How Public is Private Philanthropy?

Ray D Madoff, Boston College Law School
The debate over the role of foundations and other charities in society is often premised on the claim or assumption that government should have a bigger role in directing philanthropies and their assets because the money held by charities is “public money.” Now, two eminent students of philanthropy have completed a comprehensive analysis of the public-money claim, *How Public Is Private Philanthropy: Separating Myth from Reality* (Philanthropy Roundtable, June 2009 – available online at [www.philanthropyroundtable.org](http://www.philanthropyroundtable.org)). The authors are EVELYN BRODY, professor at the Chicago-Kent College of Law, and JOHN TYLER, secretary and general counsel of the Ewing Marion Kauffman Foundation. Brody and Tyler have concluded, on the basis of the numerous applicable legal precedents, that the public-money assertion is largely myth.

On June 19, 2009, the Bradley Center for Philanthropy and Civic Renewal hosted a panel discussion with TYLER as well as RALPH SMITH of the Annie E. Casey Foundation, the Boston College Law School’s RAY MADOFF, and GLENN LAMMI of the Washington Legal Foundation. The Bradley Center’s WILLIAM SCHAMBRA moderated the discussion.

**PROGRAM AND PANEL**

12:00 p.m. Welcome by Hudson Institute’s WILLIAM SCHAMBRA
12:10 Panel discussion
   - JOHN TYLER, Ewing Marion Kauffman Foundation
   - RALPH SMITH, Annie E. Casey Foundation
   - RAY MADOFF, Boston College School of Law
   - GLENN LAMMI, Washington Legal Foundation
1:10 Question-and-answer session
2:00 Adjournment

**FURTHER INFORMATION**

This transcript was prepared from an audio recording and edited by Krista Shaffer. To request further information on this event or the Bradley Center, please visit our web site at [http://pcr.hudson.org](http://pcr.hudson.org), contact Hudson Institute at (202) 974-2424, or send an e-mail to Krista Shaffer at Krista@hudson.org.
Panel Biographies

Glenn G. Lammi is chief counsel of the Washington Legal Foundation’s Legal Studies Division. He began at the foundation in 1992 as counsel. As chief counsel, Lammi coordinates legal policy advocacy and educational programs for the foundation. Lammi also administers Washington Legal Foundation’s nationwide networking efforts to recruit pro bono authors and speakers, and serves as the legal staff’s main liaison with the foundation’s public relations and marketing departments. He has authored numerous articles and analyses on a wide range of legal issues published by the foundation, as well as by national and local newspapers and journals, such as The New York Times, the Washington Post, USA Today and California Lawyer. Lammi also frequently presents the foundation’s position to the broadcast media, appearing on CNN, C-SPAN, ABC’s World News Tonight, Court TV, and other outlets.

Ray Madoff is a professor at Boston College Law School where she teaches trusts and estates, estate and gift, tax, estate planning, and a seminar on immortality and the law. She is the lead author of Practical Guide to Estate Planning (CCH), and has written in a wide variety of areas involving property and death. Her current project is a book exploring the legal treatment of the dead, called Immortality and the Law: The Rising Power of the American Dead (Yale University Press). Prior to teaching, she was a practicing attorney in New York and Boston. Professor Madoff is a member of the American Law Institute, an academic fellow of the American College of Trusts and Estates Counsel and past chair of the Trusts and Estates Section of the American Association of Law Schools. She also serves on the board of directors of the ACTEC Foundation.

Ralph Smith is executive vice president of the Annie E. Casey Foundation. Previously, as the foundation’s senior vice president and director of planning and development, he helped design the foundation’s comprehensive effort to help communities improve outcomes for children by strengthening families and neighborhoods. Smith serves on the boards of the Council on Foundations, the Foundation Center, Wachovia Regional Foundation, the Annenberg Institute for School Reform, and Venture Philanthropy Partners. A legal scholar and attorney, he was a member of the law faculty at the University of Pennsylvania and authored briefs in landmark cases before the United States Supreme Court and the U.S. Court of Appeals. He served in senior leadership positions for the Philadelphia school district and as senior advisor to the mayor. He is the founding director for the National Center on Fathers and Families and the Philadelphia Children’s Network. Smith is an active participant in various councils and networks working to improve national and international philanthropy.

John E. Tyler III is general counsel, secretary, and chief ethics officer for the Ewing Marion Kauffman Foundation. Tyler previously practiced law with one of Kansas City’s largest law firms, focusing on commercial litigation, personal injury litigation, and employment law. Tyler serves and has served as a director and officer of several national and local nonprofit organizations, including for the Alliance for Charitable Reform and on the advisory board for NYU Law School’s National Center for Philanthropy and the Law and Independent Sector’s advisory group on Nonprofit Effectiveness. Tyler also is a frequent speaker and author on such broad ranging topics as nonprofit governance, intellectual property, and advancing university innovation.
WILLIAM SCHAMBRA: I’m Bill Schambra, director of the Bradley Center for Philanthropy and Civic Renewal at Hudson Institute. Krista Shaffer and I welcome you to today’s panel discussion entitled, “How Public Is Private Philanthropy?” We’re particularly honored that the Philanthropy Roundtable chose this venue for the world premiere of the monograph our panel will discuss shortly.¹

And we’re pleased to have with us in the audience one of its co-authors, Evelyn Brody of the Chicago Kent College of Law, as well as collaborating author Suzanne Garment, who will be a visiting fellow at Indiana University’s Center on Philanthropy.

Our thanks again to the National Committee for Responsive Philanthropy (NCRP) for joining us last month (May 28, 2009) for a lively and stimulating discussion of its latest major publication, the report *Criteria for Philanthropy at Its Best: Benchmarks to Assess and Enhance Grantmaker Impact*. The full transcript of that discussion was just posted on our website, and might be considered a worthy companion to today’s conversation.²

It’s a good sign for philanthropy, I think, that both the Philanthropy Roundtable and NCRP are willing to go beyond the typical one-sided promotional events for their publications, and are prepared instead to encourage and engage directly in a genuine discussion about their product. Would that more foundations and nonprofits were courageous and imaginative enough to do so! The Bradley Center stands prepared to make that happen for any group so inclined.

On January 20, 1910, almost a century ago, the United States House of Representatives passed – by a vote of 152 to 65 – a bill awarding a federal charter to the foundation planned by fabulously wealthy millionaire John D. Rockefeller. By the time the bill was introduced to the House by Rockefeller’s allies, it had already left little doubt that this private philanthropy was in fact going to be pretty public:

The bill provided that the foundation board could elect its own members, but election would not become effective until notice of same had been sent to each of the following: the president of the United States, the chief justice of the Supreme Court, the president of the Senate, the speaker of the House, and the presidents of six universities – Harvard, Yale, Columbia, Johns Hopkins, and the University of Chicago. They, in turn, would have sixty days to approve or disapprove of each new foundation board member.

Nonetheless, the House of Representatives, noting in the bill that a federal charter was being considered only “because the gift is to the people of the United States, and is to be controlled by them rather than in the interest of any one section,” added even more strictures. Amendments specified that the foundation was to proceed strictly by “philanthropic means.” Perpetuity was ruled out. The total endowment was limited. All income was to be spent each


² The transcript can be found on the Bradley Center’s web page on Hudson Institute’s web site, at [http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=665](http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=665)
year. The number of board members was increased from five members to nine. And to top it all off, Congress reserved to itself “complete power to impose such limitations upon the objects of the corporation as the public interest may demand.”

As it turns out, this bill went to the Senate but never emerged from committee, leaving Mr. Rockefeller to seek a charter for his new foundation from his home state, New York – a charter that included none of the limitations demanded by Congress. Had the original federal charter been awarded to Rockefeller, and had that become the pattern for all major American foundations, there wouldn’t have been much to discuss here today – although the involvement of so many university presidents would have raised all sorts of other interesting questions, I’m sure.

But happily for the exempt organizations committee of the American Bar Association – and those of us who enjoy lively debate – the demise of the Rockefeller federal charter bill left us with plenty of room to discuss the question before us, how public is private philanthropy? And to help us tackle that question, we have a distinguished panel of experts on the issue, all with backgrounds in both philanthropy and the law.

We’ll hear first this morning from another co-author of the document, John Tyler III, who is general counsel and secretary for the Ewing Marion Kauffmann Foundation in Kansas City. Next will be Glenn Lammi, chief counsel of the Washington Legal Foundation’s Legal Studies Division. Then, in her second appearance on a Bradley Center panel, Ray Madoff, professor at Boston College Law School, where she’s working on a book entitled – I couldn’t resist mentioning this title – Immortality and the Law: The Rising Power of the American Dead.

(Laughter.)

It’s on its way to the publishers, and we’ll have her back to talk about that! Finally, also returning for a second panel visit is Ralph Smith, executive vice president of the Annie E. Casey Foundation in Baltimore and board chair this year at the Council on Foundations.

So, John, would you kick off our discussion?

