observance Society, and the Society for Organizing Charity and Repressing Mendicity.[49] The unchallenged political activism of these charities suggests that the law of charity has not always found political purposes invalid.[50]

Moreover, the authorities cited by Lord Parker did not support his conclusion. How then did he reach the conclusion that political purposes have *always* been invalid? Some authors have speculated that Lord Parker's holding in *Bowman* was influenced by an 1888 text, *The Law of Charitable Bequests*,[51] written by Amherst D. Tyssen.[52] Tyssen is the only commentator of his era to have suggested that political purposes could not be regarded as charitable.[53]

Tyssen cited one of the same authorities cited by Lord Parker in *Bowman*,[54] as well as two others.[55] The difficulty is that none of these authorities clearly support a prohibition against

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40 *National Anti-Vivisection Society*, *supra* note 36, at 53, 63, Porter L.J and Simonds L.J., respectively.

41 Brooks, *supra* note 36 at 139.

42 Francis Gladstone, *Charity, Law and Social Justice* (London: Bedford Square Press, 1982) at 98.

43 Webb, *supra* note 36 at 132.

44 *Ibid.* at 134.

45 See Peter Luxton, *The Law of Charities* (New York: Oxford University Press, 2001) at 225. This is perhaps what Gonthier J. was referring to in *Vancouver Society*, *supra* note 8, when he remarked in para. 107 that the "political purposes doctrine has a long history in Canadian law, *although its basis is a matter of some controversy*" [emphasis added].

46 *Farewell v. Farewell* (1893), 22 O.R. 573 (H. Ct. J. Ch.D.) [*Farewell*].

47 *Re Foveaux*, [1895] 2 Ch. 501. This purpose apparently necessitated a change to the law. The case references a legislative bill that was introduced for the purpose of constituting a bishopric for Birmingham.

48 *Re Villers-Wilkes* (1895), 72 L.T. 323 (Ch.).

49 See Gladstone, *supra* note 42 at 99-100; Webb, *supra* note 36 at 127-28; Chesterman, *supra* note 35 at 44, 78, 359.

50 One commentator puts it this way: "Analysis reveals that there were originally no constraints on advocacy activities of charities" (Webb, *ibid.*).

51 Amherst D. Tyssen, *The Law of Charitable Bequests: with an account of the Mortmain and Charitable Uses Act, 1888* (London: Williams Clowes and Sons, 1888).

52 Webb, *supra* note 36 at 132. Webb notes, for example, that the basis for Lord Parker's holding in *Bowman* "would appear to be neither legislation, nor decisions directly on point, but rather Tyssen's 1888 textbook on charities." See also Michell, *supra* note 36 at 6.

53 Brooks, *supra* note 36 at 137. See Tyssen, *supra* note 51 at 176-77.

54 *De Themmines v. De Bonneval* (1828), 38 E.R. 1035 (Ch.) [*De Themmines*].

55 *Habershon v. Vardon* (1851), 64 E.R. 916 (Ch.) [*Habershon*]; *Re Douglas, Obert v. Barrow* (1887), 35 Ch. D. 472 (C.A.) [*Obert*].

political purposes.[56] Although Lord Parker did not explicitly cite Tyssen's text in *Bowman*, it seems unlikely that both Lord Parker and Tyssen would have independently concluded that the same authorities stood for a proposition that they clearly do not support.

This unlikely coincidence has fuelled speculation that Lord Parker consulted Tyssen's text and acknowledged the authorities cited by Tyssen rather than the text itself. One commentator suggested that "[m]aking a mistake to which many law students are still prone, Lord Parker may have read the text but not the case."[57] The result was that Tyssen's conclusions regarding political purposes became self-fulfilling due to Lord Parker's uncritical acceptance of them in *Bowman*.[58]

Oddly enough, one case that could have been cited in support of a prohibition of sorts against political purposes — *Jackson*[59] — was not noted by either Lord Parker or Tyssen. However, even this case does not support the proposition that political purposes have "always" been held to be non-charitable, since it is inconsistent with other cases of its era. Moreover, the reasoning of this case is inconsistent with both the current rules against political purposes[60] and the kind of prohibition contemplated by Lord Parker and Tyssen.[61]

The application of the doctrine of political purposes as a time-honoured practice thus only takes us so far, since the doctrine ultimately derives from what appears to be an errant

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56 In *De Themmines*, *supra* note 54, charitable status was denied for unrelated reasons. In *Habershon*, *ibid.*, charitable status was denied on the basis that the purpose in question could jeopardize English foreign affairs. In *Obert*, *ibid.*, the court made no explicit finding on whether the purpose in question was or was not charitable.

57 Michell, *supra* note 36 at 6.

58 The authors of the second edition of *The Law of Charitable Bequests* apparently had similar misgivings regarding the veracity of Tyssen's interpretation of these authorities. The second edition, which was published four years after *Bowman* (*supra* note 29) was decided, completely reworked the commentary on political purposes. Indeed, in the second edition the discussion of political purposes was reduced to a brief excerpt from Lord Parker's holding in *Bowman*. See Claude Eustace Shebbeare & Charles Percy Sanger, *The Law of Charitable Bequests*, 2d ed. (London: Sweet & Maxwell, 1921) at 116-17. A similar point was made by Michell, *supra* note 36, n. 25.

59 *Supra* note 2. This American case dealt with the charitability of three purposes: (1) creating a public sentiment to end slavery; (2) benefiting "fugitive slaves" who escaped from "slaveholding states"; and (3) securing changes to law so as to afford women the same civil rights enjoyed by men. Justice Gray concluded that the first two purposes were charitable, but that the third was not. The reason expressly identified by the court was that the third purpose necessitated a change to the law. See the judgment of Gray J. at 555, 565, 571.

60 The creation of a particular public sentiment, which was held to be a charitable purpose in *Jackson*, *ibid.*, would today almost certainly be considered political, further to more recent cases such as *Anglo-Swedish Society*, *supra* note 6 and *Buxton*, *supra* note 6.

61 Notwithstanding express statements in *Jackson*, *ibid.*, to the effect that seeking law reform is itself non-charitable, it is not entirely clear from this judgment that charitable purposes must presuppose the perfection of the law as suggested by Tyssen, *supra* note 51 at 177. Were this not the case, then it is difficult to see how Gray J. could have upheld the charitability of helping "fugitive slaves" or have concluded that the "permission of slavery by law does not prevent emancipation from being charitable": *Jackson* at 559. This case may simply speak to the narrow issue of whether law reform can itself be a charitable purpose (as distinct from an acceptable mode of attaining a charitable purpose). The comments made by Gray J. in support of a rule against political purposes were, for example, made with specific reference to institutions that engaged "solely" in political activity or whose "expressed purposes" were to change the law. Also, note that the purpose that was held to be non-charitable in this case was worded so as to enable the conclusion that law reform was itself the purpose in question.

description of the law provided by Lord Parker in *Bowman*. This fact alone, however, does not mean that the doctrine should never have emerged. It is therefore necessary to consider the other rationales for the doctrine of political purposes.

B. RATIONALE TWO — THE LAW IS PERFECT AS IT IS

When considering the charitability of purposes that involve seeking a change to law, courts have concluded that charitable status may be granted only if it may first be concluded that it is of public benefit for the law to change. The alleged difficulty that this creates is that drawing this conclusion would require courts to acknowledge the imperfection of the law.

