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Restating the Private Benefit Doctrine for a Brave New World

Darryll K. Jones*

I. INTRODUCTION

A. *Preface: O Brave New World*

¶1 The evident harm “Bokanovsky’s Process” does to the public good did not arise from its mere discovery or existence. Instead, the harm arose from the monopolization of the Process’ technology, used in pursuit of a single conception of the public good. Aldous Huxley’s novel *Brave New World* describes “Bokanovskification” as a method of human cloning that produced “[n]inety-six identical twins working ninety-six identical machines!”¹ In the novel, Bokanovsky’s Process came to be used exclusively for the benefit of the Ford Motor Company and Henry Ford was the public’s “god” and exclusive source of all that was good. Bokanovsky’s Process could solve all societal problems by designing and “preconditioning” each member of society in such a way that predestined him to accept (and indeed prefer) the role and status assigned to him by “Alpha-Plus” scientists who were the “World Controllers.”² Personal striving and dissatisfaction would be eliminated and the “whole problem” would be solved.³

¶2 The “whole problem,” of course, is that individuals are never satisfied; individuals are always striving for something better in their personal lives. Individuals invariably insist on configuring the public order in a manner that will enhance their own private lives. In Huxley’s *Brave New World*, Bokanovsky’s Process promised to eliminate the vanity and social instability inherent in the constant struggle for individual happiness. Exclusively possessing the scientific knowledge underlying Bokanovsky’s Process, the World Controllers determined each individual’s wants and desires and, by “social predestination,” took away the emotional slavery and utter frustration of free choice and unrestrained, unsatisfied desire.⁴ Everybody was supposedly happy in the world of Bokanovsky’s Process. Thus, Bokanovsky’s Process became the exclusive method of achieving the public good in the World State—but only to the extent that achievement of that public good was consistent with the private profit of the Ford Motor Company.⁵ The public good became synonymous with a single person’s private gain.

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¹ ALDOUS HUXLEY, *BRAVE NEW WORLD* 7 (HARPER PERENNIAL, 1998) (1932).

² In the novel, Alpha Plus was the highest social caste in the World State and there were ten World Controllers, all of whom were Alpha Plus males. *Id.* at 13, 34.

³ *Id.* at 7.

⁴ *Id.* at 13–18, 45.

⁵ *Id.* at 22–23, 48–52 (referring to the process of conditioning humans to consume “transport” and “manufactured articles”). The Ford Model T was portrayed as the creation of the World State’s deity, presumably Henry Ford. *Id.* at 25.

¶3 Huxley's demonstrated the absurdity of the belief that a singular definition of the public good is even possible or desirable. The antiseptic absurdity of the World State in *Brave New World* was not so much the existence of Bokanovsky's Process, however. It was instead that the technology and the resulting definition of the public good was monopolized and enforced only insofar as the public good was consistent with a private entity's individual profit. In Huxley's scheme, the private entity was the Ford Motor Company and the public good thus became synonymous with Ford's pursuit of profit; public resources became exclusively devoted towards achievement of that individual profit.⁶ The public's benefit was actually subordinate to Ford's private gain.

¶4 In the real world, to which tax policy applies, singular private control of tax exemption-financed technology, goods, and services is not always contrary to the public good.⁷ Nor is the pursuit of individual profit inherently inconsistent with achieving the public good.⁸ Tax exemption jurisprudence—taxation being the primary method of financing the public good—agrees too readily with the first of these conclusions, and disagrees too readily with the second. Under present tax exemption jurisprudence, exclusive licensing of tax exemption-financed technology is considered presumptively necessary to extract the public good from that technology⁹ while the pursuit of whatever individual profit may be derived from individual access to tax exemption-financed technology is considered presumptively contrary to the achievement of the public good.¹⁰ These contradictory points resemble the view implicit in Huxley's *Brave New World*: that private individuals should be allowed exclusive ownership of technology and thereby determine the processes by which the public good is achieved. Conversely, individuals' pursuit of profit outside of formally condoned exclusivity is contrary to the public good.

¶5 The real absurdity of Huxley's *Brave New World* and our own twenty-first century tax exemption version is in the internal inconsistency contained in assumptions that

⁶ *Id.*

⁷ I use the phrase "tax exemption-financed" to make reference to the idea that tax exemptions are often thought of as indirect government financing of particular activities. See *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674-75 (1970) (stating that granting tax exemption "necessarily operates to afford an indirect economic benefit"); *but see id.* at 690-91 (Brennan, J., concurring) (acknowledging that tax exemptions extend economic benefit, but stating that exemptions and direct subsidies are "qualitatively different").