JOHN TYLER: Thank you, Bill (Schambra), and also thank you very much to Hudson Institute for your willingness to host this event and for allowing us to premiere the monograph in such a wonderful way. I want to give a special thank you to Bill (Schambra) for his work in putting such a great panel together, and also thank the panelists for helping Professor Brody and me achieve one of our goals – and one of the Philanthropy Roundtable’s goals – for the piece as well, which is to engage and ignite a conversation around the meaning and implications of “public money.” I’m very grateful to the panelists for helping us do that here today. Also, I very much want to thank the Philanthropy Roundtable and the Searle Freedom Trust for giving Evelyn (Brody), Susie (Garment), and me the opportunity to work on this monograph, for their support, and for publishing it.

The tension between “government” and “public,” and the influence of “government” and “public” on the assets of foundations and charitable organizations goes back about two centuries; although not so much with the foundations’ side of it. In 1819 the US Supreme
Court was faced with a case that is now famously called the *Dartmouth* case. The case had to do with the ability of the state legislature to dictate to Dartmouth College that it needed to expand its board and become a university as opposed to a college. The debate goes back at least that far.

In the late 1960s and early 1970s, the concept of “public money” began to receive greater awareness and became something of a term of art, but an ill-defined term of art. Carnegie Corporation president Alan Pifer spoke of “public money,” and then went on to reject its implications as suggesting that the term would allow greater government control of foundations, charities, and their assets. Merrimon Cuninggim, who was president of the Danforth Foundation, also acknowledged the term “public money” and the “publicness” of the assets of these enterprises. He added, though, that while it’s public money, it’s *private* decision making. And he clarified that latter point as an “immensely important distinction” – that the decisions are private; the decisions about the assets are beyond the “hands of the general public or of Government.”

More recently, the term “public money” seems to have taken on increasing significance as a term to support increased government and public control over foundation and other charity assets, governance, decision making, analysis of effectiveness, and other things. But a lot of those conversations have missed the nuanced part of Merrimon Cuninggim’s analysis; there is a duality of public money but private decision making. The emphasis more recently seems to be on the “public money” part, on the nature of the assets as public money.

Evelyn (Brody) and I had an opportunity, because of the Philanthropy Roundtable, to look into what “public money” means in a legal, literal sense. That’s what we’ve tried to do, and that is what we hope the monograph succeeds in doing – in looking at the term “public money” in its legal, literal framework. What does it mean? What should it mean? What are the implications that arise from or come out of the application of the literal term? As we looked at where the term comes from, what it is grounded in, we found that there are three primary arguments.

The first is that foundations and charities are charged with serving public purposes. The second argument is that because foundations and other charities are chartered by the state, that state charter or their capacity in a number of factors could cause foundations and other charities generally to be considered “state actors,” or subject to right-to-know laws as are government agencies. The third argument, which is the most commonly made argument and the one that comes most immediately to mind for most people, is the tax-favored treatment by way of the federal tax exemption that organizations get and the charitable contribution deduction that donors receive.

After undertaking this analysis, what Professor Brody and I concluded is that these assertions do not legally justify the lost autonomy, the lost independence, and the loss of privacy that foundations and other charities enjoy and should enjoy as entities that are the fulcrum between the government sector and the business sector as those sectors interrelate in our political systems, our civic and social systems, and our economic systems.

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3 A discussion of this case can be found on pages 28-30 and 64 in *How Public Is Private Philanthropy*?
4 See *How Public Is Private Philanthropy* p. 17.
5 Ibid.
6 These three arguments are discussed in chapters I, II, and III, respectively, of *How Public Is Private Philanthropy*?
At the risk of taking an eighty-page document and presenting it in twelve to fifteen minutes – obviously this is a high-level summary presentation; the document stands for itself and has a lot more detail – let me look at each of the three arguments that are generally used to support the public-money designation.

The first, as I mentioned, is that foundations and other charities are charged with serving public purposes – therefore, their assets are public money, and the entities themselves are public organizations. As the Supreme Court made clear in the Dartmouth case, “public purposes” does not mean “government purposes.” There is a broader view of what public purposes means than just government purposes. As you look at the sector itself, there are many exempt organizations that serve purposes that government can’t serve. Churches and other religious organizations and associations are among them. There are exempt organizations that serve purposes that are not supported by the government and would not be supported by the government, particularly if you look at the changing government and changing controls in government. Therefore, “public purposes” does not mean government purposes.

It also does not mean that all citizens must benefit from the organization’s assets or its operations. When you look at the different types of exempt organizations out there, there is no mandate that everyone in a particular geographic area or a particular community benefit from the operations or assets of a foundation or charity. In addition, these organizations are founded by donors, by founders, by creators, and they continue to be managed and overseen by boards of private individuals making private decisions about what subset of the public is to be served and what subset of the public purpose is to be served.

It is clear, though, that “public purposes” does mean not private purposes. These organizations still can’t serve purely private purposes.

The next argument that is frequently made is that the state chartering of foundations and other charities renders them public. The Supreme Court in the 1819 Dartmouth case made it absolutely clear that is not the case. The act of incorporating, the act of chartering an entity to exist, does not in and of itself render the organization public.

There are times when the state legislature or other legislative body will in fact specifically and specially charter organizations. The issue with those specific charters is different than what we are talking about – the broad, general charter filing under general charter rules. Look at for-profit businesses that charter in states, and corporations that incorporate in states; the fact of their chartering does not render them public. They are not public agencies. They are not public bodies. Richard Posner in a Seventh Circuit case as recently as 2004 addressed the nature of that issue.

So these issues don’t just go back almost two hundred years; they are current, and that they continue to be resolved in favor of chartering does not equate with “public.”

Related to that argument about chartering, folks have argued in the past – and these arguments do go back a long way – that it’s not just chartering, but there are other factors that could render an otherwise private organization to be a state actor subject to government control, subject to governmental and constitutional restrictions on equal protection and on
due process. There is another subset that there are certain otherwise private organizations that
could be subject to state sunshine laws or state right-to-know laws.

The important thing that I think our monograph points out with that is that there is an in-
depth, factual analysis that courts go through on a case-by-case basis to assess whether or not
an otherwise private enterprise should in some ways be more public as a state actor, subject
to equal protection and due process requirements or subject to state or other sunshine laws. It
is an intensive, fairly exhaustive, factual, case-by-case analysis that does not apply to the
sector as a whole.7

So, that is a synopsis of the second argument.

The third argument for why foundation and other charity assets and organizations are public
and operate with public money has to do with the tax-favored treatment. In essence, the
argument is that foundations and other charities generally do not pay income taxes, sales
taxes, property taxes; and donors are able to deduct charitable contributions to those
organizations – within certain limits, obviously. This is money that would otherwise be
collected in taxes and be available for the government, so the argument goes. Because it is no
longer available, it is “public money” that is in the private sector, and it should be used to
serve public purposes. It should be used with a quid pro quo-type analysis to ensure that all
the public is getting served or everybody is getting their fair share or their equitable portion.8

In How Public Is Private Philanthropy? Professor Brody and I present essentially five
reasons – both together and in some ways independently, but there is some overlap – why the
tax-favored-treatment analysis to support public money doesn’t work the way it is purported
to work by some. I want to address three of those here.

The first is the nature of the covenant between the donors who are getting the deduction and
the government, the public, and the organizations that are benefiting from the exemption. The
covenant is based on what is in the statutes and regulations. There is not much by way of
legislative history, as you look at the exemption and the deduction statutes. The Revenue Act
of 1894 mentions an exception for what we now call exempt organizations, recognizing that
charities should not suffer under a bill imposing income tax obligations (on corporations). In
1917 in the context of the First World War, there were those in Congress who suggested that
a charitable deduction was worthwhile because otherwise there would be fewer funds to
support the charitable work of organizations like the Red Cross.

But as I said, there is not much in the legislative history; there is a void. And over the years,
several different theories have been proposed to try to fill that void. Some of them are based
on a subsidy theory – that the tax-favored treatment is essentially a subsidy from the
government to these organizations. Other theories have focused on the tax base and how the
government levies taxes, allows deductions, and treats expenses for the operations of
foundations and other charities. There is a third group of theories that I gather under the
thinking of “metabenefits”9; foundations and other charities provide such intangible but
significant benefits to our society that to tax them or to not allow deductions would interfere
with these higher-level benefits.

7 See How Public Is Private Philanthropy? p. 34.
There are gaps in issues within each of these theories. There is no theory that covers everything that needs to be covered from beginning to end. Nonetheless there are great conversations to be had, mostly among legal scholars but in Congress as well, as there are practical implications.

The covenant in the statutes is that these organizations – foundations and other charities – are obligated to pursue charitable purposes as defined under 501(c)(3) and accompanying regulations, section 170, which references the same thing for the deduction. They are not permitted to pursue or allow private benefit. There are a host of other statutory obligations – for instance, severe limits on lobbying with private foundations and absolute prohibitions on political activity. There is also the Unrelated Business Income Tax (UBIT) regiment, the [Section] 4940 regiment that applies to foundations, and [Section] 4950(a) and others.