Some courts have embraced the idea that the law would "stultify" itself if it were to allow for the mere possibility that it — the law — is not perfect.[62] This rationale was worded by Tyssen as follows:

> However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each Court on deciding the validity of a gift must decide on the principle that the law is right as it stands.[63]

This rationale is lacking. Judges often suggest amendments to the law. One charity law case explicitly observed as such.[64] Ironically, courts have explicitly commented upon the desirability of changes to charity law[65] and even to the doctrine of political purposes itself.[66]

Moreover, the law takes account of its fallibility in multiple ways, for example, dissents, overrulings, and rules of statutory interpretation designed to deal with mistakes in legislative enactments. The very presence of reasons for judgment has been observed as inviting the possibility that those reasons may be "right or wrong, sound or unsound, adequate or inadequate."[67]

It is descriptively inaccurate to assert that the law assumes its own perfection and theoretically unsound to assert that it must do so. In fact, it is arguable that disallowing the law to recognize that it may be of public benefit for the law to change is what could cause the law to stultify itself. Tyssen prefaced his description of this rationale with the following

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62 This rationale, for example, was adopted by Lord Simonds and Lord Wright in *National Anti-Vivisection Society*, *supra* note 36 at 62, 50, respectively, and by Slade J. in *McGovern*, *supra* note 2 at 333-37.

63 *Supra* note 51 at 177.

64 *Farewell*, *supra* note 46 at 582.

65 In *Vancouver Society*, *supra* note 8 at para. 203, Iacobucci J. held that "substantial change in the law of charity would be desirable and welcome at this time." See also *Vancouver Regional FreeNet Association v. M.N.R.*, [1996] 3 F.C. 880 (C.A.) at para. 2.

66 After applying the doctrine of political purposes in *Human Life*, *supra* note 4 at para. 19 [emphasis added], Strayer J.A. may have unwittingly demonstrated the superficiality of this rationale with the following observation:

> [T]he appellant argued orally (although the matter was not identified in its factum) that the provisions of the [Income Tax] Act referring to charitable organizations and to a limitation on political activities are void for vagueness. *I would heartily agree that this area of the law requires better definition by Parliament which is the body in the best position to determine what kinds of activity should be encouraged in contemporary Canada as charitable and thus tax exempt.*

67 Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 13.

concession: "However desirable the change may *really* be."[68] The rationale thus distinguishes between that which is desirable, and that which the law may explicitly recognize as being desirable. In so doing, the rationale forces courts to maintain the untenable legal fiction that all desirable changes to the law are undesirable.[69]

However, even if the validity of this rationale may simply be taken for granted, the rationale is limited in its relevance to purposes that necessitate seeking a change to the law. Where, for example, a particular purpose involves seeking a change to the administrative practice of the government, a purpose that is "political" under the *McGovern* classification, the stultification rationale offers no explanation as to why such a purpose fails to qualify as charitable. For these reasons, this rationale provides a poor foundation for the doctrine of political purposes.

C. RATIONALE THREE — JUDICIAL INCAPACITY

Recall that one of the requirements that must be met in order for a purpose to be considered charitable is that the purpose must be determined to be of "public benefit." The benefit component of this test requires judges to make normative value judgments regarding the merits, or lack thereof, of purposes for which charitable status is sought.[70] This requirement has posed a barrier to charitable status for political purposes in that courts have concluded that they are unable to find a benefit to the public in such purposes.

The rationale has been variously described by courts and commentators,[71] but the underlying point may be put simply: courts lack the capacity to determine whether or not political purposes are of public benefit. As such, courts are bound to refrain from explicitly ruling upon the public benefit of political purposes — with non-charitability being the necessary result of this.[72]

In what sense are courts said to lack the capacity to determine whether political purposes are of public benefit? A distinction may be drawn between what courts actually cannot do

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68 *Supra* note 51 at 177 [emphasis added].

69 This is what led one author to conclude: "[I]t would have been sounder for [Tyssen] to argue to exactly the opposite conclusion than he reached on the basis of his reasoning: suggesting that the law should not recognize the legitimacy of those who argue that it should be changed is likely to lead to its stultification" (Brooks, *supra* note 36 at 137).

70 In *Re Foveaux*, *supra* note 47, Chitty J. appears to have reasoned that the public benefit test is satisfied if the intention of the settlor of the trust is to benefit the public. On this view, a court may find public benefit in a particular purpose and yet remain neutral with respect to the relative merits of that purpose. This proposition was explicitly overruled by Lord Wright in *National Anti-Vivisection Society*, *supra* note 36 at 46-47.

71 See *Bowman*, *supra* note 29 at 442; *National Anti-Vivisection Society*, *supra* note 36 at 62; *McGovern*, *supra* note 2 at 334; *Human Life*, *supra* note 4 at paras. 12, 14; *Jackson*, *supra* note 2 at 565; OLRC, *supra* note 18 at 219-20; CRA, *Policy Statement*, *supra* note 14, s. 4.

72 Thus, even where the stultification rationale (discussed above) has been adopted, its adoption has tended to be viewed by judges as a way of reinforcing the concern over judicial capacity. See e.g. *McGovern*, *supra* note 2 at 337 [emphasis added], Slade J. embraced the stultification concept as follows:

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

versus what they can, but in order to preserve the institutional legitimacy of the judiciary, simply should not do.

Courts may, in some circumstances, lack outright the capacity to determine whether a political purpose is of public benefit. They will often lack an evidentiary basis upon which to make a finding with respect to the public benefit of a purpose. Empirical evidence will in some circumstances be unavailable and will in others, such as where a proposed change to the law raises deep moral concerns, be inconclusive. Consequently, if the incapacity being referred to is evidentiary in nature, then the rationale does indeed provide a limited justification for the doctrine of political purposes.[73]

It is clear from the jurisprudence, however, that the incapacity being referred to is not actual incapacity resulting from evidentiary challenges. In *McGovern*, it was held that courts should ignore evidence suggesting that a change in the law is desirable.[74] Also, in *National Anti-Vivisection Society*, the House of Lords concluded that the purpose in question — the abolition of vivisection — was non-charitable since the evidence actually enabled the court to conclude that there was no public benefit associated with this purpose.[75]

Instead, the type of incapacity contemplated by the judicial incapacity rationale pertains more to what courts can but simply should not do, with the concern being one of maintaining the institutional legitimacy of courts.[76] In a judgment that is representative of the relevant jurisprudence, Slade J. in *McGovern* held that courts are precluded from concluding that a change in the law is of public benefit since doing so would "usurp the functions of the legislature,"[77] result in the court "prejudicing its reputation for political impartiality,"[78] and "be a matter more for political than for legal judgment."[79]

There are two themes at play here. First, there is the normative claim that judges *must* remain neutral as to the public benefit of political purposes. Second, there is the empirical claim that judges actually *can* remain neutral as to the public benefit of political purposes simply by declining to make an express finding on the matter. Both of these claims are problematic as justifications for the doctrine of political purposes.

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73 I say "limited" because there remains the problem of accounting for purposes that are charitable at law even though the public benefit of such purposes is contested, e.g., religion. There is also the problem of political purposes that are non-charitable even though the public benefit of such purposes is supported by evidence.

74 See *McGovern*, *supra* note 2 at 336-37.

75 *Supra* note 36 at 46, 65-66.

76 The language used in the cases confuses the distinction somewhat, since it is often noted in the cases that courts "lack the means" to evaluate the public benefit of political purposes. See e.g. *Bowman*, *supra* note 29 at 442; *National Anti-Vivisection Society*, *supra* note 36 at 62.

77 *McGovern*, *supra* note 2 at 337.

78 *Ibid.*

79 *Ibid.* at 339.

