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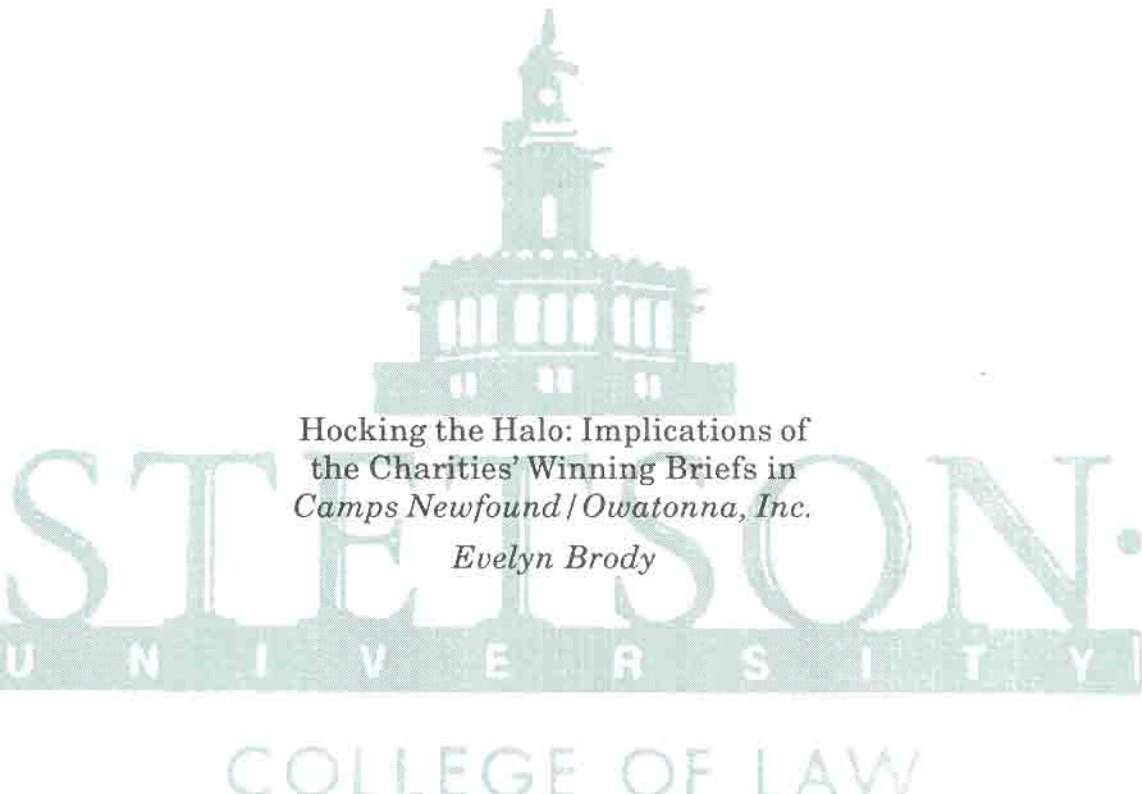

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HOCKING THE HALO: IMPLICATIONS OF THE CHARITIES' WINNING BRIEFS IN *CAMPS NEWFOUND/OWATONNA, INC.*

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Perhaps to those involved, and perhaps even to the public, the lesson of this story might not seem so important. Indeed, it might be a testament to the roles charities play in today's society that the moment passed without much notice. I believe, however, that the day charities appear in the Supreme Court declaring to be "big business" in all but purpose is a day worth reflection. For those who agree with Professor Howard Oleck that charities are "selfless, spiritual, and in the public service,"[1] such a position surrenders the core institutional values of the sector. I confess generally to being in the nonpurist camp,[2] but I never expected to be able to prove my case out of the charities' mouths.

The petitioner charity — with important assistance from friends-of-the-court charities — persuaded the Supreme Court to overturn a state law that grants property tax exemption only to those charities primarily serving state residents.[3] The charities' victory was a squeaker: the Court voted 5-4.[4] Given this statute's facial discrimination, why was the margin so close?[5] The

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1. Howard L. Oleck, *Mixtures of Profit and Nonprofit Corporation Purposes and Organizations*, 16 N. KY. L. REV. 225, 243–44 (1988). Professor Oleck made this statement in the context of deploring the decision of the American Bar Association to refer the revision of its model nonprofit corporation act to its Section on Corporation, Banking, and Business Law, "because that section is the wrong one for planning law for altruistic, voluntaristic, *pro bono* organizations — organizations whose purposes are supposed to be selfless, spiritual, and in the public service." *Id.*

2. *See* Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433 (1997) [hereinafter *Institutional Dissonance*]; Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996).

3. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1598–1608 (1997).

4. *See id.* at 1593.

5. *See, e.g.*, Jasper L. Cummings, Jr., *Fulton Corp.: A First-Person Perspective*, 11 STATE TAX NOTES 829, 837 (1996). Cummings comments that the illegality of state tax schemes such as Maine's "has long been known, though states seem to continue to ignore the law." *Id.*

petitioner's success depended on convincing a majority of Justices that Maine's crabbed statute violated the Commerce Clause of the United States Constitution.[6] The charities reasoned that coming within the Commerce Clause requires proving that charities engage in commerce (particularly interstate commerce).[7] In their focus on the financial impact of the discriminatory statute, however, the charities never offered a positive construct of property tax exemption that necessarily ignores the residency of the charity's beneficiaries.[8] The charities' omission left them vulnerable to an attractive articulation of property tax exemption, whose very definition limited exemption to charities serving state residents.

To someone familiar with the literature, the charities' *amici* brief was particularly startling for the sources it cited. The last two decades have wrought a revolution in scholarly analysis of the nonprofit sector.[9] With the passing years, academic studies have grown increasingly skeptical of the institutional claims of nonprofit organizations.[10] The *amici* brief's table of "Other Authorities" cited to much of this scholarship.[11] For the most part, the brief used these sources to support rather straightforward statements on the financial level of nonprofit activity. Thus, one wonders why, from a strategic perspective, the charities needed to bring so much dangerous information to the Court's attention. Indeed, as we will see, Justice Stevens' opinion for the Court extended the charities' argument and brought in data not raised by the charities (or the other parties).[12]

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6. The Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. If a state adopts a law discriminating against interstate commerce in an area in which Congress has not yet legislated, the Supreme Court can nevertheless strike the state law under its "dormant" or "negative" Commerce Clause jurisprudence. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479–81 (2d ed. 1988).