These are the obligations that the organizations are required to abide by. It is the covenant that exists between the organizations and government. Nothing about these obligations undermines the privateness, the independence, or the autonomy of the organizations. The covenant can put some boundaries around what is or is not deemed a “charitable purpose” – these organizations aren’t free to just go and do whatever it is they want regardless of anything else. They are expected and required to stay within the confines of the law.

The second argument against the tax-favored treatment has to do with the inconsistencies we would have in the tax code and in tax policy if the exemption and deduction were to be treated differently than other tax-favored treatments from which individuals and for-profit businesses benefit. There is a legion of benefits that individuals and for-profits get by way of tax credits, deductions, et cetera, that has the same practical effect on the public treasury as does the exemption and the charitable contribution deduction; it is money that would otherwise be in government that is not; money that individuals and businesses are able to use in furtherance of their purposes consistent with the purposes of the tax-favored treatment.

And yet these individuals and for-profit businesses are still private; they are still independent; and they are still autonomous.

The argument does get made that the for-profit sector is not beyond further regulation; we do have a host of regulations in the for-profit sector. There are securities regulations, communications regulations, environmental regulations, and more. But those regulations do not evolve from the tax treatment. They evolve from other factors and other interests of the public and that government has in the regulation.

The third opposition argument that I want to discuss very briefly, an inconsistency argument, is that governments do make grants directly; they do engage in contracts directly; and in the context of doing so they impose certain restrictions and conditions with which people are expected to comply. To treat the tax exemption and deduction, the tax-favored treatment for foundations and other charities, more harshly than the regiment associated with direct engagement by government seems an inconsistency that ought not to stand. Even direct engagement involves an element of choice by the organization engaging with government. An independent, autonomous, freely made choice to engage with the government in that way, and subject to accepting those particular conditions, is distinguishable from the exemption and the deduction, which is essentially a pact of engagement by government with the organizations where the decisions are actually made by private individuals or the private exempt organizations.
In conclusion, foundations and other charities, as I mentioned before, rest at a critical intersection, a critical focal point between the government and the business sector. Foundations and other charities are an important buffer in the interactions of those sectors, the interactions of all of us in our political, social, and economic systems. The autonomy and independence of the organizations in the sector are essential for idealism, creativity, inventiveness, and civic association, and they provide a key alternative to dependence on government and the whims of those in power.

One of the key characteristics of the sector is the pluralism of the sector, which frankly is part of what allows us to have this conversation. Infringing on the delicate balances and essential attributes and neglecting centuries of precedent should not certainly be done lightly. Our monograph concludes that it should not be done on the basis of the public money argument.

GLENN LAMMI: I would like to start today with a quote from Thomas Jefferson, which will set the tone nicely for my talk. He said that America should have, “A wise and frugal government, which shall leave men free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned – this is the sum of good government.”10

This quote appears in the excellent Philanthropy Roundtable monograph we are discussing today, and supports the statement of authors John Tyler and Professor Evelyn Brody that, “It should go without saying—but in the case of the public-money theory, it unfortunately cannot—that the limitation of government in order to preserve liberty is one of the bedrock principles of our constitutional regime.”11

It also seemed to me, when Washington Legal Foundation began to look at these issues more closely a year ago, that it goes without saying that the government’s decision to forego taxation of something or someone through an exemption or allowing a deduction doesn’t necessarily make that something or someone all of a sudden public. For instance, the federal government allows me to take a tax deduction on my home mortgage interest and property taxes. But does that allow the government to require that I hang an American flag on my home or display a “Save Darfur” sign on my front lawn? When I purchased my hybrid car, the federal government gave me a $500 tax credit. But can it then force me to adorn my car with an “I’ll give you my gun when you take it from my cold, dead hands!” bumper sticker, or one declaring “meat is murder”? (Laughter.)

Clearly, my assumption was naïve, given how easily some in government and even the philanthropic world assume that private money donated or received for charitable purposes is in fact a government subsidy, and thus “public money” or “our” money. Washington Legal Foundation is thus grateful for Professor Brody and Mr. Tyler’s exhaustive and compelling analysis of the “public money” issue.

Rather than expound further upon the legal and public policy issues that explain why private charity is not public money, which John Tyler has done so well here already, I would like to talk about why it is so important to have solid scholarship on this particular issue. The notion that charitable money is wholly or partially public money underlies an effort to inject

government deeper into the private management and missions of foundations and the nonprofits they support.

Federal law and ages-old common law lay out the limits of government oversight of charitable institutions very clearly. Marion Freemont-Smith of the Hauser Center for Nonprofit Organizations at Harvard’s Kennedy School put it best when she wrote that the law’s proper role “is to ensure that each charitable organization is carrying out the purposes for which it was established, and that its managers are not obtaining personal benefits from their positions at the expense of the charity. With few exceptions, the law neither attempts to control the decisions of managers, made in good faith, as to how the purposes will be achieved, nor how their organizations will be administered.” The last part of Ms. Freemont-Smith’s quote is a very inconvenient truth for some organizations and public officials who feel that foundations and other charities do far too little to directly and substantially assist what they call “marginalized or vulnerable groups” in society.

This perception was put into action last year as the Greenlining Institute and others sought passage in California of the Foundation Diversity and Transparency Act, better known as AB 624. On its face, the proposal appeared benign: foundations should provide the public with more information about their organization and their charitable giving. I think it was sold that way very effectively at the beginning. When you look closely at the specific information sought, though, it laid bare the sponsors’ true intentions. It asked of foundations, “What race or gender are the members of your board? How much do you give to groups serving ‘specific’ marginalized communities?” I must note here that the bill specified only 7 minority designations out of the 126 cited as distinct in the last census. It would seem the other 119 need to increase their contributions to California Assembly members. “How much do you give to groups whose boards include members of those 7 minority groups?”

The proposal measures a foundation’s success at helping the poor or oppressed not through its competence or creativity, but through its meeting some vague numerical goal of what is “enough.” Two officials from Community Advocates, Inc., a leading Los Angeles nonprofit focusing on human and race relations in the city, decried that the proposal was, “An unprecedented intrusion by government into the realm of charitable giving . . . it is the first step in setting government-mandated priorities as to where charitable dollars should go.” There was a great deal of opposition to the law itself. Unfortunately — in our opinion — ten California foundations got the message; they pledged to make multi-million, multi-year investments in minority communities, and AB 624 was dropped.

The idea has not gone away. Greenlining has of course carried its mission on to other states, such as Florida and Pennsylvania, though without success. Recently, the group issued a breathtakingly unscientific report on the percentage of “people of color” on foundations’

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13 On April 7, 2008, Hudson Institute’s Bradley Center hosted a panel discussion on this topic featuring John Gamboa, the executive director of the Greenlining Institute. The complete transcript can be found online at: [http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=528](http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=528)
15 Id. at 1.
boards, limited this time to only three minority groups and including a Scarlet-letter-like asterisk by those foundations that didn’t respond to their information requests.16

The problem with Greenlining’s approach was best summed up by a Heinz Endowment spokesperson who, when asked why they didn’t respond with the data the group sought from Pennsylvania foundations, replied, “Reducing an important issue, and a complex one, to a single data point is shallow methodology.”17

And then we have the more recent Criteria for Philanthropy at its Best,18 issued by the National Committee for Responsive Philanthropy (NCRP). Paul Brest of the William and Flora Hewlett Foundation, who is very well respected in the philanthropy community as well as the constitutional law community and who also happens to be a donor to NCRP, wrote in May that Criteria “concealed Greenlining’s fist in a velveteen glove.”19 Among other things, NCRP’s Criteria tells foundations that they don’t practice “philanthropy at its best” if they aren’t providing 50 percent of their grant dollars to “benefit lower-income communities, communities of color, and other marginalized groups, broadly defined,” and devoting “at least 25 percent of… grant dollars for advocacy, organizing and civic engagement.”

Now as an advocacy organization, Washington Legal Foundation would be thrilled if 25 percent of all the foundations out there would give their money for that. Whether that is something that is good for everybody, however, is open to question. Mr. Brest decried this as “philanthropy by the numbers,” where numbers are a “crude proxy for impact.”20

Of course, it’s entirely up to foundations to ignore NCRP’s Criteria. But if the criteria were to be embraced as government policy, that would be an entirely different matter. NCRP’s Aaron Dorfman assures us that, “I don’t believe that politicians should decide where foundation dollars go any more than I believe the government should mandate how much protein should be in a frozen pizza.”21

However, as NCRP put it in a prepublication copy of its Criteria report, “Policymakers may consider the criteria valuable when considering regulations or legislation that affect institutional grantmaking.”22 Members of Congress on committees with tax-related oversight who concur with NCRP and others on the concept that money donated is public money,23 are certainly prepared to step into this fray. We’ve heard from a member of the House Ways and Means Committee, Xavier Becerra, that he has “intense concern”24 over how the poor and disadvantaged get short shrift from charities, and that “we’re not trying to mandate

18 Available at http://www.ncrp.org/paib. The Bradley Center held a panel discussion on this publication on May 28, 2009, a complete transcript of which can be found online at: http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=665
22 Supra note 9.
something, but we will if you don’t act.” We’ve also heard from Senate Finance Committee ranking member Charles Grassley, “It’s fair to look at what benefits charities provide in return for the preferential tax treatment they and their donors receive.”