1. ARE COURTS *REALLY* REQUIRED TO REMAIN NEUTRAL AS TO THE PUBLIC BENEFIT OF POLITICAL PURPOSES?

The jurisprudence presupposes too rigid a bifurcation between the institutional roles of the judiciary and the legislature. Legislatures make law. Courts apply law. Consequently, courts cannot comment upon the public benefit of political purposes without intruding into what is the exclusive domain of the legislature.[80]

The problem is that this reflects only part of the story. One issue that has to date been ignored by charity law courts is how the *Canadian Charter of Rights and Freedoms*[81] impacts the judicial incapacity rationale. In the era of the *Charter*, courts play a constitutionally validated role in the interpretation and enforcement of constitutional rights and freedoms, a role that seems to overtly involve courts in the normative evaluation of "law." While the respective functions of the legislature and the judiciary remain distinct, the boundary has to some extent been blurred, since *Charter*-based law reforms can now occur at the behest of the judiciary.

Having regard to the role of the judiciary under the *Charter*, the claim that courts lack the capacity to determine whether a change in the law is of public benefit warrants some critical reflection.[82] Whatever else may be said about *Charter* jurisprudence, there is no denying that courts have the capacity to rule upon the public benefit of *Charter*-based law reform activities. The judicial incapacity rationale therefore tells us nothing about why courts are constitutionally precluded from evaluating the public benefit of such activities. Given the breadth of claims that could be advanced under the *Charter*, this is an exception that may be capable of swallowing the rule.

The matter has not been the subject of judicial comment, since no charity appears to have yet argued the point. Consider the following holding of Strayer J.A. in *Human Life* in relation to the charitability of promoting the pro-life point of view: "Courts should not be called upon to make such decisions as it involves granting or denying legitimacy to what are essentially

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80 See Abraham Drassinower, "The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis" in Jim Phillips, Bruce Chapman & David Stevens, eds., *Between State and Market: Essays on Charities Law and Policy in Canada* (Kingston: McGill-Queen's University Press, 2001) 288 at 298 [emphasis in original]:

> The doctrine [of political purposes] addresses not the court's ability but the court's willingness to make determinations of public benefit in respect of political purposes. It addresses not evidentiary but normative concerns pertinent to the proper bounds not of the court's competence but of its jurisdiction. The point is that the court *as court* — or as matter of principle, or on penalty of usurping the function of the legislature — ought not to make determinations of public benefit in respect of political purposes.

81 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

82 Webb has expressed a similar idea, *supra* note 36 at 134. See also E. Blake Bromley, "Contemporary Philanthropy — Is the Legal Concept of 'Charity' Any Longer Adequate?" in Donovan W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Scarborough: Thomson Canada, 1993) 59 at 82.

political views."[83] Would the same reasoning have been tenable had the charity defended its activities by arguing in favour of a constitutionally protected right to life?

Similarly, what if the charity in *Abolition of Torture* had framed its efforts to abolish human torture in the language of *Charter* rights?[84] The outcome may not have changed, but the court would have been hard pressed to deny its capacity to entertain the issue of public benefit if the charity's purposes had been framed in this light.

That said, there will always be law reform efforts that cannot be framed as matters of constitutional rights with any measure of credulity. What, if anything, does the law- and policy-making function of courts under the *Charter* tell us about the capacity of the judiciary to rule on the public benefit of these advocacy activities?

The issue here is to identify the precise difference between rights-based and non-rights based analyses of controversial matters of law and policy. Are the two sufficiently similar such that a court's constitutionally-granted capacity to engage in the former necessarily carries with it the latter? Or is the interpretation of rights a sufficiently discrete task such that the institutional capacity to carry out this task bodes nothing for the capacity of the court to engage more generally in public benefit analysis?

These are not issues that I can resolve here. Nor, however, is it necessary to do so, since the judicial incapacity rationale is subject to another criticism that renders the point unnecessary to resolve here: even putting aside the altered constitutional landscape under the *Charter*, the judicial incapacity rationale considerably overstates the extent to which ruling on the public benefit of political purposes could credibly be said to constitute an institutional intrusion into the legislature's domain.

The cases assume that finding public benefit in a law reform activity is tantamount to actually giving effect to the law reform. This mischaracterizes what public benefit analysis actually requires of courts. Courts are merely required to rule on whether there is a public benefit in a given purpose. If that purpose involves seeking a change to law, the charity is left to itself go out and effect the reform. The court has not in any way ensured the success of the law reform effort or instructed the legislature as to how to proceed. There has arguably been little to no intrusion into the law-making realm.

Moreover, a court need not even find that the *particular* law reform being sought is of public benefit. Charitable status could be granted on the basis of the more general conclusion, that it is of public benefit, for there to be public debate over matters that fall within the legally recognized categories of charity. There is precedent in the law of charity for this more generalized approach to assessing public benefit. For example, in the context of religion,

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[83] *Supra* note 4 at para. 12. For a similar holding, see also *Alliance for Life*, *supra* note 4. Interestingly, it was held in *Everywoman*, *supra* note 3, that the operation of an abortion clinic was charitable. Justice Décary distinguished the actual provision of abortion services from the promotion of a view on abortion. While there may be a meaningful distinction here, the distinction ultimately breaks down and is irrelevant to what must be decided in both instances in order to determine eligibility for charitable status, namely, whether abortion is of public benefit.

[84] *Supra* note 2.

courts rarely assess whether there is public benefit in the individual doctrines of a particular religion. Instead, the primary issue that arises in most cases dealing with the advancement of religion is whether the purpose in question is properly construed as "religious" with the public benefit of religion generally being taken for granted.[85] Evaluating political purposes with this kind of generalized approach to public benefit analysis could address the concerns underlying the judicial incapacity rationale. Just as courts avoid the controversy associated with ruling on the public benefit of individual religious doctrines by finding public benefit more generally in "religion," they could avoid the difficulty associated with ruling on the public benefit of particular law reform efforts or advocacy activities by finding public benefit more generally in such activities.

For these reasons, the normative claim that courts *must* remain neutral as to the public benefit of political purposes is problematic.

2. DOES THE DOCTRINE OF POLITICAL PURPOSES ACTUALLY ENSURE JUDICIAL NEUTRALITY?

The claim that judges may preserve their neutrality as to the public benefit of political purposes if they make no express finding on the matter can be misleading.[86] This becomes all the more apparent when regard is given to one of the aforementioned justifications offered by courts for why political purposes may not be found to be of public benefit, namely, the idea that the law will be stultified unless judges proceed from the standpoint that the law is right as it stands. Proceeding from this standpoint actually precludes neutrality, since it necessitates the conclusion that any purpose calling for a change to the law actually lacks public benefit.

A more subtle problem is that judges have erroneously assumed that they can escape making normative value judgments simply by failing to explicitly rule on the public benefit of a given purpose. Remaining silent as to the public benefit of a purpose can actually speak volumes, since whatever neutrality judges are able to maintain through such silence is only superficial in nature.

Consider what the refusal by a judge to rule on the public benefit of a given purpose implicitly communicates. This refusal conveys that judges view Parliament as the only institution through which to resolve certain matters of public debate, for example, the desirability of law reform, and so on. It also communicates that judges view the purpose in

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[85] In *Gilmour v. Coats*, [1949] A.C. 426 (H.L.), Lord Reid at 459 held that:

> [The law] assumes that it is good for man to have and to practise a religion.... The law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.

See also Dunn, "Charity Law," *supra* note 7 at 74.