⁸ The idea that the pursuit of individual profit is not inherently inconsistent with charitable tax exemption has only recently been the subject of tentative acceptance. For example, I.R.C. § 4958(c)(2) (2003) indicates that some revenue sharing arrangements between exempt organizations and their employees is permissible, despite the prohibition against individual profit taking contained in I.R.C. § 501(c)(3) (2003). See Darryll K. Jones, *The Scintilla of Individual Profit: In Search of Private Inurement and Excess Benefit*, 19 VA. TAX REV. 575 (2000) (an in-depth discussion of the prohibition against profit-taking in the charitable context).

⁹ Treas. Reg. § 1.501(c)(3)-1(d)(5)(iii)(c)(4) (as amended in 1990) (stating that granting exclusive rights to a financial sponsor of scientific research performed by tax exempt organization is permissible); Treas. Reg. § 1.501(c)(3)-1(d)(5)(iv)(b) (stating that granting exclusive rights to scientific research performed by a tax exempt organization is permissible if doing so is the only practical way to get the research results to the public).

¹⁰ See Rev. Rul. 98-15, 1998-1 C.B. 718 (holding that joint ventures between exempt and non-exempt entities are inconsistent with tax exemption if the exempt entity controls the venture). This ruling is based on the notion that if the exempt entity controls, the venture will pursue profit and that the pursuit of profit is inconsistent with the pursuit of public benefit. See generally Darryll K. Jones, *Private Benefit and the Unanswered Questions from Redlands*, 89 TAX NOTES 121 (2000).

exclusive licensing of tax exemption-financed technology is necessary to the public good, but that the pursuit of individual profit is contrary to the achievement of the public good. These two ultimately contradictory assertions are found in two different but fairly representative applications of the private benefit doctrine. The first instance involves technology transfer—in this context, the tax regulations deem exclusive licensing of new tax exemption-financed technology to be consistent, if not absolutely necessary, to the public good.¹¹ The second involves joint ventures between exempt and non-exempt hospitals, an exclusive licensing of sorts. In that context, the tax regulations view the exclusivity, one that ultimately benefits the for-profit partner, as presumptively inconsistent with the public good.¹² Private individuals, in both instances, are allowed to monopolize tax exemption-financed technology (or other resources) ostensibly in pursuit of the public good. Yet only in the latter instance does our jurisprudence object. The different results are perplexing.

¶6 Huxley’s dramatized concern in *Brave New World*—or one that can be fairly extrapolated from his story—is that when one person’s benefit becomes the standard of the public good, there is no real public gain but only private benefit. Yet, logic dictates that individuals must benefit if the public is to gain. The question implicit in *Brave New World*, sought to be answered by the contemporary private benefit doctrine, is therefore whether and to what extent is accomplishment of the “public good” consistent with the monopolization of tax exemption-financed technology, goods, and services by individuals with exclusive rights. We shall see that the private benefit doctrine recognizes that identifiable private individuals need to benefit if the public good is to be achieved. After all, the public is made up of individuals. In such instances, one individual’s private good necessarily becomes coterminous, to one degree or another, with the public good. But private individuals ought not to benefit ‘too much’ in the pursuit of the public good, lest the public good be completely sacrificed.

¶7 Our two contextual examples—exclusive licensing of tax exemption-financed technology and joint ventures involving exempt and non-exempt entities—represent the apparent boundaries of necessary and tolerable individual gain. The conclusion with respect to exclusive licensing suggests that new technology will not benefit the public unless there is sufficient profit motive so that one or more individuals will take on the expense of technology transfer. But the conclusion with regard to joint ventures suggests that health care technology can be made available to the public without identifiable individual profit, and that individual profit-making decreases the extent to which health care is made available to the public. The conclusions in those apparent extremes provide no theoretical matter with which to fill the space in between.

¶8 There must come a point when private pursuit of profit diverges from the accomplishment of the public good. Ford’s concept of the public good in *Brave New World*, for example, came to be synonymous with its own private gain, but there was a recurring underlying hint of complete public insanity.¹³ In other words, there was a point at which Ford’s private gain diverged from any reasonable conception of the public good and thus should have been deprived of public financing. Likewise, the private benefit

¹¹ See *supra* note 9 and accompanying text.