In the grand scheme of issues facing this country, I’d like to think that changing the tax code or somehow circumscribing what constitutes a “public purpose” would be way off Washington’s radar, but as Rep. Becerra and others constantly remind us, there’s gold in them hills – billions in foregone tax revenues.

In Washington Legal Foundation’s opinion, what we have seen over the past several years is just the latest iteration of a decades-long effort to more narrowly define what is “in the public interest” and thus what merits charitable tax preferences. Whether that is done by government fiat or subtle and not-so-subtle non-governmental advocacy and education, it is not in the best interest of the public, and especially not in the best interest of the “underserved.”

The beauty of American philanthropy and the civil society it has created is its diversity, with a universe of benevolent foundations and charities taking a variety of approaches to address what they see as society’s most pressing problems. I really saw this walking here today down Massachusetts Avenue, seeing the buildings of Brookings Institution, the Carnegie Endowment for International Peace, the Congressional Black Caucus Foundation, and the Peterson Foundation, a constellation of nonprofits that are all doing good work, trying to get things done for society.

Congress clearly intended a broad, pluralistic approach to what constitutes a charity, not a narrowly defined one. Seeking “social justice” as defined by Greenlining or NCRP is not the mission of many foundations and the nonprofits they support. They would not only be violating their donors’ intentions if they shifted half of their giving to the “underserved,” they would be leaving the public issues to which they are devoted – pardon the repetition here – underserved. Organizations which broadly support causes like the arts, health research, aging, education, and military veterans provide benefits to marginalized groups, but would it be enough to retain full tax benefits?

Would nonprofits which are dedicated to the underserved but do so in a non-traditional way meet NCRP’s standards? Would the St. Bernard Project, which is rebuilding houses for people of all races and financial statuses affected by Hurricane Katrina, measure up? Or would Robert Woodson’s innovative Center for Neighborhood Enterprise? Or the Careers Through Culinary Arts Program, which promotes foodservice career opportunities for lower-income youth? I think it’s very important for those who see foundations and other charities merely as private managers of public money to ask themselves, do I really want government so profoundly involved in philanthropy?

Foundations and charitable organizations work because they aren’t the government. Teresa Odendahl, a former chair of NCRP, has said, “At its best, philanthropy provides a check

26 Supra note 13.
27 See http://www.stbernardproject.org/v158/.
28 See http://www.cneonline.org/.
29 See http://www.ccapine.org/.
against corporate or government domination or indifference.”30 If she’s right, and I think most would agree she is, then how can more government benefit philanthropy?

As someone who works for a legal policy nonprofit, my view is that we need more, not fewer, voices and advocates out there on all sides of issues. A group like Washington Legal Foundation fills a void in the courts and the court of public opinion, and advances ideas and arguments that either don’t get considered or get short shrift with these key audiences. Clearly all the best ideas don’t emanate from government, and we need a lot of good ideas right now.

Leaders in the foundation world such as Pablo Eisenberg (in attendance), 31 Pew Charitable Trusts’ Rebecca Rimel,32 and Kauffman Foundation’s Carl Schramm have called on foundations to be bolder and take more risks. But will that be any more likely with the government more involved in setting and judging foundations’ missions? Will the poor and disadvantaged really benefit from the political logrolling and special-interest favors that will ultimately result from a politicization of charity?

Even if some in government say they won’t get that involved, they just can’t help themselves. For instance, it’s only been several weeks since President Obama pledged to take a hands-off approach to the management of General Motors, but already we have members of Congress from both parties calling to ask the nominal GM CEO to save distribution centers and plants in their districts.33

And, finally, while the proponents of more government involvement may reap benefits from it today, what about four, eight, or twelve years from now? What if Washington comes under new management? What if that management feels that foundations and nonprofits that support humane treatment of terror suspects, socialized medicine, and limits on carbon emissions and same-sex marriage are working against the public interest?

I started with a reference from the Philanthropy Roundtable monograph, and as a nice bookend, I will end with one. This from Jennifer Wolch, dean of the UC-Berkeley’s College of Environmental Design, who wrote in 1990 that, “The most troubling dilemma of the shadow state is that the voluntary sector may become a puppet or pawn in the service of goals that are antithetical to their organizational mission. Organizations that don’t conform or are not ‘ideologically correct’ from the perspective of the state at that given historical moment may be denied access to direct and even indirect resources.”34 This is as relevant and thought provoking today as it was almost twenty years ago.

Thank you.

RAY MADOFF (pronounced “mad-off”): This has been an incredibly interesting discussion. Now just so it’s not a distraction, let me just start off by explaining a few things about my name. With regard to my first name, no, I am not a man. As for my last name, more recently I’ve had to start saying to people that, no, I’m not related, don’t know him, never met him. (Laughter.)

It is a pleasure for me to be here to participate in this important discussion. In an era in which there has been an increasing tendency for people to speak only to those who have similar viewpoints as theirs, I think that the Bradley Center for Philanthropy and Civic Renewal stands out as a place which has consistently been bringing together people with diverse views to discuss some of the most important issues of the day. They should be commended, and it is a real pleasure to be a part of it. It certainly sounds like they are continuing that tradition today.

This report by the Philanthropy Roundtable addresses the question, how public is private philanthropy? In the report the authors suggest that there has been a mischaracterization of philanthropic organizations and their assets as being essentially “public,” and that this mischaracterization has resulted in inappropriate interventions as well as threats of legislation regarding the operation and governance of charitable organizations. While the authors don’t spell out the proposals they object to, they allude to a number of initiatives, including those that seek to cap compensation paid to trustees and other proposals – I assume the one by NCRP (Criteria for Philanthropy at Its Best) – designed to encourage organizations to serve the poor and marginalized groups.

The implication of the Philanthropy Roundtable report is that if private philanthropy were more accurately characterized as private rather than public, then we would not see this type of meddling. Moreover, the report goes even further to suggest that this mischaracterization of charitable organizations – being public as opposed to private – is going to lead to a futuristic dystopia in which (and here I quote from page 39), “The philanthropic sector would no longer be a product of pluralistic choices freely made regarding the expenditure of monetary and human resources.”

It all sounds like pretty serious stuff. However, in my comments today I would like to suggest that the authors of the report miss the mark in framing the question as they do, and that a more nuanced approach to the problem would provide a more nuanced – and ultimately more helpful – answer.

The report takes a complicated question – how should we think about the financing and obligations of charitable organizations in our society – and attempts to convert it to a question of taxonomy – are charitable organizations essentially “public” or essentially “private.” The unstated promise of this framing is that once we have successfully categorized philanthropy, then all of the hard questions will go away.

The problem with this framing is two-fold. First of all I take issue with whether it accurately characterizes the terms of the debate. Despite the assertions made in the report and some of the comments today, I am not aware of any reputable person saying that charitable organizations are public organizations just like branches of the government, or that their assets are “public assets” just like the state or federal treasury. Maybe these things are being said and I’ve missed them, but to me these are not the terms of the debate that I have been
reading about. The authors expend an awful lot of energy striking down these points, but they really just represent a straw man, and it does little to advance the discussion.

Secondly, the more troubling problem with their analysis is that even if the authors were successful in categorizing charitable organizations as 100 percent private, this would not deliver the promised “hands-off” results. Private entities are not insulated from outsiders seeking to regulate their affairs for the good of the public. As the concept of stakeholder has taken root, we as a society have come to see that you need not be an owner in order to have a significant interest in an entity’s activities. Private companies, just like charitable organizations, are frequently asked whether their activities are consistent with the public good. And if you are going to turn to the world of proposed state legislation, there is a litany of state legislation proposed to say that corporations chartered in their state should meet standards a, b and c.

Moreover, it should not be surprising that whenever there is a large investment of public resources in private enterprises – as there clearly is in the charitable field – there is often an increased measure of public oversight. Consider for example the recent pay czar who has been appointed to oversee the salaries of companies receiving Troubled Asset Relief Program (TARP) money. For those of you who read today’s Wall Street Journal, right on the front page they have an article about the CEOs of bailed-out banks who flew to resorts on firm’s jets. This was about people going to Greenbrier on private jets after getting a government handout. No one is saying that these companies are public, that we own their assets, but they are subject to an increased level of scrutiny because of this investment of capital.