[86] The following paper helped to inform my thoughts in this part of the article: Drassinower, *supra* note 80.

question as one in respect of which there exists in our system of law a legitimate scope for debate as to its public benefit (or lack thereof).

The problem is that the implicit acknowledgment of the scope for debate can on a deeper level run contrary to the claims of judicial neutrality. There exists scope for debate only in relation to those matters over which the law could swing either way without thereby failing to live up to the minimal standards to which a just system of "law" must aspire. Therefore, while it is true that a refusal to weigh in on the public benefit of a given purpose allows courts to remain neutral as to whether that purpose is or is not of public benefit, this refusal reflects a judicial conclusion that the law could countenance either approach and that it is simply not the job of courts to pick which of the various fully defensible views should carry the day. Having left open the possibility that either view could legitimately prevail, the court has only remained neutral as to which view of the matter should actually prevail.

Contrary to what courts have claimed, this is not a value-neutral conclusion. By failing to explicitly weigh in on the issue of public benefit, the court has actually ruled out two possibilities: (1) that the purpose stands in such apparent conformity to some foundational principle of law that it absolutely must be of public benefit; and (2) that the purpose stands in such marked contrast to some foundational principle of law that it absolutely cannot be of public benefit.[87] There are implicit value judgments being made here about the minimal standards of "just law" and whether the purpose in question is essential to or opposed to those minimal standards.[88]

This value judgment will often be so subtle as to practically escape perception. Consider an applicant seeking charitable status for the purpose of pressing for legislative reform consistent with a particular vision of how best to secure pedestrian safety at marked crosswalks.[89] This purpose is likely to draw out competing points of view as to its public benefit by well-intentioned people equally committed to a defensible conception of "law." A refusal to comment upon the public benefit of such a purpose could amount to little more than an innocuous acknowledgment by the court that the law could quite defensibly adopt any one of a number of approaches to this issue.

In other instances, the value judgment implicit in a court's refusal to rule on the public benefit of a purpose will be more stark. Assume a hypothetical litigant seeking charitable

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87 The counter-argument is that judges are simply honouring the principle of parliamentary deference and that such deference does not reflect any judicial conclusion whatsoever as to the public benefit (or lack thereof) of the purpose in question. This, I concede, is a possible characterization of what is going on. However, I confess to some difficulty in accepting this as the most likely characterization, since it presupposes that courts are either (1) blindly deferring to Parliament without any regard whatsoever for minimal normative standards in law (standards that the same judges play a role in defining and enforcing under the *Charter*), or (2) deferring to Parliament notwithstanding their awareness that there is only one outcome that the law may countenance (which means that there is actually no decision to defer to Parliament).

88 Drassinower, *supra* note 80 at 305: "[W]hile the political purposes doctrine seeks to present itself as a principled refusal to enter into the political arena, this refusal is itself reflective of a particular political viewpoint."

89 I use this example, since it was used by the CRA (oblivious to the point that I am attempting to make here) in its discussion of distinguishing charitable from political activities in, CRA, *Policy Statement*, *supra* note 14, s. 14.

status for the purpose of pushing for changes to the law that would mandate racial segregation. A court will obviously (and quite appropriately) deny charitable status to this purpose. But what if the expressed reason for withholding charitable status is that the court is unable to determine one way or the other whether legislated racial segregation is of public benefit? Far from being value-neutral, the judge's refusal to commit to any explicit position as to the public benefit of such a purpose would itself be an implicit denial of the inviolability of the core values that are foundational to a system properly characterized as one of "law." The judge's silence as to public benefit here would implicitly proclaim his or her parsimonious view of "law" and its essential standards.

The example of a trust established for the purpose of racial segregation is admittedly extreme. There are, however, real-world examples that bear out the same point. In *Abolition of Torture*,[90] Décary J. upheld the decision of regulators to strip charitable status from an organization that was being operated for the purpose of abolishing human torture. The court's reasons included a reference to the familiar claim that judges must not "compromise their impartiality."[91] Also, having adopted the view that *every* effort to influence *any* member of the government in relation to *any* issue is by definition political, Décary J. rejected the submission that the abolition of torture "transcends the arena of political debate."[92] The implication of this is that no purpose — no matter how inextricably linked with the minimal standards of just law — may be impressed upon Parliament without entering the realm of "politics." On this view, campaigning against human torture is no less political (and thus no more charitable) than lobbying the government for a personal exemption from income tax.

The approach has thus been for charity law courts — in the name of maintaining judicial neutrality — to adopt, as an absolute imperative, the notion that courts may not comment upon the public benefit of any effort to alter any law or any governmental practice. For the reasons mentioned above, this approach will often be incapable of attaining its stated objective of neutrality. A failure of courts to fully appreciate this has at times resulted in them having stubbornly clung to a policy of "no comment" on the issue of public benefit, even where doing so has communicated an overly broad conceptualization of matters over which there exists a scope for legitimate debate and an unduly minimalist vision of the non-negotiable standards of "law."

D. RATIONALE FOUR — CHARITY AND POLITICS ARE "JUST DIFFERENT"

The foundational claim of the doctrine of political purposes is that "charity" and "politics" are separate categories — that they are "just different." This claim bears some scrutiny in light of how the law conceptualizes "charity" and "politics." If the *Pemsel* categories are accepted as the normative benchmark for what should and should not be charitable, some difficult questions arise when one tries to understand why certain purposes have been characterized as political. How does the advancement of religion, which is charitable, differ from the promotion of a point of view on a controversial social issue, which is said to be political? How does the advancement of education, which is charitable, differ from

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[90] *Supra* note 2.
[91] *Ibid.* at para. 39.
[92] *Ibid.* at para. 18.

promoting an attitude of mind, which is said to be political? Why is pressing for law reform said to be a political purpose rather than an acceptable means of attaining a charitable purpose?

Satisfactory answers to such questions are in short supply in the jurisprudence. In what follows, I critically reflect upon select aspects of the manner in which the doctrine of political purposes operationalizes the claim that charity and politics are "just different." The specific authorities considered are those that deal with the distinction between activities and purposes in charity law, those that have equated the controversial with the political, and those that have held that promoting a point of view is a political purpose. The intention is to illustrate that, even if some restriction on political purposes is warranted, the specific contours of the boundary drawn between charity and politics reflect an incoherent understanding of charity.

1. CHARITABLE ACTIVITIES VERSUS CHARITABLE PURPOSES

In an article entitled "The Myth of Charitable Activities," Maurice Cullity (now Justice Cullity of the Ontario Superior Court of Justice) argues that no activity may in the abstract be characterized as charitable or non-charitable.[93] According to Cullity, it is necessary to consider the specific purpose in furtherance of which the activity is being carried out in order to determine the proper characterization of the activity. If that purpose is charitable, then the activity will be a charitable activity. In contrast, if that purpose is non-charitable, then the activity will also be non-charitable.[94] Cullity's observation has been endorsed by the Supreme Court of Canada.[95]

Many of the cases dealing with political purposes lose sight of the distinction between means and ends. The fact that purposes necessitating a change to law have been defined as political purposes demonstrates the point.[96] If an activity cannot be characterized as charitable without regard to the ultimate end being sought, then how can seeking law reform be characterized as non-charitable without regard to the end that is sought to be achieved through the proposed law reform?[97]

Law reform will practically never be an end in itself. The question to be posed of law reform efforts undertaken by charities is whether the end sought is charitable. It is only where the end sought is non-charitable or where there is no rational connection between the specific law reforms being advocated and the alleged charitable purpose being sought that it may be said that seeking a change to law is necessarily non-charitable. In order for the doctrine of political purposes to insist that all purposes necessitating a change to the law are non-

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93 Maurice C. Cullity, "The Myth of Charitable Activities" (1990) 10 E. & T.J. 7. See also Dunn, "Charity Law," *supra* note 7 at 65-66, 73.