7. *See* Brief of the American Council on Education et al. as *Amici Curiae* in Support of Petitioners at 12, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

8. *See id.* at 22–23. The charities emphasized the potential financial damage from loss of exemption: "If allowed to stand, the decision below poses a substantial threat to the financial welfare of nonprofit institutions generally. States following Maine's lead could force educational institutions and other nonprofits to forgo otherwise available tax exemptions simply because they primarily benefit out-of-state residents." *Id.* at 8.

9. *See id.* at iv–vi.

10. The seminal article is Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

11. *See* Amicus Brief of the American Council on Education at iv–vi, *Camps Newfound/Owatonna, Inc.* (No. 94-1988).

12. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1603. Luckily for the charities, the Supreme Court did not delve into the most seditious of their authorities, the

Justice Stevens' data relates to the level of competition, not just between nonprofits, but also between nonprofits and for-profits, and could make it difficult for the charitable sector to justify distinct treatment and subsidies in the future.[13] The charities might have achieved a short-run tactical victory at the cost of their long-term strategic interests.

I. THE CASE

A. Background

On May 19, 1997, by a 5-4 vote, the United States Supreme Court struck down a Maine property tax exemption law that discriminates against interstate commerce.[14] The Supreme Court had, over the years, invalidated a variety of state tax laws that preferred in-state proprietary taxpayers to out-of-state competitors. The "commerce" involved in *Camps Newfound/Owatonna, Inc.*, however, raised a question of first impression: "[W]hether a different rule should apply to tax exemptions for charitable and benevolent institutions."[15] The Maine statute grants property tax exemption to charities operated "principally for the benefit of" state residents; a limited exemption is available for charities primarily serving nonresidents, but only if the beneficiaries pay at most an average of thirty dollars a week.[16] Challenge was brought by a summer camp attended by children of Christian Scientists; 95% of its campers came from outside Maine and tuition averaged about $400 a week.[17] Camps Newfound's tax bill came to some $20,000 a year.[18]

Clotfelter-edited study of "[w]ho benefits from the nonprofit sector?" *See infra* note 46. The essays in this study uniformly conclude that charities perform little redistribution to the poor, but rather serve mostly middle-class and elite constituencies.

13. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1603–04.

14. *See id.* at 1598–1608. Justice Stevens wrote the opinion for the Court, joined by Justices O'Connor, Kennedy, Souter, and Breyer. Justice Scalia filed a dissent on the merits, joined by Chief Justice Rehnquist and Justices Thomas and Ginsburg. Justice Thomas also wrote a separate dissent limited to an analysis of the proper role of the dormant Commerce Clause; Justice Scalia joined this dissent in its entirety, and Chief Justice Rehnquist joined in Part I. *See id.* at 1593.

15. *Id.* at 1602.

16. Other portions of the statute grant exemptions to specific nonprofits, such as colleges and universities and houses of religious worship, regardless of the residency of their beneficiaries. *See* Brief for Respondent at 1 n.1, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

17. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1594.

18. *See id.* "The 80-year-old camp is one of the town's biggest taxpayers. A revaluation in the late 1980s spurred the dispute with the town." Jason Wolfe, *Nonprofit*

The trial court agreed with the Camps that the statute violated the Commerce Clause.[19] The Town — but not the State of Maine — appealed.[20] The Maine Supreme Judicial Court (the "Law Court") reversed.[21] Relying on a state statute characterizing tax exemptions as "tax expenditures," the Law Court analyzed the exemption in the same manner as a state purchase of charitable services for residents.[22] The Law Court found that the exemption statute "treats all Maine charities alike" because "all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally," and the statute only incidentally affects interstate commerce.[23] The Law Court further found that Camps Newfound failed to provide evidence that its facility "*competes* with other summer camps outside of or within Maine."[24]

B. The Briefs of the Parties and the Friends-of-the-Court

1. Brief for the Petitioner

The Camps' brief on the merits characterized Maine's tax scheme as facially discriminating against interstate commerce.[25] The Camps agreed with the decision of Maine's high court that

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Groups Wary as High Court Weighs Town, Camp Tax Feud, PORTLAND PRESS HERALD, June 2, 1996, at A1.

19. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1595. The trial court found:

> Denial of a tax exemption is explicitly and primarily triggered by engaging in a certain level of interstate commerce. This denial makes operation of the institutions serving non-residents more expensive. This increased cost results from an impermissible distinction between in-state and out-of-state consumers . . . . Maine's charitable tax exemption is denied, not because there is a difference between the activities of charitable institutions serving residents and non-residents, but because of the residency of the people whom the institutions serve.

Camps Newfound/Owatonna, Inc. v. Town of Harrison, CV-92-658 (Me. Super. Ct. Mar. 2, 1994) (LEXIS, Fedtax Library, Stnmag File), *rev'd*, 655 A.2d 876 (Me. 1995), *rev'd*, 117 S. Ct. 1590 (1997).

20. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1595. Property tax exemption raises complex questions of intrastate policy. Exemption typically appears in a state constitution or statute, while the impact of lost revenue falls on the property-tax dependent municipality where the real estate is located.

21. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 655 A.2d 876, 877 (Me. 1995), *rev'd*, 117 S. Ct. 1590 (1997).

22. *See Camps Newfound/Owatonna, Inc.*, 655 A.2d at 878.

23. *Id.* at 879.

24. *Id.* (emphasis in original).

25. Brief for Petitioner at 10, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

"[t]he purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide."[26] However, the Camps argued that the issue is the "legitimacy, not of the tax exemption, but of the state's decision to make it unavailable to charities that serve too many non-residents."[27]

Among other arguments, the Camps contended that the discriminatory property-tax exemption scheme fails because the State had adequate alternatives available that do not violate the Constitution:

> Withholding exemptions from charities that serve too many non-residents was by no means the only way that the state could have secured its purported interest in directing public financial support to the benefit or residents alone . . . . The tax exemptions, for example, could be replaced with vouchers to residents for use at licensed camps, nursing homes, or other covered establishments. Or payments could be made directly to the institutions to defray residents' fees. There could be no constitutional objections to such measures, any more than to granting scholarships to residents. Interstate commerce would not be affected, since charities would not be penalized for serving non-residents. And these alternatives would be more than "adequate," since financial support would be limited to residents, whereas under [the Maine statute] benefits also flow to non-residents who are served by charities that are devoted primarily to residents.[28]

It might seem like a bizarre strategy to advocate repealing tax exemptions and replacing them with direct subsidies that would have left the petitioner equally poorly off. Perhaps the Camps believed that none of these "reasonable and adequate alternatives" have political appeal. After all, one would not expect to see the Maine Legislature voting to distribute "camping vouchers" to its residents. Nevertheless, as we will see, the opinion for the Supreme Court cited the availability of these alternatives in overturning the statute.