I feel that public-versus-private is the wrong question. But if it is the wrong question, what is the right one? The appropriate question we should be asking ourselves today is whether we are satisfied with the current state of affairs. Regardless of whether the public are “owners” of charitable entities, through the tax code we as taxpayers are investing billions of dollars each year in the charitable sector. We need to ask ourselves, are we getting everything we want out of the investment?

Our world today reflects the results of a bold experiment. Historically there was a period in the nineteenth century – which I won’t go into – where the world was very different. Charities had to be chartered by the government. They had to get absolute public approval. Since then, we’ve pursued this bold experiment where we’ve established a very broadly encompassing definition of what constitutes “charitable,” one that enables people to choose equally among purposes as broad as “for the betterment of mankind” to purposes as narrow as “for the preservation of Huey aircraft.” And they’re all fine; they’re all charitable. If you’re wondering, Huey aircraft were used in Vietnam – but then again, if you’re wondering, then maybe the folks who work toward the preservation of Huey aircraft should be doing a better job. (Laughter.)

The second feature of our experiment is that we have provided extremely generous subsidies for these endeavors through our tax code. Yes, charities don’t pay tax on income. But even greater than that is the deduction for “charitable” for income tax purposes, which is limited, but there is also an unlimited deduction for estate tax purposes. Throughout we have lots of generous subsidies, and the subsidy is the same regardless of the particular charitable purpose chosen.

Finally, we impose few obligations on the operation of these organizations.
It strikes me that it is totally appropriate for us to consider the results of the experiment – particularly in this time of real economic need, when the government has more demands on its resources and fewer tax dollars to meet these demands. Perhaps we are happy with what we see. But for those who are not, it is not surprising that there is some pressure to modify the circumstances that brought us to this place.

If we consider the issue of easy entry to status as charitable organizations, perhaps this should be tightened up. This has been done in England in recent years, where the most recent charities act provides stricter meaning of what it means to be charitable. Schools will no longer be presumed to qualify if they merely educate paying students; they must serve additional public benefits.

Moreover, in this country as well the contours of what makes something “charitable” have regularly been subject to reflection and modification. I want to touch on two examples from the past fifty years. Firstly, the 1969 legislation significantly revamped what types of donations would qualify for the charitable deduction, and cut back on things which people felt should qualify but the government said, no, the charities aren’t getting enough resources. Secondly, there’s the 1983 Supreme Court Bob Jones case, which I think is particularly important to remember today. That was a case that was litigated all the way up to the Supreme Court addressing the issue about whether a school which discriminates on the basis of race should be considered charitable. The Supreme Court said, no. This reflected a significant shift from prior law.

If we consider the issue of generous financial support, perhaps we can no longer afford a full deduction for transfers to charities. Particularly if it is the case that little money is going towards those who are most in need.

I must add one thing here: There was much mention about the legislative history, but How Public Is Private Philanthropy? failed to mention the more recent legislative history – from the 1938 legislation on. The deduction is discussed – and this was quoted by the Supreme Court in Bob Jones – as follows: “The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds and by the benefits resulting from the promotion of the general welfare.” I wasn’t aware of this legislative history but that sounds pretty quid pro quo to me!

In the report, the authors suggest that health care and education for the poor are better addressed through public dollars than through private philanthropy. If that’s the case perhaps we should go through that route, but if we go that route we are going to need the money from somewhere.

I personally don’t think we should be cutting back on the charitable deduction, but I certainly think it is something that should be considered if we want to have this let-everybody-do-what-they-want route.

Finally, the issue that is most likely to attract legislative change is the lack of oversight of private charitable organizations. Perhaps it no longer makes sense to simply trust organizations to “do the right thing.” We have seen time and time again that while many
organizations pursue excellence, others fall short of the mark. This is true both in the public and private sector. Perhaps it is now time to adopt provisions that would increase the likelihood of charitable dollars being used to fulfill charitable purposes.

The drafters of the report use an excellent example to support their argument that there should be a “hands-off” approach, and that’s the idea that just because you get a home mortgage deduction, it doesn’t mean that the government can tell you how to decorate your house – or your car, with the bumper stickers. It’s a really compelling example, and I think it’s worth a response. The problem with this argument is that it fails to take into account the relative purposes of the deductions. The home mortgage deduction is designed to encourage the purchase of residential homes. Once a home is purchased, the purpose of the deduction has been fulfilled.

In contrast, the purpose of the charitable deduction is not fulfilled simply by transferring the property to a foundation or donor-advised fund. The transfer of assets from one bank account to another does nothing for the betterment of the world. In order for the purpose of the charitable deduction to be fulfilled, the money needs to be put to charitable use. In order to increase the likelihood of this happening, there are areas that are ripe for oversight. These include a limitation, or even elimination, on fees paid to trustees and a limitation on administrative expenses. It might not be appropriate to grant a charitable deduction to organizations that spend more money on administrative expenses than they do on fulfilling their charitable mission. Finally maybe we should have a requirement that charities spend more of their assets currently, rather than in hoarding them for a future that may never come.

These changes would not interfere with charities; they would simply define what it means to be a charity – this is the question we need to constantly ask ourselves.

RALPH SMITH: If this were a more culturally attuned audience, this is a point where you would say, and the church says, “Amen!” (Laughter)

In an audience filled with law professors, I have to admit that I read the Philanthropy Roundtable report How Public Is Private Philanthropy? carefully, but I didn’t read all the footnotes. (Laughter.) So if there is something in the footnotes, I didn’t get it. I also have to say that in an audience with both John Edie and Andrew Schulz (former general council and current deputy general counsel for the Council on Foundations, respectively), two people who know more about this than anybody else, I feel as if I have some backup here, should it be needed. But Bill (Schambra) has always been kind to me; he has not required me to meet the absolute-certainty test that generally is required for these types of engagements. So he has allowed me to come often with as many questions as answers. With that in mind, let me offer a couple of additional observations.

First, I think this was a really good piece of work, and I really encourage everybody to read it. I think there is an implicit plea for some language discipline; the authors make that point. But then in many of their own arguments, they seem to conflate philanthropy generally with philanthropy as practiced by foundations. It feels to me that there is an important distinction to be made that has a whole lot to do with the arguments that are put forward.

As importantly – and I think we heard it here today – in this discussion of public and private, “public” gets defined as “government.” It loads the argument; if you figure out your position on government, you figure out what side of this argument you are on. It feels to me, as Ray
(Madoff) suggested, that there is a more nuanced conversation that we need to have. I don’t know anybody who has really taken the strong view about government.

I think How Public Is Private Philanthropy? does a fairly decent job, and it’s a really good refutation of the broadest public money argument. But in many respects, because it is the broadest argument, it is the one virtually no one makes. So there is sort of a straw-man quality to the debate. As such, it feels as though this is a very good piece of writing about a very narrow point, and one that’s not going to really be debated by very many people just simply on the merits as stated.

The lynchpin of the argument is this “original bargain” or “covenant.” There are echoes of original intent. For those folks who believe in original intent – that that ought to be the interpretation – there is a tilting towards believing that there is more there than there is. It feels as if when it all comes down to it, this original bargain or this covenant finds its root in the debate and decisions around the Internal Revenue Code, particularly around section 501(c)(3). If that bargain or covenant is grounded in a provision of the Internal Revenue Code, unless one also makes an argument of pre-emption, then in many respects it suggests that this argument fails in at least fifty states.

The argument on one hand is overly narrow, and on the other hand it overreaches quite a bit. I would love to hear the authors talk about that. The argument, as thorough as it is, doesn’t respond to some of the knotty questions that I think are important, the ones really worth chewing on a bit. For example, 501(c)(3) imposes significant restrictions on political involvement, involvement in political campaigns and lobbying. This is a real incursion on what one would normally think of as First Amendment rights. If 501(c)(3) could do that, then what else could it not do? Why is it that we would say, that is part of the original bargain? But as far as inviting, and directing, and wondering out loud about whether more public benefits should go someplace, why is that a deeper incursion on private decision making than burdening private decision making with a limitation on First Amendment rights? This seems to me an interesting question that is worth discussing. I don’t have a good answer for it, but I suspect that we ought to talk about it.

If donor intent is unclear, ambiguous, or is made irrelevant or illegal by the passage of time, who decides? Are we willing to admit there is a role for government or for the public sector, however one defines it? And does that make it “public money” or are we saying that there is a legitimate role over and above barely enforcing the “no private benefit” rule?

As we think about the conversion foundations which have come out of Blue Cross Blue Shield, when a nonprofit decides that it really should do better as a for-profit and somebody steps in to take a look at those assets and figure out what to do with them, isn’t there a legitimate role there? And how is that legitimate role consistent with the underlying bargain, over and above just making sure there is no private benefit?

Should the current board of directors or board of trustees of the Annie E. Casey Foundation, and those of us who manage that institution have precisely the same discretion and scope of authority in decision making as Jim Casey, who founded it and named it after his mother? Does the passage of time and does succession do anything to this?