94 Cullity, *ibid.* at 10-11. See also *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] 1 Ch. 73 (C.A.) at 86 where Russell L.J. discusses that publishing the Bible may either be a charitable or profit-making activity depending upon the purpose being pursued.

95 See *Vancouver Society*, *supra* note 8 at paras. 53-54, 152.

96 See e.g. *Bowman*, *supra* note 29; *National Anti-Vivisection Society*, *supra* note 36; *McGovern*, *supra* note 2; CRA, *Policy Statement*, *supra* note 14, ss. 4-5; *Co-operative College of Canada v. Saskatchewan (Human Rights Commission)*, [1976] 64 D.L.R. (3d) 531 (Sask. C.A.); *Re Patriotic Acre Fund*, [1951] 2 D.L.R. 624 (Sask. C.A.).

97 See Cullity, *supra* note 93 at 25.

charitable, some explanation is necessary for why charitable ends cannot as a matter of fact be achieved through the medium of law. It is unlikely that such an explanation is possible.

Consider the second "head" of charity, the advancement of religion. The proposition that law is an appropriate medium to advance religion is highly controversial. Reasonable people disagree on the extent to which religious beliefs should be reflected in law. However, an outright denial that law is at least a *possible* means of advancing religion is problematic. The very idea that religion and law do not mix presupposes that religion remains religion and does not mutate into politics when it is advanced through law.

Some of the cases recognize that law reform is unlikely to be sought as an independent end. In *National Anti-Vivisection Society*, Lord Simonds held that: "In a sense no doubt, since legislation is not an end in itself, every law may be regarded as ancillary to the object which its provisions are intended to achieve."[98] But Lord Simonds was not willing to commit to the implications of this observation. The institution under consideration in *National Anti-Vivisection Society* was held to be non-charitable on the ground that its "main *purpose*" was to secure a change in legislation. But if legislation is not an end in itself, how could seeking a change to legislation ever be considered to be the main purpose of an institution? If we accept the observation of Lord Simonds that "every law may be regarded as ancillary to the object which its provisions are intended to achieve,"[99] then the *only* question that the court needed to consider was whether the purpose sought to be achieved through law reform was charitable. If the answer to this question is yes, then the institution could have been found to be charitable even if seeking a change to the law was its *sole* activity.

Courts have imported the doctrine of "incidental and ancillary purposes" to the context of political purposes without fully considering the implications of having done so. The "incidental and ancillary doctrine" was described by Lord Denning in *British Launderers'* as follows:

> It is not sufficient that the society should be instituted "mainly" or "primar[il]y" or "chiefly" for the purposes of science, literature or the fine arts. It must be instituted "exclusively" for those purposes. The only qualification — which, indeed, is not really a qualification at all — is that other purposes which are merely incidental to the purposes of science and literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of [charitable status]. Once however, the other purposes ... *cease to be a means to an end*, but *become an end in themselves*; that is, become additional purposes of the society; then ... the society cannot claim [charitable status].[100]

Applied to political activity, this doctrine has been interpreted to mean that a certain amount of political activity is okay, but at some indeterminate point, political activity becomes an impermissible political purpose.[101] The reference point employed for determining

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98 *Supra* note 36 at 61. Also, in *McGovern*, *supra* note 2 at 340, Slade J. explicitly held that "the mere fact that trustees may be at liberty to employ political *means* in furthering the non-political purposes of a trust does not necessarily render it non-charitable."

99 *Ibid.*

100 *Supra* note 8 at 467-68 [emphasis added].

101 See e.g. *Re Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2d) 236 (H. Ct. J.) at 253. *ITA*, *supra* note 7, ss. 149.1(6.1)-(6.2) also reflect this approach.

how to characterize an activity as charitable or political is the extent to which it is engaged in, rather than the purpose for which it is carried out. This completely ignores the claim set out above that activities cannot be characterized without regard to the end sought. Where the end sought is charitable, it should make no difference whatsoever to the characterization of an activity, whether it is engaged in occasionally, or as the sole activity of a charity.[102]

2. EQUATING THE CONTROVERSIAL WITH THE POLITICAL

There is a tendency in the cases to equate the controversial with the political. In *National Anti-Vivisection Society*, for example, Lord Wright explicitly referred to the controversial nature of the institution's purposes in finding them to be political.[103] Also, in *Southwood*,[104] charitable status was denied to a trust known as the Project on Demilitarisation (Prodem). The stated purpose of Prodem was "[t]he advancement of the education of the public in the subject of militarism and disarmament."[105] The Court held that Prodem's real purpose was to "educate the public to an acceptance that peace is best secured by 'demilitarisation.'"[106]

The apparent problem was that the issue of how *best* to achieve peace is a matter of considerable controversy. The court concluded that charitable status must be withheld from the promotion of any single view on the matter.[107] Charitable status likely would have been granted if the educational materials were directed at educating the public towards acceptance of the uncontroversial view that peace is preferable to war.[108]

The Canadian cases are inconsistent on whether controversy is a relevant consideration. The Federal Court of Appeal held that this is *not* a relevant consideration in *Everywoman*.[109] This case considered whether a clinic that provided abortion services qualified for charitable status. The controversial nature of abortion was one argument advanced against granting charitable status.[110] Rejecting this argument, Décary J. held that the controversy surrounding abortion was irrelevant.[111]

More recently, the Federal Court of Appeal in *Human Life*[112] suggested that controversy is a relevant factor. In this decision, charitable registration was stripped from an institution for promoting the pro-life point of view. The revenue authorities argued that "activities which are designed essentially to sway public opinion on a *controversial* social issue are not charitable."[113] Accepting this argument, Strayer J.A. concluded that the purposes of the institution were political rather than charitable.

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102 See Cullity, *supra* note 93 at 26, who makes this point.
103 See *National Anti-Vivisection Society*, *supra* note 36 at 52.
104 *Supra* note 5.
105 *Ibid.* at para. 3.
106 *Ibid.* at para. 29.
107 See the judgment of Chadwick L.J., *ibid.*
108 *Ibid.*
109 *Supra* note 3.
110 See *ibid.* at 67.
111 See *ibid.* at 68-69.
112 *Supra* note 4.
113 *Ibid.* at para. 5 [emphasis added].

The assertion that charity and controversy are incompatible with one another is unsustainable. The correlation between charity and controversy has been described as follows:

> There is a tendency to regard charity as intrinsically free of controversy because it includes only activities that are "good" or "beneficial to the public." This notion ... represents a fundamental misunderstanding of the institution which not only perverts its historical development, but also destroys its essential values. The most traditional of charitable purposes ordinarily require the acquisition, development, and dissemination of information and ideas, and they are not rendered the less charitable because such information or ideas are disputable and disputed.[114]

The definition of charity demonstrates the point. Courts have somehow managed to sustain the contradictory assertions that charity and controversy are incompatible but that promoting religious beliefs is charitable. This irony has not gone unnoticed in the relevant jurisprudence. One judge candidly remarked that: "I can imagine the severest contest between two sets of witnesses in the case of a gift for a religious purpose, the one saying that it is the most beneficial and the other that it is very harmful."[115]

In recognition of the difficulties inherent in drawing too rigid a boundary between controversy and charity, Stone J.A. suggested in *Alliance for Life* that advancing controversial positions is permissible for charities, provided that the controversy remains ancillary and incidental to charitable activities.[116] This observation is a mixed blessing for the law of charity. A greater latitude for "controversy" is a coherent way to proceed. However, insisting that controversial undertakings remain "ancillary and incidental" to "charitable activities" misses the point.