"One important function of the 'available alternatives' test," continued the Camps' brief, "is to put the state to its proof as to the

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26. *Camps Newfound/Owatonna, Inc.*, 655 A.2d at 879.
27. Brief for Petitioner at 33, *Camps Newfound/Owatonna, Inc.* (No. 94-1988).
28. *Id.* at 30–31.

asserted statutory purpose."[29] Here, the brief charged:

> There was *no* discussion during the legislative debate about the desirability of limiting tax support to the provision of charitable services to residents. Rather, there was a good deal of discussion about the desirability of raising money and of preventing fraud by ostensibly charitable organizations — as to which, of course, much more suitable alternatives were at hand — as well as indications of considerably less benign purposes — both animus toward non-residents and the one legislative purpose, economic protectionism, that has been repeatedly identified by this Court as a badge of Constitutional infirmity.[30]

Turning to the policy of the Commerce Clause, the Camps argued that the Constitution "speaks simply of interstate commerce, not for-profit commerce."[31] But the brief went further, asserting that nonprofits themselves function as businesses:

> To begin with, non-profit organizations in this country are collectively, and in many cases individually, "big business" in every sense except that they have purposes other than making a profit. We leave to *amici curiae* a self-description, but all know that in terms of every indicia — number of employees, wages and benefits, purchase of goods and services — non-profits are major players in the American economy.[32]

The Camps' brief went on to describe the commercialism of parts of the charitable sector:

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29. *Id.* at 35.

30. *Id.* at 36 (emphasis in original). In footnote 46, the brief provided relevant excerpts of the legislative history, for example: the desire to raise revenue "from 'institutions that are set up within the State of Maine by out-of-state people for out-of-state people'" and "the corresponding belief that the bill will not 'affect any business that is in the State run by anybody that is in this State.'" *Id.* at 36 n.46.

31. *Id.* at 39.

32. Brief for Petitioner at 39, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988). In a footnote, the brief quoted FRANCES R. HILL & BARBARA L. KIRSCHTEN, FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS ¶ 1.01, at 1-1 (1994): "In 1990, exempt organizations' total assets exceeded $1 trillion, their total gross receipts reached $807 billion, and their gross revenues totaled approximately $560 billion, or 10.5 percent of the gross national product. Exempt organizations employ approximately eight million people." Brief for Petitioner, *supra*, at 40 n.53.

> As to the particular activities here in question — the provision of services to campers, residents of nursing homes and boarding facilities, patients at mental health service facilities and the like — commercial relationships are central. The patrons, who are the persons likely to be ultimately affected by the tax, enter into contracts with the service providers, and *from the patrons' viewpoint it makes no difference whether those providers are non-profit or for-profit.*[33]

Accordingly, the brief argued: "It is the ultimate 'non-profit' consumer who is likely to pay for the discriminatory tax through higher prices."[34] Contending that this goes to the heart of the Commerce Clause's purpose to halt the states' mutual jealousies, economic aggressions, and retaliations, the brief concluded:

> [W]hat Maine says to other states through this statute is not just that charity begins at home, but that it ends there too. In terms of impact, the message is quite different than that conveyed by direct assistance to state residents . . . . Overtly targeting charities for serving non-residents is the very sort of "interfering and unneighborly regulation" that the Constitution was designed to end.[35]

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33. *Id.* at 40 (emphasis added).
34. *Id.*
35. *Id.* at 42.

2. *The Charities'* Amici *Brief*[36]

The *amici curiae* brief referred to by the Camps' brief was filed jointly by sixteen major charities and charity associations. The roster represents an impressive collection of national and international organizations that own property in one state but primarily serve nonresidents.[37]

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36. A separate *amici* brief was filed jointly by the Christian Legal Society, the Coalition for Christian Colleges and Universities, World Relief, the International Union of Gospel Missions, the Christian Life Commission of the Southern Baptist Convention, the National Association of Evangelicals, and the Evangelical Council for Financial Accountability. One of the NAE's member organizations is Christian Camping International/USA; it estimated that its members own approximately 346 square miles of land for Christian camping use, and would pay almost $22 million annually if all lost their property tax exemption. Brief of the Christian Legal Society et al. as *Amici Curiae* in Support of Petitioner at 17–18, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988). This *amici* brief argued: "The relationship between a religious group and its adherents across a state line is not merely that of a business and a customer; it has deep religious significance and is often part and parcel of the practice of religion." *Id.* at 7. Moreover, charged the religious *amici*, to determine the eligibility of a charity, "the Maine statute presents an added danger, for religious groups can legitimately fear that the state will enforce the statute by investigating the membership (or the recipients of benefits) of exempt entities, a level of interference that this Court has long condemned." *Id.* at 12. In sum, "the statute severely penalizes religious organizations for ministering to American citizens who have beliefs, rather than geography, in common." *Id.* The Supreme Court did not address the religious issue.

37. The brief was filed by the American Council on Education (whose membership includes 1800 institutions of higher education and over 175 nonprofit educational associations and organizations); the Independent Sector (whose membership includes over 800 not-for-profit corporations, foundations, and voluntary organizations); the American Association of Museums (whose membership includes over 14,000 art, history, science, military, maritime, college, university, and youth museums, historical societies, preservation projects, zoos, planetariums, aquariums, gardens and arboretums, libraries, and science and technology centers); the American Heart Association (and its 53 affiliates, representing "more than four million volunteers"); the Center for Non-Profit Corporations (representing over 600 member nonprofits in New Jersey); the Council for Advancement and Support of Education (representing more than 2900 public and private colleges and universities, private schools, and other education-related nonprofit and commercial organizations); the Delaware Association of Nonprofit Agencies (235 members); the Maine Association of Nonprofits (over 200 nonprofit members and 40 "commercial sponsors"); the National Association of Independent Colleges and Universities (representing over 875 private, nonprofit colleges and universities nationwide); the National Association of Independent Schools (representing over 1100 accredited nonprofit day and boarding schools); the National Council of Nonprofit Associations (whose membership consists of over 30 statewide and regional associations of nonprofit organizations); the National Easter Seal Society (with over 135 member societies operating nearly 500 sites); the National Multiple Sclerosis Society (having 135 chapters and branches in a 50-state network); the Nonprofit Coordinating Committee of New York (having over 725 nonprofit members "working in the fields of social services, religion, philanthropy, the arts, health care, education, and public policy research"); the United Way of America (providing