Are there circumstances under which size matters? In the private sector we understand that sometimes to preserve competition we ought to pay attention to monopolies. If on the
philanthropic side we now have foundations whose assets are larger than the gross national product of some countries, does that raise a question? And if one could imagine the ten largest foundations getting together and deciding to go in a particular direction, would that combination of assets so tilt the field that the pluralism that we celebrate could be compromised? And if that pluralism is compromised, who should do what?

My concern is that the certainty around this original bargain does not address the real issues and challenges that are being raised. It feels to me that what Aaron Dorfman and his colleagues at the NCRP might be inviting (with their publication of *Criteria for Philanthropy at Its Best*) is a sort of a public conversation that goes beyond 501(c)(3), a conversation along the lines that Ray Madoff just outlined. It may be that it’s time for our version of a constitutional amendment within this area, or a constitutional convention, because it seems as if this is not outside the realm of public – not government, but of *public* – decision making.

I want to use this report as an invitation and the opening of a public conversation or broader conversation without accepting its position that somehow we will do irreparable injury to the delicate balance struck by the original bargain or the covenant. It feels to me that philanthropy writ large is strong enough, broad enough, well embraced enough to engage in that conversation, a conversation which in many respects could be long overdue. It’s a conversation which might essentially take us in some exciting new directions, and in directions that would be consistent with the notion that philanthropy is where we find the best expression of idealism, the best potential for creativity, and the best embodiment of the diversity and the pluralism which we celebrate as a nation.

(Applause)

WILLIAM SCHAMBRA: That was a terrific series of opening statements. Ralph (Smith) let me just ask you this: I suspected this report, this monograph, was prompted in part because, in the convention centers that host the Council on Foundations year after year, there has been sort of an unchecked flow of rhetoric that this is public money without a great deal of pondering the questions which you have raised – and through no fault of your own, who is always scrupulously careful about these matters. But nonetheless, I wonder what your view of that is, and your fellow panelists should of course join in. I don’t mean to put you on the spot as the chairman of the board of the Council on Foundations! But what would be your posture towards that rhetoric in general? Surely you have heard it; of course you have never indulged in it. Is that possibly one of the reasons for the monograph being considered to be necessary by legal sticklers?

RALPH SMITH: When a certain congressman said that philanthropy was a $30-billion-dollar earmark – er, who’s counting, a $42-billion-dollar earmark – I must admit that came as a bit of a surprise to me. That was never the way that I thought of philanthropy. I think there is a lot of shorthand, and the public conversation has been lacking in nuance, but I think people say “public money” when they mean to say “public benefit money.” So the truth of the matter is, I discount it a great deal, because I think most of us understand that there is kind of a gradation going on here. We are really talking about the benefit and how we all try to make sure philanthropy is more effective. And we have significant disagreements about that, but I don’t believe that there is any groundswell within the Council on Foundations or among foundations generally to compromise the autonomy or the essentially private nature of philanthropy. What I think there is is probably a lack of language discipline on both sides of the aisle on this one.
WILLIAM SCHAMBRA: Glenn (Lammi) and John (Tyler), there’s a very interesting point that Ralph (Smith) and Ray (Madoff) both raised. Having dispatched possibly with the notion that this is public money, nonetheless there is an understanding of charity – as Professor Madoff points out – which has led to restrictions of various sorts on the use of charitable dollars on behalf of public purposes. How does that square with the underlying argument of your monograph, in the definition of charity which often imports public purposes, i.e. no involvement in campaigns, no overt lobbying efforts? Is that an unconstitutional infringement? Some people argue that, incidentally, and some people on the left even make the argument that to keep nonprofits and foundations from advocacy is an infringement of First Amendment rights. How would you wrestle with that issue?

JOHN TYLER: Evelyn (Brody) and I did wrestle with that issue, and frankly continue to wrestle with the issue. I think all the panelists made wonderful points – and in fact helped make the points for us – that this is a complicated conversation; it is a nuanced conversation; and there are sledge hammer elements to the conversation as well. This is one of those elements.

One of the things that the monograph does not stand for is the proposition that the sector cannot be regulated. That is not what we are saying. There are appropriately applicable statues and regulations to help determine what organizations in the sector are able to do, and what the limits are. Congress does have certain rights as Congress, and state legislators have rights to be able to impose certain restrictions.

Part of what the monograph is getting to, though, is the question, what is the basis for the restriction? What is the basis for the conditions with the “no political activity” restriction? Is that an imposition on these organizations because it’s public money? Or, is it an imposition to help better define and better restrict the ability of individuals, or individual organizations, to use the money in furtherance of their private purposes towards a particular political agenda? There is an argument that can be made that the particular political agenda is in fact a private purpose as oppose to a charitable purpose. So the restrictions and the conditions are not based on the notion that it is “public money,” but rather on other purposes to be served, like defining “charitable purpose.”

GLENN LAMMI: I think that the issue of political involvement and the use of money for those sorts of ends may necessitate another monograph of sorts. I think it really is an interesting issue that Ralph (Smith) raised – if government is able to restrict someone’s ability to speak that way, what else can’t it do? I think one of the reasons why Congress decided to keep charitable organizations out of politics was the fear of politicization of the entity itself. But I think that compelling arguments can be made that in certain situations, getting involved in lobbying for a specific bill is the best way to meet a public purpose. Ultimately laws are passed by Congress through the process which involves lobbying.

I honestly wonder: if more charitable institutions were involved in lobbying, would there be this horrible aura around the concept? It seems so distasteful for people to give money to lobbyists to go out and advocate for what they do. But how much different is what lobbyists do from what a lot of organizations like Washington Legal and others that are involved in advocacy and education do?
JOHN TYLER: I would also add, and Evelyn (Brody) will remember because I’ve forgotten which case — there’s a court case which addressed this specific issue in some ways. Part of the reason the court came down on the side of the public, or the political activity restriction being legitimate or not an infringement on First Amendment rights, is that there is an avenue for these organizations to voice their speech — that is, through setting up companion 501(c)(4) organizations. So there is not an absolute bar, an absolute prohibition, because of this alternative avenue.

WILLIAM SCHAMBRA: Ray (Madoff)?

RAY MADOFF: That leads to a follow-up question: It seems like a lot of the discussion is about getting one’s rights to do various things taken away, but one can lobby, for example; one just can’t lobby as a tax-exempt organization. So, don’t take the charitable deduction for the donors, and then do whatever you want! No oversight! No one tells you what to do!

JOHN TYLER: And you have broader rights and broader freedom than would otherwise exist.

RAY MADOFF: Absolutely! You would get a lot of agreement with that. You could maybe have two types of organizations for choices of these activities.

JOHN TYLER: And there are donors who have made those choices and who are making those choices not to pursue the tax deductibility. They are either setting up for-profit enterprises, nonprofit enterprises that are not tax exempt, or offshore enterprises.

RAY MADOFF: Then why isn’t that an answer to this problem? It’s not really a question of rights. You have this other avenue available to you.

JOHN TYLER: We are now talking about the potential for changing the dynamic of a very important sector that has been around for centuries. People have those rights, they have those choices, and they have had those choices, those other opportunities and other avenues. But the sector as it exists now is still one of those legitimate choices, subject to the restrictions and requirements that do exist.

WILLIAM SCHAMBRA: Let’s go to the audience — we have a terrific and distinguished audience!

ROGER REAM, The Fund for American Studies: I’m a little bit troubled with the discussion so far, and would like to ask Mr. Tyler if he could respond to an argument that Professor Madoff made about the subsidy issue.

I’m the president of a nonprofit and I don’t view my organization as having any taxpayers investing in it, or it being subsidized by the government in any way, because we don’t take direct government grants. Maybe the analogy would be, if you have two soda choices, Coca Cola and Pepsi, and the government comes along and puts a ten-cent tax on Pepsi, I don’t view that as subsidizing Coca Cola; I view that as penalizing Pepsi.

It seems to me that Professor Madoff would accept the idea that the nonprofit sector is getting a $42 billion dollar earmark from Congress because of the exemption. And I think, Mr. Tyler, you were too quick in that last response to concede that because there are alternatives,
therefore that allows government to impose regulations on the nonprofit sector. I would say that case may be flawed. I’m particularly concerned about efforts to clamp down on First Amendment rights of clergymen and issues like that.

JOHN TYLER: I didn’t intend to concede that point. If I did, I retract my answer! (Laughter)

The issue of subsidy is actually a very complicated issue. Ralph (Smith) pointed out that some of what we are arguing or dealing with ourselves, even in the monograph, is the issue of semantics. We went to some length in the introduction, talking about the semantic difficulties that exist in the sector as it relates to the term “public money,” as it relates to “public charity” and “private foundation.” “Subsidy” is one of those words we don’t actually talk about specifically in the introduction. But there are different ways to look at it. Some folks think that if it’s not in the public treasury and it otherwise could be, it’s a subsidy. Some folks will drill down and say, well, subsidy is only those direct, concrete, tangible decisions made by government to send money from point a to point b; they’re distinguishing a direct subsidy from what might be considered a passive subsidy, where it is not government making the decision.