It may be that the court was simply stressing that controversy cannot be an end in itself. But Stone J.A.'s comments appear to go further. Requiring that controversy remain "ancillary and incidental" to charitable activities minimizes the extent to which controversy will often be at the heart of charitable purposes rather than a mere collateral consequence. In this way, the holding in *Alliance for Life* perpetuates the false dichotomy between "charity" and "controversy" that recurs in the jurisprudence.

3. PROMOTING A POINT OF VIEW

Canadian courts have held that promoting a point of view is a political purpose.[117] The purposes that have been found offside this rule include promoting an attitude of mind,[118] the

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114 Albert M. Sacks, "The Role of Philanthropy: An Institutional View" (1960) 46 Va. L. Rev. 516 at 529. See also Betsy A. Harvie, "Regulation of Advocacy in the Voluntary Sector: Current Challenges and Some Responses" (Voluntary Sector Secretariat, 2002), online: Voluntary Sector Initiative <http://www.vsi-isbc.org/eng/policy/pdf/regulation_of_advocacy.pdf> at 18. Both take issue with the claim that charity and controversy are inconsistent with one another.

115 *National Anti-Vivisection Society*, *supra* note 36 at 59, Porter L.J.

116 *Supra* note 4 at para. 52.

117 See *Aboliton of Torture*, *supra* note 2 at para. 38.

118 In *Toronto Volgograd Committee v. M.N.R.*, [1988] 3 F.C. 251 (C.A.), an institution whose purpose entailed promoting understanding between residents of Toronto and Volgograd was held to be political on the ground that it promoted an attitude of mind. In *Buxton*, *supra* note 6, an institution whose purpose

appeasement of racial tension,[119] promoting the pro-life point of view,[120] promoting the point of view that pornography is a social ill,[121] and promoting "political" doctrines.[122]

There are a number of difficulties with the jurisprudence on this point. These difficulties call into question the proposition that promoting a point of view is not charitable, or at the very least, call into question the manner in which this proposition has been put into practice. This argument is set out below through specific reference to the advancement of religion and the advancement of education.

a. Advancement of Religion

What, if anything, is to be made of the fact that it is political to promote a point of view but charitable to advance religion? I am not suggesting that a parallel exists between tendentious propaganda and the promotion of a religious world view. Having said that, the authorities suggest that a degree of overlap exists between advancing religion and promoting a point of view. What is lacking is an explanation of what the distinction is and why we draw it.

In *Human Life*, Strayer J.A. justified the conclusion that promoting a view on abortion was non-charitable as follows:

> [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*?[123]

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entailed the "improvement of international relations and intercourse" (at 237) and encouraging "personal intercourse between the inhabitants of different countries" (at 237), was also held to be political, since it promoted a "climate of opinion" (at 242).

119 In *Re Strakosch*, [1949] 1 Ch. 529 at 538, Lord Greene M.R. held: "[t]he problem of appeasing racial feeling within the community is a political problem, perhaps primarily political." However, in September 2003, the Charities Directorate of CRA released Policy Statement CPS-021, which allows for charities to be organized for the purpose of promoting racial equality: Canada Revenue Agency, *Policy Statement*, CPS-021 (2 September 2003), online: CRA <http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-021-e.html>.

120 *Human Life*, *supra* note 4; *Alliance for Life*, *supra* note 4.

121 *Positive Action Against Pornography*, *supra* note 27.

122 In *Re Loney* (1953), 61 Man. R. 214 (Q.B.), a trust whose purpose entailed "promoting and propagating the doctrines and teachings of socialism" was held to be non-charitable (at 214). In *Re Hopkinson*, [1949] 1 All E.R. 346, a trust whose purpose entailed further the ends of socialism was also held to be non-charitable. In *Bonar Law Memorial Trust v. Commissioners of Inland Revenue* (1933), 49 T.L.R. 220, a trust promoting conservative education was held to be non-charitable. In *Re Bushnell*, [1975] 1 W.L.R. 1596 (Ch.D.), a trust to propagate the teaching of "socialised medicine" was held to be non-charitable. For a general discussion of these cases and others on point, see Jean Warburton & Debra Morris, *Tudor on Charities*, 8th ed. (London: Sweet & Maxwell, 1995) at 51-54; Brooks, *supra* note 36 at 149; Oosterhoff, *supra* note 8 at 348. In *Re Knight* (1937), O.R. 462 (H. Ct. J.), it was held that promoting the teachings of Henry George set out in his book *Progress and Poverty* was non-charitable.

123 *Human Life*, *supra* note 4 at para. 12 [emphasis added].

This reasoning breaks down when the advancement of religion is considered.[124] If determining "what are the proper forms of conduct, though not mandated by present law, to be urged on other members of the community"[125] is properly a political purpose, then how is it that the advancement of religion is charitable? Is it not the very purpose of most, if not all, religious charities to advance views on precisely that issue?

According to the authorities, the advancement of religion extends to the promotion of a theological world view. An American decision upheld the charitability of creating a public sentiment against slavery based in part upon its conclusion that this is consistent with the advancement of religion.[126] Other authorities have given a similarly liberal construction to the advancement of religion.[127]

Not everything that is justified in the name of religion can legitimately be said to advance religion.[128] At some point, the claim that religion is being advanced through the promotion of a point of view becomes too tenuous to sustain. However, Canadian courts have not squarely considered where this point lies. This issue is unsettled, as no charity that has been alleged to be guilty of impermissibly promoting a point of view appears to have seriously argued that they were in fact advancing religion.[129] The CRA *Policy Statement*, CPS-022, on political activities does not address this issue either.[130] There remains an unresolved tension

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124 Note that the advancement of religion was not argued before the court in *Human Life*.

125 *Human Life*, *supra* note 4 at para. 12.

126 See *Jackson*, *supra* note 2 at 566-67.

127 In *United Grand Lodge of Ancient Free & Accepted Masons of England v. Holborn Borough Council*, [1957] 1 W.L.R. 1080 at 1090, Donovan J. held:

> To advance religion means to promote it, to spread its message ever wide among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.

In *Keren Kayemeth Le Jisroel Ltd. v. Commissioners of Inland Revenue*, [1931] 2 K.B. 465 (C.A.) at 477 [*Keren Kayemeth*], Lord Hanworth held:

> The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it – not merely a foundation or cause to which it can be related.

According to Warburton & Morris, *supra* note 122 at 69, the vast range of purposes that have been found to fall under the advancement of religion include trusts for "spreading Christianity among infidels" [footnotes omitted].

128 One could argue that Lord Hanworth's comment in *Keren Kayemeth*, *ibid.*, that religion must be promoted in a wide sense rather than in relation to any single "cause" to which religion relates, is suggestive of a restrictive approach to the advocacy that religious charities may engage in. The comment admittedly seems to preclude single-issue religious charities, such as a religious charity organized solely for the purpose of advocating a religious point of view on the doctrines of socialism. Nevertheless, Lord Hanworth's holding that spiritual teaching "in a wide sense" must be promoted supports my argument. Rather than limit advocacy activity for religious charities, this arguably gives a broad scope for such activity, since it seems to insist that whatever advocacy is undertaken must pertain to a wide range of issues that relate to religion rather than in relation to any such single issue.