The *amici* charities took two tacks in arguing that nonprofits are entitled to the protections of the Commerce Clause.[38] First, they asserted, "The Court has recognized explicitly that an activity's status as being in the stream of interstate commerce does not depend on the transmission of 'value'."[39] But if it does, they alternatively claimed that "[n]onprofit institutions account for a significant share of the nation's economic activity."[40] Even if the Court should not accept that "nonprofit businesses" directly engage in interstate commerce, the *amici* illustrated ways in which nonprofits "manifestly 'affect' interstate commerce in a substantial way": their use and provision of goods and services; the provision of industry codes and standards, information, and advice "affecting the policies and economic viability of other government, for-profit, and not-for-profit entities"; and the employment of "a substantial number of individuals nationwide."[41] The brief added: "Nonprofit organizations, moreover, compete among themselves for donations and other forms of financial support, or, in the case of colleges and universities, students."[42]

Invoking their heavy dependence on donations and tax exemption in "today's environment of scarce direct public funding,"[43] the charities argued that their not-for-profit character should not make them constitutionally worse off than businesses:

> Under the decision of the Maine Supreme Judicial Court, interstate nonprofits will no longer receive tax exemptions and will be forced to pass their increased costs along to their customers and beneficiaries or else provide fewer goods or services — simply because they do not operate for monetary gain and are therefore not entitled to the constitutional protections afforded for-profit

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services to its 2000 community-based member United Ways); and the YMCA of the USA (whose over "950 local corporate YMCAs serve 14 million Americans each year"). Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 1–8, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

38. "*Amici* also wish to assist the Court in understanding the harmful effects the decision below will have on nonprofits and the national economy if allowed to stand." *Id.* at 9.

39. *Id.* at 10.

40. *Id.*

41. *Id.* at 10–11.

42. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 11, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

43. *Id.*

> organizations similarly operating in the stream of interstate commerce.[44]

The *amici* brief concluded by focusing on the protectionist effects of Maine's statute: "Through its subsidization of nonprofit organizations that principally serve in-state interests, the state is manifestly preferring those organizations and aiding their economic development."[45]

Although the charities' brief did not ignore competition between the nonprofit and for-profit sectors,[46] it focused on the activities of

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44. *Id.* In this argument, the charities ignored the limitation in the Maine statute that denies full exemption only if the charity primarily serving nonresidents charges the average beneficiary more than $30 a week. If charities operated as traditionally assumed — supported by donations rather than fees — such a limitation might not bind. (For charities that charge less but still serve primarily nonresidents, exemption is extended only to the first $50,000 in property value.) In its main argument, the *amici* brief acknowledged that "traditional sources of public funds are dwindling," and argued that commercial activities give charities the resources to carry on. *Id.* at 21 (citing Henry B. Hansmann, *The Two Nonprofit Sectors: Fees for Service Versus Donative Organizations*, *in* THE FUTURE OF THE NONPROFIT SECTOR 91, 98–99 (Virginia A. Hodgkinson et al. eds., 1989); Jerald Schiff & Burton Weisbrod, *Competition Between For-Profit and Nonprofit Organizations in Commercial Markets*, *in* THE NONPROFIT SECTOR IN THE MIXED ECONOMY 127, 127 (Avner Ben-Ner & Benedetto Gui eds., 1993)). Thus, the *amici* brief reflects the modern charitable world in which private donations constituted only 18.4% of total funds received by charities in 1992 (down from 26.3% in 1977); government contributions constituted 31.3% (up from 26.6%); private payments in the form of dues, fees, and charges constituted 39.1% (up from 37.7%); and other income (such as from investments) came to 11.1% (up from 9.6%). VIRGINIA ANN HODGKINSON ET AL., NONPROFIT ALMANAC 1996–1997: DIMENSIONS OF THE INDEPENDENT SECTOR 5, 193–94 tbl. 4.3 (1996). Moreover, only 40% of household contributions go to charities other than churches. *See id.* at 65.

45. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 22, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

46. The charities mentioned the view that "nonprofits often 'come into existence when for-profit firms and the government fail to meet the demands of certain groups in a particular market.'" *Id.* at 18 (quoting Avner Ben-Ner, *Who Benefits from the Nonprofit Sector? Reforming Law and Policy Towards Nonprofit Organizations*, 104 YALE L.J. 731, 734 (1994)). In a footnote, the brief described the innovation model of organizational form, in which nonprofits "are often the forerunners in 'risky but valuable activities' that for-profits initially may avoid because low returns are predicted for such activities." *Id.* at 18 n.3 (quoting Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anyone's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. REV. 1761, 1805–06 (1995)). "For example," the footnote concluded, "nonprofit organizations were the first to provide recycling services and home health care and now those industries are dominated by for-profit firms." *Id.* In addition, the brief cited the work of Henry Hansmann and Avner Ben-Ner in listing the industries — education, research, health care, media, the arts, social services, and "high-culture" — in which nonprofit organizations play an important or dominant role. *See id.* at 18–19.

nonprofits. Indeed, the brief occasionally suggested that nonprofits conduct unique — albeit commercial — activities. Nonprofits, the *amici* wrote in the summary of their argument, "provide a number of important educational, research, health, social, religious, artistic, and cultural services *that are not provided by for-profit institutions or governments*."[47] In the body of their argument, they stated: "Nonprofit organizations . . . provide a wide variety of articles and services across state lines to individuals, other nonprofit organizations, government entities, and for-profit businesses and *often compete among themselves* for funding, whether from consumers or donors."[48] For purposes of the *Camps Newfound* case, it doesn't matter whether nonprofits engage in commercial competition with business, or are the sole sectoral supplier of particular services. However, in other contexts the difference can be crucial, and the fact that the Supreme Court highlighted the existence of mixed-sector industries could prove troublesome for favored treatment of nonprofits in the future.[49]

The data supplied by the *amici* on the financial scope and scale of the sector caught the attention of the Court.[50] The charities' brief stated: "To produce its goods and services, the nonprofit sector spends over $389 billion each year in operating expenses — approximately seven percent of the gross national product."[51] The *amici* brief added that "[m]any nonprofit subsectors are 'heavily dependent on fees by paying customers, with private payments accounting for at least half of total revenues'"[52] — although the brief dropped a footnote declaring: "The fees charged by these nonprofit organizations for services provided, such as hospital charges, tui-

47. *Id.* at 10 (emphasis added).

48. *Id.* at 21 (emphasis added) (citing Schiff & Wiesbrod, *supra* note 44; Richard Steinberg, *Nonprofit Organizations in Commercial Markets*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 118, 130 (Walter W. Powell ed., 1987)).