¹² See *supra* note 10 and accompanying text.

¹³ In *Brave New World*, John, “the savage,” ultimately manifests this insanity through his suicide. HUXLEY, *supra* note 1, at 259.

doctrine ought to articulate a method to determine the optimal degree of private gain necessary to the accomplishment of the public good, without allowing tax exemption-financing monopolies that result in an undercurrent of public fiscal insanity, metaphorically speaking.

B. *Back to The Future*

¶9 Even today, there is a danger of absurdity with regard to a singular, private monopolization of tax exemption-financed technology, goods, or services. There are dramatic examples that directly involve tax-exempt organizations. When two researchers at the University of Florida developed “Gatorade Thirst Quencher”¹⁴ and then granted an exclusive license to Stokely-Van Camp, Inc.,¹⁵ nobody seemed to question whether granting such exclusive control of tax exemption-financed technology to private interests was inappropriate from the standpoint of the public good. Perhaps there did not seem much reason to question the license, assuming Stokely-Van Camp, Inc. paid a fair price. Yet that publicly-funded technology eventually yielded, and continues to yield, millions of dollars for private interests, which allowed Stokely-Van Camp, Inc. to capture and control for itself a very lucrative market.¹⁶ Granted, no one can doubt that Stokely-Van Camp, Inc. has been wildly successful in transferring the technology of “performance-enhancing soft drinks” to the public.¹⁷ Perhaps the public benefit arising from Gatorade was and continues to be consistent with Stokely-Van Camp, Inc.’s immense private gain. Gatorade, though, is just a soft drink and it is highly unlikely that Gatorade will reconfigure society in a manner exclusively designed to achieve a single person’s private benefit. As long as Stokely-Van Camp, Inc. paid fair market value for publicly financed technology, there seemed no reason to question the exclusive transfer of what amounted to a whole new market to one private individual who was then left to define the public good, vis-à-vis that technology, synonymously with its private gain.

¶10 Today, however, tax-exempt organizations are not merely producing new soft drinks. Some are exploring knowledge related to the creation and maintenance of life itself. Stanford University recently announced the establishment of an institute formed to study the potential uses of embryonic stem cells.¹⁸ Only a day or two before that, the University of Minnesota announced that it had granted an exclusive license in newly discovered adult stem cells to Athersys, Inc., a commercial biotechnology firm.¹⁹ Before

¹⁴ Gatorade was invented in 1965 by two University of Florida scientists, Dr. Dana Shires and Dr. Robert Cade. See Stokely-Van Camp, Inc., *The Gatorade Story*, at <http://www.gatorade.com> (last visited Nov. 12, 2003).

¹⁵ At the time of the invention, the University of Florida had no policy with regard to faculty inventions and had to sue the inventors to obtain rights in the invention. The University eventually won a judgment granting it a twenty percent royalty on Gatorade sales. It is estimated that, as of 1995, the University received \$4.5 million per year in royalties. See David Villano, *Big Money on Campus*, FLORIDA TREND, Dec. 1, 1995, at 66, available at 1995 WL 8683002.

¹⁶ Stokely Van-Camp, Inc. is now a wholly owned subsidiary of Quaker Oats Company (having been acquired in 1983). Gatorade commands approximately eighty-five percent (by total annual sales) of the sports drink market. In 1999, revenues from the sale of Gatorade reached \$1.8 billion worldwide. Betsy McKay, *PepsiCo Asks More of Gatorade Despite Its 85% Market Share*, WALL ST. J., Jun. 11, 2002, at B4.

¹⁷ Gatorade is now available in approximately forty-seven countries. See Stokely Van-Camp, Inc., *Global Availability, Products*, at <http://www.gatorade.com> (last visited Nov. 12, 2003).

¹⁸ Nicholas Wade, *New Stanford Institute is to Study Stem Cells*, N.Y. TIMES, Dec. 12, 2002, at A29.

¹⁹ Andrew Pollack, *‘Politically Correct’ Stem Cell is Licensed to Biotech Concern*, N.Y. TIMES, Dec.

that, the University of Wisconsin granted an exclusive license in embryonic stem cells to the Geron Corporation, another privately owned biotechnology firm.²⁰ These transactions, involving tax exemption-financed technology of the greatest magnitude to date, beg the question whether tax exemption jurisprudence should be concerned with more than just the simple economics of transfer. If a tax-exempt scientific organization discovers monumental new technology, is the public good sufficiently protected by a requirement that the organization not grant exclusive ownership in that technology except upon the receipt of “fair compensation”? Or does the meaning of “public benefit” embody more than simple economics?