In the US Supreme Court case *Walz v. Tax Commission*, Justice Brennan in his concurring opinion talks about this distinction and characterizes indirect subsidies as “pregnant with involvement” by government. And he characterizes direct subsidies as “involving government forcibly diverting taxpayer income to the recipient” whereas an exemption is government refraining from devoting to its own uses income independently generated through voluntary contributions. So even the Supreme Court is wrestling with this distinction on subsidy, what it means, and what the semantic issues associated with are.

WILLIAM SCHAMBRA: So, Professor Madoff, would you agree? Is it a $42 billion dollar subsidy – would you agree with Congressman Becerra?

JOHN TYLER: Congressman Becerra says earmark –

WILLIAM SCHAMBRA: Yes, sorry – earmark.

RAY MADOFF: Well, I’m not going to agree with that because I sense from the crowd that that is not the thing to agree with! (Laughter)

But I do agree that it is a subsidy, and although the issue is a complicated one, it is complicated on different grounds. It is not so complicated that it can’t be understood. And I would like to just take one minute to look at this.

Some deductions are appropriate because they are a better reflection of income. So if you purchase something for $80 and sell it for $100 you are entitled to subtract that $80 from the $100 and that’s because that more accurately reflects your income. I’m not saying all deductions – every time the government doesn’t tax – is a subsidy. However, an insight of Stanley Surrey in the 1970s was that the government can spend money in different ways; sometimes it gives a direct handout, and sometimes it says, give us less. Some of those subsidies – like the one for your hybrid car – are in fact the same as if the government had sent you a check. The value of this tax expenditure analysis, the purpose of it, was to say that although they feel different to us, you should know they are the same, and therefore you should analyze them appropriately. It is a tool of greater insight.
This is where I take issue with some of the tone of sections of the monograph that talk about treating handouts differently than tax subsidies. If we give somebody a welfare handout, then they have to do all sorts of things. But if we just don’t tax them, then they don’t have to do things, then it’s just passive. The whole point of the tax expenditure analysis was to recognize that maybe these are the same; maybe they are not so different. To say that they feel different to people doesn’t really address the issue.

WILLIAM SCHAMBRA: Someone prove to Professor Madoff that we actually have a diverse crowd here! We have Aaron (Dorfman), we have Pablo (Eisenberg)! Somebody ask a tough question, okay?

(Laughter.)

RALPH SMITH: Well, while you are getting it – it’s quite possible that what we want to do is to promote philanthropy; we want to promote generosity among those who have (wealth), and encourage them to put private wealth to a benevolent purpose. It feels to me that there is a deep societal and shared interest in that. It feels as if part of what we also want to do is to encourage and promote better decisions, good decisions by those folks.

So on one hand government says that it wants to promote philanthropy and take into account the idiosyncrasies and the like, but there are certain things it is not going to allow charities and donors to do – like support terrorism, no matter how much they might like it; they draw a line and put some things on other side of the line. What I wonder is: Is there also a way, without compromising the decision, to do what the National Committee for Responsive Philanthropy (NCRP) is suggesting – lifting up some things so that they can be seen? NCRP is saying that x is “philanthropy at its best”; they’re not saying you have to do it. Is there a way to lift up some things so they get in the line of sight – people, and places, issues, and concerns that could be the natural beneficiaries of philanthropy? And if civil society isn’t quite doing that, is there a role for folks to do that? Would a glass-pockets, more transparent notion of philanthropy be a way of promoting better decision making on the part of folks?

We need to be promoting good philanthropy, more philanthropy, and better philanthropy at the same time. It feels to me that this is what we are struggling with, and if we maybe had a ceasefire in the ideological war we might actually be able to make some progress on that!

(Laughter)

JOHN TYLER: Ralph (Smith), some of what we were hoping, and I think what Philanthropy Roundtable was hoping, with this monograph was to stir conversation and debate around the public money issue, which sometimes muddies and clouds a lot of the issues that you raised, Ray (Madoff) – and Glenn (Lammi), the issues that you raised in talking about AB 624 and the NCRP report. We were hoping that we could get enough clarity around that issue so that we would have an appropriate context for these other debates to happen – and they should happen. I don’t think any of us involved with the monograph would say that there shouldn’t be conversations around diversity. There should be the right context and the right sorts of consequences and thinking and approaches around that. These are good conversations; it’s important for the sector; and in fact it protects the plurality of the sector for those policy debates to happen in a policy context as opposed to a context that might be perceived to be more threatening.
WILLIAM SCHAMBRA: One could be forgiven for thinking, Ralph (Smith), after going to the meetings of the Council on Foundations, that legally this is public money. The rhetoric is so prevalent that one might assume that question had been long since settled. To be perfectly honest, when I heard that you all were writing this monograph, I thought, “Talk about swimming against the tide and dredging up arguments that haven’t been heard in seventy-five years!”

JOHN TYLER: They actually haven’t been made very much. The topic is out there but the underside of it hasn’t really been exposed.

WILLIAM SCHAMBRA: Right, there were certain assumptions that have gone more or less unexamined for a very long time.

RALPH SMITH: I just have to go to more Council sessions; that is all I can say! (Laughter)

WILLIAM SCHAMBRA: I endorse that completely!

RAY MADOFF: Can I just ask a quick question then about the style of the report?

I do think that there would be a lot more agreement if the style was maybe different. A number of times throughout the report, How Public Is Private Philanthropy? you say that you are perfectly happy that there should be regulation drawing the line between private benefit and public charity, what constitutes charity, and what constitutes private benefit. My concern is that a lot of the reports that you reference complain that the folks who want more regulation or oversight want to “decide how many board members there are.” Those suggestions come in reports that are often very much focused on avoiding the private inurement problem by, for example, managing things like trustees’ fees and all that stuff. Don’t you think the report would have been stronger if you had said flat out, look, we think that a number of these proposals are appropriate because they really go to the nature of what it is to be charitable, and they go to the nature of private inurement? If you had carved out those things and then said, but we don’t think you should, and there are things that might be on the other side, that would be for me a more satisfying starting point so that we don’t have to go all the way back to stuff that shouldn’t really have to be argued right now, it strikes me.

JOHN TYLER: The danger with doing the carve-outs, or doing the targeting thing, saying, we agree with these things and they are fine but these other things we don’t agree with, is that we then run the risk of getting into the dirt of the issues when what we wanted to do with this monograph is to not have the specific issues about number of directors, about trustees fees, about 5 percent versus 6 percent payout, about administering to have those things.

RAY MADOFF: Those are very different things – number of directors and trustee fees are very, very different. One might go to management, and one goes possibly, to private inurement.

JOHN TYLER: Sure, but getting into that conversation as a policy matter is a different conversation than getting into it in the context of public money or not.

RAY MADOFF: Okay.
JOHN TYLER: And to get into it as a policy matter detracts from the public money argument in conversations that we want to have. So we would have rejected our own advice by setting things up in that sort of way. A colleague had suggested that we do something like that—presenting symptoms, if you will, as a medical diagnosis in a medical approach. What are the presenting symptoms here, and why don’t you lay those out and carve them out? Maybe that’s the next article.

PABLO EISENBERG, Georgetown University: I commend the authors for writing the monograph and launching a discussion. What confused me was the lack of distinction made between legal arguments and political arguments in discussing what regulations are legitimate or not legitimate. John (Tyler), at one point in talking about how businesses and foundations should be similar, you mention the justification for Sarbanes-Oxley as leveling the playing field. Why shouldn’t that apply to foundations? The nonprofit sector is the one major sector that has no level playing field; it is governed by an elitist group of wealthy professionals and wealthy people. Why shouldn’t that be the criterion? Why is it okay to have a rule about payout when certainly it is an interference with the management of the foundation in terms of how much money they can give? And why is an antitrust provision not okay, in terms of Ralph’s (Smith) question, if it would prevent what is increasingly becoming a mega-foundation field dominated by two or three founding members and the possibility of harm to democracy five years from now? The theory might discern what the tension is between political and legal.

But in a sense, who cares about the legal arguments and the points of origins? Most of the decisions are going to be political in future.

WILLIAM SCHAMBRA: That’s actually a very interesting question, which is not surprising considering it’s from Pablo (Eisenberg)!

(Laughter and agreement on the panel.)

WILLIAM SCHAMBRA: On the basis of this monograph, can we now anticipate, for instance, a kind of a retreat from the argument that this is public money? Will this legal argument have some effect on the broader political notion of the public nature of this money? Is that your intention—and going to Pablo (Eisenberg)’s point, is there an entirely different set of arguments going on in the political sphere that this legal argument won’t touch at all? To put it harshly, what if you haven’t really gone after the dragon in its den?

JOHN TYLER: There is a whole host of issues and arguments related to those issues in the political and policy sphere that this monograph doesn’t get to, won’t get to, and wasn’t intended to get to. To the extent that those issues in the political and policy sphere are shaped by the notion—an inconsistent ill-defined notion—that it is public money, then that has an impact on the underlying debate.