49. *See* discussion *infra* Part 2C.

50. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1604; *infra* nn.67 & 75 and accompanying text.

51. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 19, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988) (citing VIRGINIA A. HODGKINSON ET AL., NONPROFIT ALMANAC 1992–1993: DIMENSIONS OF THE INDEPENDENT SECTOR 20–21 (1994); Ben-Ner, *supra* note 46; INDEPENDENT SECTOR, AMERICA'S INDEPENDENT SECTOR IN BRIEF 1 (1996)).

52. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 19, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988) (quoting Charles Clotfelter, *The Distributional Consequences of Nonprofit Activities*, *in* WHO BENEFITS FROM THE NONPROFIT SECTOR? 1, 6–7 (Charles T. Clotfelter ed., 1992)); Hansmann, *supra* note 10, at 840–41.

tion, and admission fees, of course do not cover the full costs."[53] The brief also reported that in 1985, "nonprofits generated an estimated $110 billion in fee, sale, and investment revenues exempt from federal income taxes and held approximately $300 billion in real property exempt from state and local property taxes."[54] Asserted the charities: "these expenditures and revenues cannot be ignored simply because the organizations generating this commerce do not operate for profit."[55]

These data can cut both ways. Granted, a high value for tax exemptions means that loss of exemption would cost dearly. However, high levels of tax-exempt income and broad holdings of tax-exempt property reflect what could be viewed as the vast wealth of the sector. As mentioned above, the charities' brief does not express a policy justification for the charitable property tax exemption that necessarily ignores the residence of the beneficiaries.[56] Should the

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53. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 19 n.4, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988) (citing Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity*, *in* THE NONPROFIT SECTOR, A RESEARCH HANDBOOK 55, 62 (Walter W. Powell ed., 1987)).

54. *Id.* at 22 (citing John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, *in* THE NONPROFIT SECTOR, A RESEARCH HANDBOOK 67, 67 (Walter W. Powell ed., 1987)). Property tax exemption typically extends only to real property used in the active conduct of a charitable activity, and not to real estate held for investment. By contrast, charities' investment income — whether rent, interest, dividends, or capital gains — generally enjoys exemption from the income tax. I estimated that the current value of charities' investment holdings likely exceeds $500 billion, roughly the same value as their operating assets. Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 887 (1997).

55. Brief of American Council on Education et al. as *Amici Curiae* in Support of Petitioner at 19, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

56. However, the *amici* brief of the religious organizations did declare:

> The vast majority of religious and charitable institutions in the United States receive some kind of state tax exemption. Tax exemption is critical to their survival for, by definition, these organizations are "nonprofit" and do not exist for the purpose of amassing wealth. Rather, they exist to serve the public interest, through public charity, for the good of all. Thus, for most nonprofits, tax exemption of one sort or another is not only a benefit, it is a necessity. If most charities had to pay real estate or income taxes they would have to severely curtail, if not discontinue, their services. Thus, the ironic result of state taxation of these entities would not be to raise revenue, but to drive them out, depriving all of the people served (regardless of where they live) of the benefits or services that the charity provides and of the jobs they provide to the local economy.

Brief of the Christian Legal Society et al. as *Amici Curiae* in Support of Petitioner at 14–15, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997)

debate shift from constitutional grounds, leaving the argument at the level of "we need the money" risks the counter-argument that this is not how the state chooses to spend its money.

3. Brief for the Respondent

The brief for the Town attempted to take nonprofit economic activity out of the commercial arena — for both the nonprofits and for the states.[57] In contrast to the briefs by and on behalf of the petitioner, the Town offered a policy reason for the narrow tax-exemption statute. The Town's brief asserted: "Exemptions for charities are not designed to confer competitive advantages to in-state economic interests . . . . Instead, they are awarded in recognition of the value to society of the work done by the charitable organization."[58] Specifically, "exemptions for charities are granted in return for a service. They are part of a *quid pro quo*."[59] According to the Town:

> Some courts have observed that without this *quid pro quo* — tax exemption in return for relieving a public burden/conferring a public benefit — property tax exemptions would violate the principle of equal taxation and would be nothing more than a gift of public funds at the expense of the nonexempt taxpayer.[60]

The Town then argued that Maine was merely acting as a market participant in deciding to purchase charitable services for its residents via its targeted exemption criteria. As the brief described:

> The expenditures which exemptions for charities represent can be viewed as "purchases" of services through a tax exemption . . . . It makes no economic difference to the taxpayer whether his or her money is actually paid to the charities or is used by the municipality to replace tax money lost through exemption of those charities. Further, it makes no economic difference to the charity whether it receives money from the municipality to pay its

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(No. 94-1988) (citation omitted).

57. *See* Brief for Respondents at 1–49, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

58. *Id.* at 31–32.

59. *Id.* at 32.

60. *Id.* at 33–34 (citing Kimberly Sch. v. Town of Montclair, 60 A.2d 313 (N.J. 1948)).

> taxes or is relieved from the obligation of paying taxes.[61]

As the Camps conceded, direct governmental subsidies to charities that serve only residents would be constitutional. Accordingly, the Town concluded that subsidies in the form of "tax expenditures" should enjoy the same constitutionality.[62]

In a footnote, the Town turned the charities' protectionist argument against them:

> The fundamental discrimination is, of course, between nonprofit organizations and for-profit businesses. There are many summer camps in Maine. Although the record is devoid of any evidence to support the petitioner, the petitioner not only admits but also argues strenuously that it is in competition with summer camps that are for profit businesses as well as those that are nonprofit. Pet. Br. 41. Petitioner apparently believes that there is no constitutional problem with its being exempt and, consequently, having a clear economic advantage over for profit camps, but that there is a problem with its not being tax exempt when nonprofit camps that benefit principally Maine residents are tax exempt.[63]

C. The Supreme Court Opinions

1. The Majority Opinion

Justice Stevens' opinion for the Court declared, "were this statute targeted at profit-making entities," there is no question "it would violate the Commerce Clause."[64] The Court noted that "ample alternatives short of a facially discriminatory property tax exemption" were available to Maine to

> achieve its apparent goal of subsidizing the attendance of the State's children at summer camp: Maine could, for example, achieve this end by offering direct financial support to parents of resident children . . . . Though we have not had the occasion to address the issue, it might also be permissible for the State to subsidize Maine camps directly to the extent that they serve residents.[65]

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61. Brief for Respondents at 34, *Camps Newfound/Owatonna, Inc.* (No. 94-1988).
62. *See id.* at 49.
63. *Id.* at 13 n.12.
64. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1598.
65. *Id.* at 1601 n.16 (citations omitted).