¶11 It is unclear to what extent the public good, and tax exemption-financing proceeds directed towards achieving that public good, may be made synonymous with private individual gain. This question underlies much of contemporary tax exemption jurisprudence related to the goal of ensuring that tax exemption-financing achieve public good (rather than operate for private benefit). The favorable treatment accorded to the technology transfer process, as well as hurdles faced by joint ventures seeking tax exemption, ultimately revolves around this question.

¶12 This article explores tax law’s approach to the private control and use of tax exemption-financing in the modern era. The article concludes that the area of tax law most concerned with ensuring that the public is adequately served by charitable tax exemption financing—the “private benefit doctrine”—is woefully unexplored, undeveloped and unarticulated, particularly with regard to the use of tax exemption-financed technology to achieve a public good.²¹ Tax law’s legitimate interest in the topic

11, 2002, at C8. See Marilyn Chase and Antonio Regalado, *Full Disclosure: Stanford Unveils Stem-Cell Plans*, WALL ST. J., Dec. 11, 2002, at B1.

²⁰ *Standard Nonexclusive License Agreement dated January 1, 1996 between Registrant [Geron Corporation] and Wisconsin Alumni Research Foundation [Exhibit 10.11][Jan. 1, 1996]*, in *Form S-1 Registration Statement [Geron Corporation][June 12, 1996][File #: 333-05853]*, as superseded by *License Agreement with Wisconsin Alumni Research Foundation [and Geron Corporation][April 23, 1999][Exhibit 10.1]*, in *Form 10-Q Quarterly Report [Geron Corporation][Nov. 15, 1999]*, as superseded by *License Agreement dated as of January 8, 2002, by and between Registrant [Geron Corporation] and Wisconsin Alumni Research Foundation [Exhibit 10.1][Jan. 8, 2002]*, in *Form 8-K Current Report [Geron Corporation][Jan. 18, 2002]*, available at <http://www.sec.gov/edgar.shtml> (last visited Nov. 12, 2003). Between the time of the original agreement and subsequent agreements, the Wisconsin Alumni Research Foundation [hereinafter “WARF”] became dissatisfied with Geron Corporation’s plans to commercialize the stem cell lines that were the subject of the original agreement. In addition, WARF was concerned with Geron’s assertion of exclusive access to certain stem cell lines, particularly in light of a newly announced policy of limited federal funding to sixty-four lines of existing stem cells, the United States’ supply of which was owned by WARF, through its subsidiary, WiCell Research Institute. After negotiations between the parties failed, WARF filed suit seeking to terminate the Geron’s rights to expand the exclusive license to any other stem cells owned by WARF. The last superseding agreement of January 8, 2002 essentially embodies the out of court settlement between the parties. For a concise history of the dispute between WARF and Geron regarding stem cell, see Antonio Regalado, *Research, Red Ink: An Academic Group Seeks Balance*, WALL ST. J., Jan. 14, 2002, at B4; see also David P. Hamilton and Antonio Regalado, *Geron Gives Up Some Stem-Cell Rights*, WALL ST. J., Jan. 10, 2002 at A3; see also Press Release, Geron Corporation, (Jan. 9, 2002) [Exhibit 99.1], cited in *Form 8-K Current Report [Geron Corporation]*, available at <http://www.sec.gov/edgar.shtml> (last visited Nov. 12, 2003).

²¹ I have previously touched on this subject in the context of addressing more particular issues pertaining to charitable tax exemption. See generally Jones, *supra* note 11 (regarding joint ventures between charitable and non-charitable health care entities); see also Darryll K. Jones, “First Bite” and the Private Benefit Doctrine: A Comment On Temporary and Proposed Regulation 53.4958-4T(a)(3), 62 U. PITT. L. REV. 715 (2001) (regarding proposed regulations under I.R.C. § 4958). These previous articles focused on the resolution of specific issues. This article gives primary focus to the private benefit doctrine

is derived from two underlying assumptions. First, taxation is manifestly based on the assumption that when individuals experience economic gain, they should financially contribute to the maintenance of the societal structure that makes that gain possible.²² Second, taxation assumes that no person should be made individually wealthier by what otherwise appears as economic activity.²³ Instead, the activity is assumed to be exclusively supportive of societal structure—of public good, rather than private benefit. It is implicitly assumed that charity and profit making cannot coexist—this assumption is the one responsible for much of the uncertainty in tax exemption jurisprudence.²⁴