129 In *Alliance for Life*, *supra* note 4, it appears as though the charity attempted to justify its pro-life advocacy as being consistent with the advancement of religion. The CRA is reported to have taken the position that "simply because an activity is undertaken in conformity with a religious conviction does not mean that the activity is a religious activity" (at para. 11). It is unclear, however, if the issue was argued before the Court, since the judgment of Stone J.A. does not espouse a view on the matter one way or the other.

130 CRA, *Policy Statement*, *supra* note 14.

between the cases holding that promoting a point of view is political and the well-established rule that the advancement of religion is charitable.

b. Advancement of Education

The idea that promoting a point of view is political also creates difficulties under the second head of charity, the advancement of education. This head of charity was considered by the Supreme Court of Canada in *Vancouver Society*.[131] Elaborating on the boundaries of education in the charitable sense, Iacobucci J. held that:

> [Education must be] truly geared at the training of the mind and *not just the promotion of a particular point of view*.[132]
>
> ...
>
> [S]o long as information or training is provided in a structured manner and for a genuinely educational purpose — that is, to advance the knowledge or abilities of the recipients — and *not solely to promote a particular point of view or political orientation*, it may properly be viewed as falling within the advancement of education.[133]
>
> ...
>
> Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough. *Neither is "educating" people about a particular point of view in a manner that might more aptly be described as persuasion or indoctrination*.[134]

These restrictions reflect the intention of the Supreme Court to uphold earlier decisions in which it was held that in the absence of objectivity, activities undertaken in the name of education are best characterized as political.[135]

The definition of education articulated in *Vancouver Society* was applied by the Federal Court of Appeal in *Alliance for Life*. In this decision, Stone J.A. held that the activities under review were not educational in the charitable sense. The primary reason was that the activities lacked objectivity.[136]

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131 *Supra* note 8.

132 *Ibid.* at para. 168 [emphasis added].

133 *Ibid.* at para. 169 [emphasis added].

134 *Ibid.* at para. 171 [emphasis added].

135 These earlier decisions include *Positive Action Against Pornography*, *supra* note 27 at para. 9 [emphasis added], which held that the "presentation to the public of *selected* items of information and *opinion* on the subject of pornography" is not educational; *Human Life*, *supra* note 4 at para. 10 [emphasis added], which held that the "dissemination of a set of *opinions* on various social issues" through "tendentious or polemical" literature is not educational; *Re Bushnell*, *supra* note 122 at 1605, which held that education is not being advanced where there is no attempt to "educate the public so that they [can] choose for themselves, starting with neutral information, to support or oppose" any particular policy preference; *Re Koeppler Will Trusts*, [1986] 1 Ch. 423 at 437, which held that "genuine attempts in an objective manner to ascertain and disseminate the truth" are educational "even when they touch on political matters."

136 See *Alliance for Life*, *supra* note 4 at paras. 56-57.

Neutrality and objectivity are therefore required in order for an activity to be considered educational for purposes of charity law. Where neutrality and objectivity are absent, the institution will be considered to be promoting a point of view and to have a political purpose.[137]

There are a number of difficulties with this approach. The main problem is that many of the authorities insist on drawing an absolute distinction between education and persuasion. It may well be that education and persuasion are ultimately distinguishable ends. A disingenuous presentation of facts about a topic, while perhaps persuasive, could not be accurately described as educational. But charity law should not extrapolate from examples at the extremes, as a general rule under which the degree of overlap between education and persuasion is unduly minimized. The appropriate thing to do is to instead define the degree and kind of persuasion that is compatible with "education."

As indicated above, the approach generally preferred in charity law has been to emphasize the importance of impartiality and objectivity. This approach suggests that education must be value-neutral in order for it to be charitable. Apart from whether value-neutral education is desirable, it is questionable whether it is in the first place even possible. The Ontario Royal Commission on Learning, for example, concluded that "[t]here is no such thing as value-free education."[138]

Some cases have acknowledged the futility of drawing too rigid a boundary between persuasion and education. In *Challenge Team v. Canada (Revenue)*,[139] Sharlow J.A. held that "educating people *from a particular political or moral perspective* may be educational in the charitable sense."[140] The mere fact that an educational curriculum reflects certain value commitments should therefore not preclude charitable status. However, following *Vancouver Society*, Sharlow J.A. went on to stipulate that an activity will *not* be educational for purposes of charity law if it is only undertaken to "promote a particular point of view."[141]

The distinction drawn by the law is, therefore, between *promoting* a point of view and educating *from* a point of view. This subtle distinction is almost impossible to draw in practice. Justice of Appeal Strayer's candid observation in *Human Life* that "there is much subjectivity involved in characterizing particular activities as political"[142] bears relevance here.

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137 Mayo Moran notes, however, that established educational institutions, such as universities, are rarely, if ever, challenged for failures of "neutrality." See Mayo Moran, "Rethinking Public Benefit: The Definition of Charity in the Era of the Charter" in Phillips, Chapman & Stevens, eds., *supra* note 80, 251.

138 Report of the Royal Commission on Learning, *For the Love of Learning* (Queen's Printer for Ontario, 1994), online: Ontario Ministry of Education <http://www.edu.gov.on.ca/eng/general/abcs/rcom/full/royalcommission.pdf> at 81.

139 2000 D.T.C. 6242 (F.C.A.).

140 *Ibid.* at para. 1 [emphasis added].

141 *Ibid.*

142 *Supra* note 4 at para. 14.

The difficulties in the case law on this issue also find expression in the CRA's *Policy Statement* on political activities.[143] According to the *Policy Statement*, an educational activity will be charitable only if it is based on a "well-reasoned position" and does not rely upon an "appeal to emotions."[144] To meet the "well-reasoned" criterion, the activity must be based upon "factual information" and consider counter-arguments.[145]

There are several problems with this approach to distinguishing education from politics. The requirement for factual information is inconsistent with how education is framed in other authorities. In *Vancouver Society*, Iacobucci J. noted that the different kinds of knowledge that can be advanced in the charitable sense include "theoretical or practical, speculative or technical, scientific or moral."[146] A curriculum advancing theoretical, speculative, and moral knowledge, however educational it may be, will rarely, if ever, be able to satisfy the requirement for factual information. Does it make sense to therefore categorize such a curriculum as political?

Certain kinds of arguments — no matter how educational they may actually be — will fail to satisfy the requirement for "factual information" because they draw upon sources of knowledge other than facts and experience. The requirement for "factual information" is underinclusive with respect to what is characterized as educational, and overinclusive with respect to what is characterized as political.

As for the requirement to consider counter-arguments, it has been observed "to defy common sense," since it "denies the reality of how contentious issues are debated."[147] One commentator has raised the following rhetorical questions:

> [Would] a charity devoted to combatting cancer ... have to provide information on studies that disprove the deleterious effects of second-hand smoke? Does a group against impaired driving have to give the "other side" of impaired driving, whatever that might be? Would environmental groups have to present the arguments of industry in pollution debates?[148]

My view is that the insistence that a "well-reasoned" argument will consider relevant counter-arguments is valid. The difficulty here does not derive from the correlation between "well-reasoned" and the consideration of counter-arguments, but instead from the correlation drawn between "not well-reasoned" and political. On this approach, what differentiates the political from the educational is simply the strength of the argument being advanced. But this approach may itself not be well-reasoned. On the one hand, it concludes that an argument that is weak in the sense that it fails to address relevant counter-arguments is tantamount to promoting a point of view and on that basis is political and thus non-charitable. On the other

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143 CRA, *Policy Statement*, *supra* note 14.