The Court detected nothing in the "nonprofit character of an enterprise" that should exclude it from the coverage of the Commerce Clause, citing Hansmann's description of the various industries in which both for-profit and nonprofit enterprises operate.[66] Specifically, the Court observed: "Summer camps may be operated as for-profit or nonprofit entities; nonprofits may depend — as here — in substantial part on fees charged for their services."[67] "Entities in both categories are major participants in interstate markets" and "the interstate commercial activities of nonprofit entities as a class are unquestionably significant."[68] Accordingly, the Court held: "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities" is "wholly illusory."[69] The Court easily conceived of why a state might find it reasonable to "use tax exemptions as a means of encouraging non-profit institutions to favor local citizens"[70] — but viewed such a mechanism as the same as using "discriminatory tax exemptions as a means of encouraging the growth of local trade."[71] Such protectionism is prohibited by the Dormant Commerce Clause.[72] "If there is need for a special exception for nonprofits, Congress not only has the power to create it, but also is in a far better position than we to determine its dimensions."[73]

In its lengthy footnote eighteen, the Court recognized the important financial presence of nonprofit enterprise.[74] In so doing, the Court acknowledged the information provided in the charities' brief: "We are informed by *amici* that 'the nonprofit sector spends over $389 billion each year in operating expenses — approximately seven percent of the gross national product.'"[75] Moreover, the

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66. *Id.* at 1602–03.

67. *Id.* at 1603. The court quoted the statement from Clotfelter, which appeared in the charities' brief, regarding the heavy dependence of many charities on fees. *See supra* note 50 and text accompanying note 52.

68. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1603.

69. *Id.*

70. *Id.* at 1604.

71. *Id.*

72. *See supra* note 6. The Court stated in a footnote that its holding in this case does nothing to prevent "a State from giving a tax break to charities that benefit the State's inhabitants." *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1604 n.19. Moreover, states may still provide "generally applicable nondiscriminatory tax exemptions" without violating the Dormant Commerce Clause. *Id.*

73. *Id.* at 1604 (footnotes omitted).

74. *See id.* at 1603–04 n.18.

75. *Id.* at 1603 n.18 (quoting Amici Brief of American Council on Education et al.,

Court evidently probed the sources cited by the charities, referring to a particular table not mentioned in their brief: "In recent years, nonprofits have employed approximately seven percent of the Nation's paid workers, roughly 9.3 million people in 1990."[76]

Footnote eighteen continued by characterizing as "quite misleading" the suggestion in Justice Scalia's dissent that the "narrow tax exemption" serves only "to relieve the State of its burden of caring for its residents."[77] The majority further observed that Maine's property tax statute separately exempts "property used by such important nonprofit service industries as nursing homes and child care centers."[78] The Court then described the activities of nonprofit hospitals and health maintenance organizations as "serious business."[79] Moreover, the Court pointed out the significant *for-profit* presence in these industries.[80] Citing to a source mentioned in none of the briefs, the Court enumerated the $305 billion in non-profit hospital receipts in 1994 (compared with $34 billion for for-profit hospitals); the $18 billion in revenues of nonprofit nursing homes (compared with $40 billion for for-profit nursing homes); and the $5 billion in nonprofit child day-care services ("compet[ing]" with $11 billion generated by for-profits).[81]

The Court then turned to the Town's argument that "Maine's exemption statute should be viewed as an expenditure of government money designed to lessen its social service burden and to foster the societal benefits provided by charitable organizations."[82] The Court declined to address the constitutionality of direct subsidies benefiting only charities principally serving state residents.[83] The Court, however, ruled that "our cases do not sanction a tax exemption serving similar ends."[84] The opinion rejected the notion that the state, by granting tax exemption "to cover broad swathes of the nonprofit sector," is acting as a market participant.[85] Maine's

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at 19, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988)).

76. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1603 n.18 (citing HODGKINSON ET AL., *supra* note 51, at 29 (Table 1.5)).

77. *Id.* (quoting 117 S. Ct. at 1608–09 (Scalia, J., dissenting)).

78. *Id.*

79. *Id.* at 1604 n.18.

80. *See id.*

81. *See id.* (citing U.S. BUREAU OF THE CENSUS, SERVICE ANNUAL SURVEY: 1994, at tbls. 7.1, 7.3, 8.1 & 8.3 (1996)).

82. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1604.

83. *See id.* at 1605.

84. *Id.*

85. *Id.* at 1607. The Court had previously permitted states to favor their citizens

statute, the Court concluded, "must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function."[86]

2. *The Dissent on the Merits*[87]

Joined by three other Justices in dissent, Justice Scalia characterized Maine's exemption statute as "a narrow tax exemption, designed merely to compensate or subsidize those organizations that contribute to the public fisc by dispensing public benefits the State might otherwise provide."[88] Justice Scalia would defer to the state to declare the purposes it "might otherwise provide."[89] Thus, he described approvingly one case in which "an organization devoted to maintaining a wildlife sanctuary was denied exemption on the ground that the preserve's prohibition on deer hunting conflicted with state policy on game management, so that the preserve could not be deemed to provide a public benefit."[90]

Justice Scalia adopted the Town's view of "the theory underlying the exemption": "it is a *quid pro quo* for uncompensated expenditures that lessen the State's burden of providing assistance *to its residents*."[91] He criticized the majority's failure to confront directly the implications of its distinction between discriminatory tax exemption (unconstitutional) and discriminatory direct distribution of state benefits (constitutional):

> The problem, of course, is not limited to municipal employment and free public schooling, but extends also to libraries, orphanages, homeless shelters and refuges for battered women. One could hardly explain the constitutionality of a State's limiting its provision of these to its own residents on the theory that the State is a

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when the state acts in its proprietary capacity, such as in making purchases. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808–10 (1976).

86. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1607.

87. Chief Justice Rehnquist and Justices Thomas and Ginsburg joined Justice Scalia in his dissent. *Id.* at 1608–14. *See also supra* note 14 (describing Justice Thomas' separate dissent).

88. *Id.* at 1609 (Scalia, J., dissenting).

89. *Id.*

90. *Id.* at 1610 (citing Holbrook Island Sanctuary v. Town of Brooksville, 214 A.2d 660, 666 (Me. 1965)).

91. *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1611 (Scalia, J., dissenting) (emphasis added).