¶13 In any event, the two explicit assumptions—first, that tax-exempt economic activity benefits society, and second, that tax exemption should not confer identifiable individual wealth—are enforced via three doctrines that are often difficult to distinguish: the eligibility of an organization for tax-exempt status under the Internal Revenue Code (“I.R.C.”), the private inurement doctrine, and the private benefit doctrine. Initially, tax exemption requires that the exempt activity be conducted primarily for a purpose enumerated in I.R.C. Section 501(c)(3).²⁵ This requirement is thought to define the difference between economic activities that should be taxed and those that should not. Yet, an activity with a charitable purpose can often appear identical to one with a profit-making purpose.²⁶ That profit-making and charitable activities can indeed appear identical²⁷ is only the first strand of evidence in rebuttal to the notion that profit and charity cannot co-exist.

¶14 In many (but not all) instances, the determination of whether an activity is conducted for a charitable purpose depends on the application of two other sub-

itself, though it uses real life issues for context.

²² The imposition of tax liability is premised on clearly realized “accessions to wealth.” *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). For a theoretical expansion of this assertion, see HENRY SIMONS, *PERSONAL INCOME TAXATION* 1-40 (1938).

²³ There are, undoubtedly, many theories of charitable tax exemption and many types of charitable organizations. But, as Professor Hansmann noted, the essential characteristic for tax exemption is the “nondistribution constraint.” Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L. J.* 835, 838 (1980). In the United States, tax exemption is to be granted only in situations “in which no man receives a scintilla of individual profit.” 44 *Cong. Rec.* S4150-51 (1909) (statement of Sen. Bacon) (regarding the enactment of the original predecessor to I.R.C. § 501(c)(3)). *See also* Jones, *supra* note 9 (analyzing the history and application of the private inurement prohibition).

²⁴ Of course, the assumption is no longer unquestionably accepted. *See supra* note 8 and accompanying text.

²⁵ I.R.C. § 501 (c)(3) (2003); *Treas. Reg.* § 1.501(c)(3)-1(c)(1) (as amended in 1990).

²⁶ Thus, Treasury Regulation § 1.501(c)(3)-1(e) states “an organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization’s exempt purpose or purposes” *Treas. Reg.* § 1.501(c)(3)-1(e). *See also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 566, 585 (1997)

There are a number of lines of commerce in which both for-profit and nonprofit entities participate. Some educational institutions, some hospitals, some child care facilities, some research organizations and some museums generate significant earnings; and some are operated by not-for-profit corporations.

²⁷ *Compare* *Scripture Press Found. v. United States*, 285 F.2d 800 (Ct.Cl. 1961) (religious publishing organization held tax exempt despite the presence of substantial profits), *with* *Inc. Trustees of Gospel Worker Soc’y v. United States*, 510 F. Supp. 374, 381 (D.D.C. 1981), *aff’d*, 672 F.2d 894 (D.C. Cir. 1981) (court denies tax exemption to a religious publishing organization because of its “commercial hue,” including the presence of profit).

doctrines.²⁸ First, the “private inurement doctrine” states that an organization is not operated for a charitable purpose and is therefore not entitled to tax exemption if it distributes its net earnings to managers or other persons in a position analogous to owners of for-profit organizations.²⁹ Clearly, this doctrine relates to the idea that tax exemption is appropriate only to the extent that there are no gains in individual wealth. Second, the “private benefit doctrine” states that an organization does not operate for a charitable purpose and therefore is not entitled to tax exemption “unless it serves a public rather than a private interest.”³⁰ Occasionally, judicial opinions apply the private benefit prohibition but judicial discussion is generally devoid of any obvious criteria or theory.³¹ Rather, these instances where the private benefit doctrine dictates the outcome seem to be the most obvious of cases.³² In most judicial opinions regarding the private benefit doctrine, the purpose to achieve individual gain is too obvious to ignore and revocation of tax exemption seems all but a *fait accompli*.³³ In any event, the absence of individual wealth, particularly since individual wealth is considered inconsistent with charity, is thought to guarantee the accomplishment of public benefit.