144 *Ibid.*, s. 8.

145 *Ibid.*: defines factual information as "[i]nformation used or produced by a registered charity that is based on facts resulting from the charity's direct experience or research from a reputable source" (Appendix 1).

146 *Supra* note 8 at para. 170. See also OLRC, *supra* note 18 at 207.

147 Harvie, *supra* note 114 at 15-16.

148 Webb, *supra* note 36 at 42, citing Paul Tuns, "When is a charity considered to be dealing in 'propaganda'?" *The Globe and Mail* (1 February 1999) A9. See also *ibid.*

hand, it concludes that an argument that is strong in the sense that it refutes relevant counter-arguments, and is therefore better able to support its conclusions, is educational and thus charitable. Although promoting a point of view is said to be political, the argument that is better able to advance its underlying point of view is the one that qualifies as charitable.

As for the stipulation that a genuinely educational activity cannot be based upon an appeal to emotions, the apparent intention of the CRA is to distinguish "reason" from "rant." The underlying assumption appears to be that emotions thwart rather than facilitate reason. Be this as it may, it is ill-conceived to rigidly distinguish emotion from reason for the purpose of determining what is educational in the charitable sense.

One problem is that determining whether "an appeal to emotions" is present is an inherently subjective task. What may be viewed as emotionally charged by one person may be viewed as common sense to another. It is therefore difficult for charities and their advisors to determine what does and does not comply with the rules.[149]

The subjectivity of emotions highlights a more general problem, which is that emotions are in many respects culturally determined.[150] It is primarily those ideas that run contrary to accepted norms that are likely to elicit strong emotional responses. By restricting education to that which does not appeal to emotions, the *Policy Statement* therefore limits education to that which reinforces rather than challenges existing norms. The problem here is that it is arguably one of the very purposes (or at least one of the great benefits) of education to critically evaluate and challenge the status quo.

It may be argued in reply that the *Policy Statement* does not deny that education will frequently *incite* strong emotional responses, but instead merely stipulates that education in the charitable sense does not entail an *appeal* to emotions. However, the distinction between inciting and appealing to emotions is far too subtle to serve as a meaningful basis upon which to distinguish charity from politics.

IV. CONCLUSION

In *Gilmour v. Coats*, Lord Simonds candidly observed that the law of charity "has been built up not logically but empirically."[151] Although this observation was not made with specific reference to the cases dealing with the doctrine of political purposes, it provides an accurate description of the incoherence that is characteristic of these cases. How are we to account for this?

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[149] Harvie, *supra* note 114 at 16, has described this problem as follows:
> How should a charity that works with children living on the street characterize its policy recommendations for coping with child prostitution, for example? Does inserting realistic but disturbing images of these children to illustrate their circumstances cause the document to be political speech?

[150] See e.g. Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91 at 103-106.

[151] *Supra* note 85 at 449. This sentiment was echoed by Lord Normand in *Oppenheim v. Tobacco Securities Trust Co. Ltd.*, [1951] A.C. 297 (H.L.).

Masked reasoning may account for some of what is going on in the jurisprudence dealing with the doctrine of political purposes. The tax, trust, and property law privileges associated with charitable status[152] are a surprisingly muted consideration in the cases. The denial of these advantages to political purposes is framed in the jurisprudence as a mere consequence of the doctrine of political purposes and not as a justification for it. The focus of the cases is inward-looking. Political purposes are held to be non-charitable because they fail the test for charitable status established under charity law. The suggestion is that judges reason from within the law of charity to determine whether a given purpose is charitable or political.

One gets the impression from this approach that the legal construction of charity may be understood without regard to the various ways in which the law privileges charitable status. This impression is misleading. Charitable status has little to no intrinsic legal significance. It matters for purposes of law only because of the various legal privileges afforded to charities. When a court categorizes a purpose as political, that decision is in substance a decision to deny not charitable status per se, but the legal advantages of charitable status. The categorization of the purpose as political is simply a mechanism by which the benefits of charitable status are rationed. Signs that this point has not been lost in courts are beginning to emerge. Just recently in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*,[153] a charity law case that did not involve the doctrine of political purposes, the Supreme Court of Canada explicitly reasoned that charity should not be defined without specific consideration being given to the legal privilege that hangs in the balance.[154]

It is therefore likely that rather than reason from the inside out, as they generally claim to do, judges applying the doctrine of political purposes are reasoning from the outside in. Consciously or otherwise, judges may be concluding on the basis of, say, income tax, trust law, or property law concerns, that political purposes do not warrant one or more of the benefits of charitable status. This reasoning becomes masked when judges justify their decision to withhold charitable status by citing the various rationales discussed in this article.

When the cases are viewed in this light, certain aspects of the doctrine of political purposes begin to make greater sense. As noted in the introduction to this article, the characterization of electioneering as political serves an income tax purpose. That said, viewing the cases this way highlights additional problems with the doctrine of political purposes. If income tax, trust, and property law considerations are at the heart of the doctrine of political purposes, then it may not make sense for the law to adopt a single construction of charity. It is possible that a purpose that is justifiably considered political in the income tax context could unobjectionably be characterized as charitable for trust or property law purposes.[155] One problem with judges failing to correlate their characterization of a purpose

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152 See Part II above.

153 2007 SCC 42, [2007] 3 S.C.R. 217.

154 In particular, Rothstein J. held that it is "necessary to consider the scheme of the *ITA*" when considering whether any given purpose is charitable for income tax purposes (*ibid.* at para. 31).

155 One can think of many reasons why the law would want to be more restrictive in its approach to doling out the income tax privileges of charitable status than in its approach to the trust and property law privileges. For example, one of the trust law advantages of charitable status is that charitable trusts are exempt from the "beneficiary principle," which is a general trust law rule further to which a trust is required to be for the benefit of a person rather than for a purpose. The beneficiary principle has, however, become more relaxed over the years in many jurisdictions, e.g., non-charitable purpose trusts

as political with a specific income tax, trust, or property law rationale is that this unnecessarily results in a "one-size-fits-all" approach to constructing charity in law.

However, an insistence upon more transparent reasoning in charity law matters can only go so far. The conceptual problems plaguing the doctrine of political purposes are symptomatic of a more fundamental problem confronting the law of charity, namely, the absence of an overarching theory of "charity," that can help make sense of what the law should and should not consider charitable. One gets the impression when reading some of the cases on political purposes, that judges viscerally reject the charitability of such purposes, but struggle to cogently account for their intuition in this regard. Unable to point to an established theory of "charity," they do their best to articulate reasons for withholding charitable status. The difficulty is that, with all due respect, the articulated reasons are frequently unconvincing and/or inconsistent with cases in which charitable status has been granted.

What ultimately appears to be missing is a theory of charity to guide judicial decision-making. The superficial understanding of charity as the four disparate *Pemsel* categories is a poor substitute for such a theory and is bound to lead to some of the problems identified in this article. While this article deals only with the doctrine of political purposes, other aspects of charity law also suffer from the absence of such a theory. For example, the authorities dealing with permissible business activities of charities fall prey to some of the same criticisms that have been advanced in this article. The same could be said of the authorities pertaining to the meaning of "public benefit" in charity law. Until such a theory is articulated, the law of charity will continue to struggle to rationally distinguish charitable from non-charitable purposes.

are permitted to exist for 21 years under s. 16 of Ontario's *Perpetuities Act*, R.S.O. 1990, c. P.9. Consequently, it is becoming increasingly less important to restrict the meaning of charity for trust law purposes.