> "market participant." These are traditional government functions, far removed from commercial activity and utterly unconnected to any genuine private market.[92]

Accordingly, he continued: "If . . . a State that provides social services directly *may* limit its largesse to its own residents, I see no reason why a State that chooses to provide some of its social services indirectly — by compensating or subsidizing private charitable providers — cannot be similarly restrictive."[93] In a footnote to this statement, Justice Scalia conceded that a state could not give preferential tax treatment to domestic commercial enterprises, but asserted:

> [T]here is no valid comparison between, on the one hand, the State's giving tax relief to an enterprise devoted to the making of profit and, on the other hand, the State's giving tax relief to an enterprise which, for the purpose at hand, has the same objective as the State itself (the expenditure of funds for social welfare).[94]

In sum, he wrote:

> In my view, the provision by a State of free public schooling, public assistance, and other forms of social welfare to only (or principally) its own residents — whether it be accomplished directly or by providing tax exemptions, cash or other property to private organizations that perform the work for the State — implicates none of the concerns underlying our negative-commerce-clause jurisprudence. That is, I think, self-evidently true, despite the Court's effort to label the recipients of the State's philanthropy as "customers," or "clientele" . . . . Because [the Maine statute] clearly serves these purposes and has nothing to do with economic protectionism, I believe that it is beyond scrutiny under the negative Commerce Clause.[95]

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92. *Id.* at 1612.
93. *Id.* at 1612–13 (emphasis in original).
94. *Id.* at 1613 n.4.
95. *Id.* at 1614.

II. THE PRICE OF VICTORY

A. The Hazards of Litigation

The interest of Camps Newfound in this litigation is obvious: They faced an annual property-tax bill exceeding $20,000.[96] The interest of the *amici* charities is less clear. Only one other state has a law similar to Maine's.[97] In their brief, the charities expressed the fear that:

> If other states follow Maine's lead, interstate nonprofit organizations may soon be treated differently for a wide variety of state and local government purposes. Such a result not only will severely undermine the financial strength of these organizations, but also will seriously endanger the future viability of nationally coordinated nonprofit institutions.[98]

Not every victory needs to be achieved on constitutional grounds. A right grounded in the Constitution, of course, has the advantage that it cannot be taken away by legislation.[99] Otherwise, the proponents are still free to seek privileges from the legislature. Indeed, all of charities' special tax treatments have been won in the legislative arena, given that exemptions and deductions

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96. *See* Brief for Petitioner at 3, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (94-1988).

97. *See* MICH. COMP. LAWS ANN. § 211.7q (West 1986). In addition, the Town's brief cited to:

> 68 Okl. St. Ann. section 2887(8) (granting exemption from ad valorem taxation for charitable institutions, "provided the net income from such property is used exclusively within this state for charitable purposes"); N.C. Gen. Stat. section 105-3(3) (granting exemption from inheritance tax for foreign charitable corporations if the corporation is "receiving and disbursing funds donated in this State for religious, educational or charitable purposes"); D.C. Code section 47-1002(8) (real property exempt from taxation includes buildings belonging to charitable institutions, "which are used for purposes of public charity principally in the District of Columbia").

Brief for Respondents at 3 n.4, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988). As the Petitioner pointed out in its reply brief, however, the District of Columbia's statute was enacted by Congress, and so it is immune from Commerce Clause challenge. *See* Reply Brief of Petitioner at 3 n.1, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (94-1988) (citing National Med. Ass'n v. District of Columbia, 611 A.2d 53, 55–57 (D.C. App. 1992) (rejecting a challenge on grounds other than the Commerce Clause)).

98. *Amici* Brief of American Council on Education, at 11, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

99. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

are matters of "legislative grace"[100] subject only to the easy-to-satisfy constitutional requirement of equal protection.[101] Today's charities, however, rightly fear that as states get hungrier for revenue, graciousness might yield to the desire to limit their scarce resources to their own residents.

Paradoxically, though, the charities' posture in *Camps Newfound*, while bolstering their constitutional argument, might undermine their political support. The public appears uneasy about, if not hostile to, the increasing nonprofit commercialism.[102] So far, charities have enjoyed a "halo effect" in our political economy. The rationalized myth[103] of charities as selfless, donative, and volunteer-run deliverers of services to the poor has never entirely been true,[104] but it underlies society's grant of tax exemption and tax deductibility for contributions.[105] To the extent, however, that this *quid* depends on the idealized *quo*, should charity's core myth change — in a way that becomes visible to the public — society's willingness to alter the subsidies could also change.[106]

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100. *See* New Colonial Ice Co., Inc. v. Helvering, 292 U.S. 435, 440 (1934). "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is a clear provision therefor can any particular deduction be allowed." *Id.*

101. In the state courts, the Camps had also challenged Maine's property-tax exemption statute under the Equal Protection Clause. The lower courts, affirmed by the Maine Supreme Judicial Court, rejected this claim because an earlier decision of the high court of Maine had upheld the statute against such a challenge. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 655 A.2d 876, 879–80 (Me. 1995) (citing Green Acre Baha'i Inst. v. Town of Eliot, 193 A.2d 564 (Me. 1963)), *rev'd*, 117 S. Ct. 1590 (1997). An Equal Protection claim was not raised before the Supreme Court. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1595 n.4.

102. *See Institutional Dissonance*, *supra* note 2, at 461–70.

103. The term "rationalized myth," coined by sociologists John Meyer and Brian Rowan, recognizes the influences of a host of institutional forces on the behavior of an organization. John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977), *reprinted in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 41–62 (Walter W. Powell & Paul J. DiMaggio eds., 1991). Professors Meyer and Rowan found that organizations maintain gaps between their formal, ceremonialized structures and their actual work activities. *See id.* at 41. They explain:

> Many of the positions, policies, programs, and procedures of modern organizations are enforced by public opinion, by the views of important constituents, by knowledge legitimated through the educational system, by social prestige, by the laws . . . . Such elements of formal structure are manifestations of powerful institutional forces which function as highly rationalized myths that are binding on particular organizations.

Id. at 44.

104. *See Institutional Dissonance*, *supra* note 2, at 437–70.

105. *See id.*

106. *See also* Leslie Lenkowski, *High Court Ruling Is No Victory for Charities*,

Thus, we might one day see the situation — postulated by the Camps' brief,[107] but which they undoubtedly thought remote — of tax subsidies converted to direct expenditures targeted to state residents. If the Supreme Court then finds (as it suggested in *Camps Newfound* and earlier cases that it would)[108] that such a mechanism withstands Commerce Clause scrutiny, then the charities will have lost both their constitutional support and their political good will.