¶15 The prohibition against private inurement does not resolve the issue with which this article is concerned. Granting exclusive rights in tax exemption-financed assets is legitimate vis-à-vis the private inurement doctrine if that grant is made for fair compensation.³⁴ The private inurement doctrine is relevant to our inquiry but does not go far enough since it is an exclusively economic construct. Economic fairness cannot be the sole criteria by which to determine whether the public good is achieved. The broader, more important issue speculates as to whether the grant of an exclusive license is really “good” for society and on whose behalf is the exempt grantor acting, notwithstanding the economic equivalency of the exchange. The label “private benefit” will therefore be used as shorthand for the analysis that seeks to resolve that issue. The prevailing underlying analysis, however, is insufficient to the task. The “private benefit” analysis is either outdated, relative to today’s technology, or more likely was never sufficient.

¶16 This article aims to establish and then resolve this insufficiency. It begins by exploring the scant, but somewhat consistent, regulatory and judicial articulation of the private benefit doctrine and compares these articulations with those set forth by the Internal Revenue Service (“the Service”) in its non-binding administrative documents. This article selects what it concludes is the better approach—the Service’s non-binding

²⁸ In some instances there is neither individual wealth nor a lack of public benefit and yet the activity will still be viewed as conducted for a non-exempt purpose. *See, e.g.*, *Presbyterian & Reformed Publ’g Co. v. Comm’r*, 79 T.C. 1070 (1982) (organization’s tax exempt status revoked despite the absence of individual accession to wealth or the lack of public benefit, because the organization operated for a commercial rather than exempt purpose).

²⁹ Unlike the private benefit doctrine, the prohibition against private inurement is explicitly stated in I.R.C. § 501(c)(3).

³⁰ *Treas. Reg.* § 1.501(c)(3)-1(d)(1)(ii).

³¹ *See, e.g.*, *KJ’s Fund Raisers, Inc. v. Comm’r*, 74 T.C.M. (CCH) 669 (1997), *aff’d*, 166 F.3d 1200 (2d Cir. 1998) (denying tax exemption on the basis of private benefit).

³² *Id.*

³³ *See supra* note 32. *See also* *Lowry Hosp. Ass’n v. Comm’r*, 66 T.C. 850 (1976) (noting nonprofit hospital’s operations were so intertwined with that of private individual as to prevent it from operating for public benefit but rather for individual gain).

³⁴ *Cf.* I.R.C. § 4958(c)(1)(A) (2003) (defining an “excess benefit transaction” as one in which an insider obtains an organization’s services or assets for less than fair market value).

administrative articulation—and then asserts the most convincing underlying theoretical explanation for that approach.

¶17 The article begins from the presumption that the Service does indeed know best about the doctrine of private benefit. The reason that the Service’s view has not been explicitly adopted in a formal sense might be because the Service has never explained and defended the theoretical underpinnings of its articulation of the private benefit doctrine. It either cannot articulate a defensible rationale for what it instinctively knows to be right or it simply does not consider it important enough to do so. The most likely underlying rationale, one that is the *raison d’etre* of this article, is that “charity” is defined qualitatively—in that charity is all things “good”—and quantitatively—that is, to benefit the public, good things must enhance the lives of the great multitudes in roughly equal proportions, without regard to status or class.³⁵ Only when economic activities are good, qualitatively and quantitatively, should they be labeled “charity” worthy of tax exemption-financing.

¶18 This article seeks to provide an analysis by which to determine whether something is quantitatively good so that it is indeed worthy of tax exemption (assuming it is also good qualitatively). Whether an activity is qualitatively “good” so that it is worthy of the title “charity” is a great imponderable beyond the scope of this article.³⁶ Indeed, others have sought to define “charity” from a qualitative standpoint and, in essence, have left us only with the notion that charity is that which is qualitatively “good.”³⁷ Ultimately, the private benefit doctrine concerns itself with whether an activity is quantitatively worthy of the “charity” label because it affects sufficient numbers of people equally, and thus deserves tax exemption financing. When an activity fails the quantitative test of “charity,” it confers a private benefit and is unworthy of tax exemption-financing.