As far as the question about leveling the playing field, there is a very real difference between what the securities regulatory statutes and environment is as it relates to information—“leveling the playing field” as it relates to information—and “leveling the playing field” by distributing assets on some sort of a pro rata or equitable share or some other basis. The securities—and Sarbanes-Oxley among it—were intended to get to different things in leveling a completely different field.
JOHN EDIE, PriceWaterhouseCoopers: One quick comment before the point I want to make: In the twenty-three years I was with the Council on Foundations I don’t remember anybody in the Council on Foundations arguing that it was public money, so I’m not sure where that comment came from.

The point I want to make is that I draw a huge distinction, a big line in the sand, between Congress saying that if you are going to get tax exemption and charitable deductions, you can’t commit certain abuses, and Congress saying that because you have the exemption and deductions, Congress can tell you how you spend your charitable money.

In the sixties you had foundations that owned big organizations, big businesses, and were declaring no dividends; they were saying that they couldn’t give to charity because they didn’t have any money. Congress said, that’s an abuse, and we are going to regulate that. So you got payout and excess business holdings. Fast forward to top officials ripping off private benefits from the United Way of America; you got the intermediate sanction regulations. Two or three years ago, it was supporting organizations and donor advised funds that were being abused, and so you got regulations for that.

It’s not because it’s public money. It’s because you’ve applied for an exemption, and if you get this exemption you can’t carry out abuses. To me that’s perfectly fine – and we’ll see more of those because unfortunately part of human nature is to abuse systems as much as you can. But as I said, I draw the line on the other side of it because it is a very different thing to say to an organization that is living perfectly within all the regulations, filing its returns, violating nothing, because you have these exemptions, public money, and within the charitable field, we are going to tell you how you spend your charitable money. That’s a very different thing, and I think talking about abuse regulation is really off the topic.

WILLIAM SCHAMBRA: Mr. Edie was general counsel with the Council on Foundations, and of course never in an official document was there the suggestion that this was public money! However, Ralph (Smith), you will recall that when Congressman Becerra made his comment about the earmark, I didn’t exactly see the foundations rising up in horror at that remark. That is what I meant by the general comment.

JOHN TYLER: In one of our footnotes we cite a 1975 report by the Council on Foundations. The phrasing is slightly different, but they said that foundation assets are “not our money but charities.”

WILLIAM SCHAMBRA: Mr. Edie wasn’t there in 1975!

RALPH SMITH: Let me ask John (Edie) a question. One would say that the asset allocation policy of a foundation really feels as if it ought to be a matter for private decision making. So let’s suppose, for example, we have a number of foundations that had asset allocation policies that put them in a very highly leveraged, cash-short position. Then the economy tanks, and foundations find themselves having to significantly reduce grantmaking to nonprofit organizations, who had no say in that decision and had no notice of the foundations’ asset allocation policies and the private decisions that were made. Given the Sarbanes-Oxley approach, given what we see on the private side with the SEC, do you think it would be fair and appropriate to require asset allocation decisions to be reported on a timelier basis, so that folks who depend on foundations would have the kind of information they need to determine
the extent of their risk should something happen in the market? And if so, would this be an appropriate thing for Congress or for states to require?

JOHN EDIE: My first thought is that large private foundations file hundreds of pages listing every individual investment they have, so a lot of that information is ridiculously out there anyway, because nobody ever reads it, and it makes the return two thousand or three thousand pages long. I think that there are state laws that place obligations, with the Uniform Management of Institutional Funds Act and more recently the Uniform Prudent Management of Institutional Funds Act (UPMIFA). So there are state laws about fiduciary duties that can be enforced by attorneys general. If the question is, would it be beneficial for foundations or for that matter any charity with an endowment, university, museum or whatever, to be required to say, here is our asset allocation policy, and to make it public, several of them do voluntarily. I don’t see that as a big problem, particularly. I’m not sure that it would help the grantees in any way, shape or form, and my sense is that there are –

RALPH SMITH: – Not if it’s two years after you do it! But suppose that it’s relatively simultaneous. Suppose that you really knew that your biggest funder was very highly leveraged and would not have the cash on hand to make the grant on which you are depending next quarter. What I’m doing, actually, is just saying I think you drew that line about abuse, and I’m wondering whether that is really the abuse/non-abuse. I’m wondering whether we are at a stage where this notion of stakeholders would invite us to think about a broader conversation that’s not just a dichotomy about whether there is an abuse or not, but where there are practices which ought to somehow be looked at because they might have some impact on the field and some impact on the extent to which the foundation or philanthropy could continue to maximize public benefit.

JOHN EDIE: I guess my view on that is that pretty much everybody was hurt. I’m not aware of any foundations that were invested in the way you’ve described. Most foundations, most endowments, have lost money even though they could afford the most sophisticated and careful investment management information and advice that money can buy. In some circumstances they are down less than others, I think, because they did get good advice and they did hedge various things. So I’m not sure what that is going to gain.

Would there be an odd situation where you would be able to look and see that a foundation has 90 percent in junk bonds, and that would that tip you off that maybe you shouldn’t rely on them? Yeah, probably. But I don’t see that.

RALPH SMITH: Let me withdraw the question because I know Bill (Schambra) is looking at the clock and wanting to move along.

WILLIAM SCHAMBRA: One last question if we could. And you all can respond to that as well, if you want to get into that. But in the meantime, Kevin (Laskowski) has a question, and it will be our last for today. Kevin?

KEVIN LASKOWSKI, National Committee for Responsive Philanthropy: I would say to Mr. Edie that those who invested with Mr. Madoff were in exactly that position!

This monograph – I say this after having read it very quickly – is obscuring the larger public policy questions of what foundations ought to be about doing with the relatively settled question, I believe, of the legal status of who owns the money, it seems to me. The argument
is less about the legal status and foundation autonomy than what obligations foundations have to the public and to the government, and which, if any, of those obligations should be enshrined as law.

In light of that argument, I would really like to get to Ms. Madoff’s question – that is, are you satisfied with the current foundation situation? In the interests of promoting substantive accountability, are you satisfied with current foundation operations?

WILLIAM SCHAMBRA: A complementary question?

ANNE HEALD, formerly with Washington Regional Association of Grantmakers, New Ventures in Philanthropy, and the German Marshall Fund: Ralph (Smith) has moved us into the direction of what is this larger industry, and what is government’s role in regulating this larger industry with respect to the larger public purpose? We depend on philanthropy to support nonprofits and deliver social services, advocacy, and many dimensions of civil society. No industry is very good at regulating itself. Are we asking the best questions about how we have the best – is there such a thing as malpractice in philanthropy? What amounts to really fulfilling the role in our society and what is government’s relationship to fulfilling that role?

Just a quick example to Ralph’s question: In the private sector, companies in many places that do plant closings are required to give advance notification and worker adjustments strategies. For the film industry there is a censorship (ratings) board; it was under threat of Congressional regulation that the industry put a board in place that improved best practices. What’s the larger role, and are we accomplishing it in terms of our public policy?

WILLIAM SCHAMBRA: That’s a terrific final question. In other words, beyond the legal argument here, what do we have to say about the broader public purposes of foundations? Are they in fact living up to certain public obligations? If not, what might be done?

JOHN TYLER: I would answer both questions and both observations by suggesting that as a sector, foundations and charities can do better. I think that there are a lot of areas where there can and should be good conversations and debate about how to improve the sector and how to improve operations, how to improve effectiveness. I would also say that there is a danger in painting that with too broad a brush and applying one-size-fits-all best practice standards across the board to every organization in the sector. Does the sector need to continue its self-assessment – and not just the assessment by itself of itself, but external assessments of the sector as well? I think that does need to continue, and is continuing.

WILLIAM SCHAMBRA: Glenn (Lammi), I’m counting on you to say that the problem with the charitable sector is that there is way too much government supervision and we need to have less oversight.

(Laughter.)

GLENN LAMMI: What I did want to say though is that it depends what the measurements are as to whether or not a foundation is meeting people’s expectations. What are your expectations is the question, I guess.

JOHN TYLER: Are those legitimate and are you legitimate in having those expectations?
GLENN LAMMI: A lot of that gets into subjective value choices as to what’s valuable and what’s not. I remember reading in the research for both the one-pager that the Washington Legal Foundation did on this, and for this, that there has been talk of this idea of creating somewhat of a variable tax rate in terms of rewarding certain kinds of philanthropy more than others. I think that gets into the distinctions of what’s more charitable than other things, and what’s more valuable in terms of the money that government is getting for its tax subsidy – and I hate to use that word because I don’t think of it as a subsidy! But I think if we get into those sort of subjective value judgments, we get into the risk that I tried to lay out in my talk, the questions of who is in charge, and who’s going to think what’s valuable and what’s not, and is that going to continually change?

WILLIAM SCHAMBRA: If there are no further last comments, let’s thank our panel for a terrific conversation.

(Applause)