B. The Subordinate Sector?

The majority opinion, like the briefs for the Camps and the charities, never needed to articulate a theory of tax exemption. In effect, the majority decided that whatever the policy behind state-level tax exemption, the Commerce Clause prevents a state from differentiating between charities based on the residency of their beneficiaries.[109] In contrast, the dissent's conception of property tax exemption accepted a definition that limits the exemption to charities benefitting state residents.[110]

That four Justices dissented in *Camps Newfound* suggests that, even in the face of massive financial data, many people still refuse to view nonprofit activity as commercial. However, such a view took an unnerving turn in the dissenting opinion.[111] The dissenters might have adopted what I think of as the "sovereign" approach to the charitable sector, under which governments treat charities almost with comity, granting them the same tax exemption as governments.[112] If society would approach charities in this manner, then even in the absence of a constitutional right to the same property tax exemption granted charities serving residents, interstate charities would likely win such treatment in the legislative process.

CHRON. PHILANTHROPY, July 24, 1997, at 47.

107. *See* Brief for Petitioner at 1–45, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (No. 94-1988).

108. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1601 n.16 (discussing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994); New Energy Co. v. Indiana v. Limbach, 486 U.S. 269, 278 (1988); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 816 (1976) (Stevens, J., concurring)).

109. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1598–99.

110. *See id.* at 1611–14 (Scalia, J., dissenting).

111. *See id.* at 1608–14.

112. *See* Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. __ (forthcoming 1998) (on file with Author) [hereinafter *Sovereignty and Subsidy*].

In contrast, though, the dissenters took a market approach to the *state's* use of charities.[113] This approach puts charities in a subordinate role to government, carrying out the state's desires in return for tax exemption.

Justice Scalia commented during the oral argument, "'It's unreal to talk about competing' in the context of charitable services."[114] He wondered whether such competition would be "to see who could give away more money or services."[115] One prominent tax writer agrees with Scalia's conception of charities:

> The subsidized charitable sector is not comparable to business, regardless of how large a participant in interstate commerce it is. Charitable summer camps are not comparable to profit-seeking hotels; they are more like schools and orphanages, the state tax treatment of which would not be occasion for federal interference.[116]

Such paternalism contains obvious risks to charities. Attorney Janne G. Gallagher, who represents nonprofit groups, complained that Justice Scalia "says he basically believes in a system in which the state can simply tell non-profits what to do."[117] People with that view, she continued, "really begin to see charities as no more than some sort of an adjunct of the state, and as an adjunct a state can tell them exactly what to do, even with their private resources."[118]

C. The Domino Effect

Property tax exemptions differ from other tax exemptions in one fundamental way: Unless the charity serves entirely a local clientele — drawn from the municipality in which the charity owns

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113. *See* 117 S. Ct. at 1612–13 (Scalia, J., dissenting).

114. Marlis L. Carson, *Justices Ponder Non-Profit's Property Tax Exemption Dispute*, 73 TAX NOTES 126, 127 (Oct. 14, 1996).

115. Marlis L. Carson, *Editor's Notebook*, 15 EXEMPT ORG. TAX REV. 157, 157 (Nov. 1996).

116. Lee A. Sheppard, *Hello Muddah, Hello Faddah, Here We Are at Camp Owatonna*, 75 TAX NOTES 1183, 1184 (1997). She adds: "That there is a growing problem with business activities migrating to the tax-exempt sector, however, should not affect a state's power to decide which activities are charitable and how much they should be subsidized through tax exemptions." *Id.* at 1185.

117. Jennifer Moore & Grant Williams, *A Tax Victory for Charities*, CHRON. PHILANTHROPY, May 29, 1997, at 31.

118. *Id.* at 31–32.

property — a mismatch occurs between those who enjoy the benefits of the charity's exemption and those who bear the burden through their higher property tax bills. The Supreme Court's opinion effectively requires municipalities having a charitable property-tax exemption to "import" the burden of charitable services to non-residents. On the other hand, permitting states to limit exemption to charities serving residents invites a collective action problem, potentially depriving the real estate of national or international charities of exemption.

Nor can the charitable sector ignore the potential domino effect of a parochial view of property-tax exemption. In their brief, the Camps extended their concern to other types of state and local taxes:

> Moreover, the potentially destructive impact of empowering states to exact discriminatory property taxes would, in our view, be augmented by their consequent power to restrict charitable state income tax deductions in the same way. We see no way for distinguishing between the two. And if a state concluded that there was enough to gain to warrant taking the first step, it is hard to see why it would stop short of the other. But surely it is unlikely that a significant move by one state to advantage its own at the expense of its neighbors would be contained. If Virginia, say, were to disallow deductions for contributions to charities serving many District of Columbia or Maryland residents, one would not suppose those jurisdictions would long abide without responding in kind.[119]

Finally, the Camps' brief limited its speculation to the *state*-level treatment of income tax deductions for charitable contributions. After all, this was a Commerce Clause case, and the Commerce Clause limits only the states.[120] Congress may amend the Internal Revenue Code without running afoul of this constitutional provision. Accordingly, while *Camps Newfound* has no immediate impact on the issue of federal-level tax treatment of charities, the

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119. Brief for Petitioners at 43, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (94-1988) (footnote omitted). The brief continued: "restrictions on tax deductions would put at risk the principal source of funding for countless other non-profit organizations, including, it may be presumed, every national charity." *Id.* However, focusing on the loss of tax deductibility for contributions overstates the relative importance of donations. *See supra* note 44.

120. *See* U.S. CONST. art. I, § 8.

posture assumed by the charities makes it more risky that society — and hence Congress — could be open to revisiting federal tax exemption and charitable-contribution deductions.

CONCLUSION

Once they decided to participate in the *Camps Newfound* litigation, the *amici* charities had no choice but to cast their activity in as commercial a form as possible. Dropping the pretense that charity is not "big business" might simply declare what all could see if they would only look. However, while disclaiming the halo might be "realistic," charities have so far enjoyed this "institutional lag."[121] The strategy of the charities in *Camps Newfound* might encourage society to rethink its favorable view of the charitable sector. The Supreme Court suggested that the Constitution would not prevent a state from repealing charitable tax exemptions and using state resources instead to pay direct subsidies to residents.[122] As improbable as this result sounds, the very argument made by the charities in *Camps Newfound* that the charitable sector engages in commerce "just like the big boys" jeopardizes the special protected view of charities, making society more willing to reconsider public subsidies long taken for granted by charities.

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121. *See* Brody, *Institutional Dissonance*, *supra* note 2, at 464.
122. *See Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1601 n.16.