¶19 After relating the proof that the private benefit doctrine represents a quantitative definition of charity, the article refines and restates the Service’s articulation in the form of a proposed regulation (“the Restatement”) that includes examples designed to direct focus on key aspects.³⁸ The Service’s articulation of the doctrine is under-developed. The Service’s informal articulation of the private benefit doctrine implicitly recognizes non-economic considerations, but neither identifies those non-economic considerations nor provides a hint as to the weight that should be given to those non-economic considerations. Therefore, this article seeks to complete the articulation using technology transfer and healthcare as helpful context. Thereafter, the article defends its proposed

³⁵ Professor Atkinson is particularly eloquent in this regard:

Regard for others need not embrace the whole world. Rather, it spreads in concentric circles from immediate family to clan, tribe, class, and nation, perhaps to embrace all humanity. Moving outward along these expanding ripples of concern for others, one eventually crosses the frontier of charity. That frontier is defined somewhat differently in the lay and the legal parlance, but both are clear on the essential point. Though charity may begin at home, it is worthy of the name [and tax exemption] only after it has crossed the threshold.

Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C.L. REV. 501, 532 (1990).

³⁶ For an attempt to define “charity” from a qualitative standpoint, see Lars Gustafsson, *The Definition of “Charitable” For Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587 (1996).

³⁷ *Id.*

³⁸ The Restatement contained herein is essentially a significant redrafting of a proposal this author has made in two prior articles that have sought to apply the private benefit doctrine to particular controversies. See *supra* note 21 (citing the author’s previous articles relating to this subject).

Restatement against the more obvious criticism, primarily its inherent subjectivity. The short answer is that subjectivity ought to be encouraged with regard to any concept of “public benefit.” There is need for a Restatement that tolerates diverse conceptions of public benefit while simultaneously providing enforcement against “too much” individual benefit. Finally, the article returns once again to its original contextual examples—stem cell technology and Gatorade—to summarize the likely rationale underlying the private benefit doctrine and why the proposed Restatement is superior to present regulatory articulation.

¶20 This article never argues that the tax-exempt organizations necessarily violate a public trust by granting the exclusive rights of their technologies to single individuals or commercial entities.³⁹ By the same token, though, the article challenges the view that private gain ought to constitute a nearly insurmountable obstacle to tax exemption, such as is the case with joint ventures.

¶21 In a capitalist society—one that accepts the individual profit motive as the best means to supply goods and services—there is simply no logical basis to argue that private gain is inherently inconsistent with the public good. Instead, the article points out that because the prevailing private benefit analysis lacks an explanation or understanding of its purpose and theoretical basis, it never demands consideration of the political and social issues raised when private, identifiable individuals are the conspicuous vehicles by which the public good is achieved. The result, it seems, is a vague judicial and administrative groping through the various contexts in which private benefit ought to apply more clearly.⁴⁰ The restated private benefit doctrine would not necessarily alter the outcomes in any given case, but would change the process and thereby allow for more efficient and predictable outcomes. In doing so, the private benefit doctrine will finally serve the purpose of ensuring that tax exemption-financing furthers the public good even as it might provide opportunity for private individual wealth.

II. THE PREVAILING JUDICIAL PRIVATE BENEFIT DOCTRINE

¶22 The importance of a correctly articulated private benefit doctrine derives from the fact that profit-making activities are no longer so readily distinguishable from “good” activities presumptively worthy of tax exemption-financing that it is easy to determine when tax exemption is appropriate.⁴¹ Scholars and judges concerned with the meaning of “charity” for purposes of tax exemption typically begin by referring to the Statute of

³⁹ To be accurate, I should note that some of the universities discussed in this article are not actually tax exempt under I.R.C. § 501(c)(3). Instead, the income derived by the University of Florida and the University of Minnesota—two institutions that have not applied for recognition under I.R.C. § 501(c)(3)—is exempt either under I.R.C. § 115 (2003) or the (highly debatable) common law proposition of “intergovernmental tax immunity.” See *State of Michigan v. United States*, 40 F.3d 817 (1994) (discussing intergovernmental immunity). Nevertheless, the fact that some state universities have not actually applied for recognition—though clearly they would qualify—is but a minor detail since exemption from tax, under whatever theory, is axiomatically based on the assumption of public benefit.

⁴⁰ Exclusive licensing of tax exemption-financed technology, for example, is presumptively acceptable when perhaps it ought to be considered without a beginning presumption. Joint ventures between charitable organizations and for profit organizations are presumptively unacceptable when perhaps they too should be judged without prejudice.

⁴¹ See *supra* note 27 and accompanying text.

Charitable Uses,⁴² (the “Statute”) an English law enacted more than 400 years ago.⁴³ The Statute’s preamble supported the concept that tax exemption is appropriate in the absence of personal gain and only in the presence of public benefit.⁴⁴ Apparently, there had been notorious instances in which charitable trusts were abused for private gain in violation of the underlying assumptions of charitable tax exemption.⁴⁵ But the Statute does nothing more than confirm one of the two assumptions underlying tax exemption—that exemption be granted and reserved for activities that provide public benefit rather than personal gain.⁴⁶ The Statute lends evidence in support of the axiomatic assertion that tax exemption ought to be reserved for activities conducted exclusively for the public good. However, the matter is left at that. Just like the American modern-day version contained in I.R.C. § 501(c)(3), the Statute provides no hint or clue as to how the public good is to be determined or distinguished from private benefit, once activities proceed beyond presumptively charitable activities such as feeding the poor.⁴⁷ Additionally, the seventeenth century world in which the Statute was relevant is entirely foreign to today’s world in which the creation or regeneration of life itself is sometimes at stake.

Four “heads of charity”⁴⁸ derived from the Statute—(1) poverty relief, (2) education, (3) religion, and (4) things beneficial to the community⁴⁹—essentially comprise a list of qualitative examples of charity, but give no hint as to how the public good is to be determined if not specifically within those examples. Nor does the Statute

⁴² Statute of Charitable Uses, 1601, 43 Eliz. 1, c. 4 (Eng.), *available at* <http://ksghome.harvard.edu/~phall.hauser.ksg/01.%20Charitable%20uses.pdf> (last visited Nov. 12, 2003).

⁴³ *See, e.g.*, Nina Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); James Fishman, *The Development of Nonprofit Corporation Law and an Agenda For Reform*, 34 EMORY L. J. 617, 621 (1985).

⁴⁴ The preamble included the definition of “charitable uses” gifts:

some for Relief of aged, impotent and poor People, some for Maintenance of sick and Maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, some for Repair of Bridges, Points, Havens, Causeways, Churches, Sea banks and Highways; Some for Education and Preferment of Orphans, some for or towards Relief, Stock or Maintenance for Houses of Correction, some for Marriages of poor Maids, some for Supportation, aid, and help of young Tradesman, Handicraftesmen and persons decayed, and others for Relief or Redemption of Prisoners or Captives, and for Aid or Ease of any poor Inhabitants concerning Payments of Fifteens, setting out of Soldiers and other Taxes.

Statute of Charitable Uses at 43.

⁴⁵ The statute was entitled: “An Act to Redress the Mis-employment of Lands, Goods, and Stocks of Money Heretofore Given to Charitable Uses.” *Id.*

⁴⁶ For a survey of English and American cases interpreting charity to mean those things that enhance the public good, *see* Gustafsson, *supra* note 36, at 617-44.

⁴⁷ I.R.C. § 501(c)(3) (2003) provides exemption for:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

⁴⁸ Penina Kessler Lieber, *1601-2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 734 (2001).

⁴⁹ *Comm’rs for Special Purposes of Income Tax v. Pemsel*, 1891 A.C. 531 (H.L. 1891).

assist in distinguishing between present day situations involving qualitatively “good” activities conducted for personal profit from qualitatively “good” activities conducted for the public good. Recall that in today’s society good activities, such as education and health care are conducted by profit-takers and good Samaritans alike. In any event, there is little, if any, contemporary or even historical evidence that original or subsequent lawmakers were or are even cognizant of the Statute of Uses, or that they intentionally sought or seek to inject, under the label “private benefit,” whatever theory of public good the Statute may have contained.⁵⁰ The Statute is therefore relevant only to the qualitative definition of charity—as it helps answer the question of what is “good” from a qualitative perspective. Even then, it provides no articulated definition of qualitative charity. It appears instead that “charity” was and continues to be a concept assumed by all concerned to be easily recognized, even if difficult to precisely articulate.

¶24 As the world grows in complexity and individual profit making becomes the universal method by which to achieve the public good,⁵¹ qualitative notions of charity no longer provide a sufficient basis upon which to allocate tax exemption-financing. As noted earlier, activities historically conducted for purposes other than profit-maximization, such as health care, education, and scientific research, are now routinely undertaken in the successful and lucrative pursuit of profit.⁵² Charitable activities are no longer conspicuously distinguishable from profit-making activities. If qualitative “good” were truly sufficient to grant tax exemption financing, such financing would be appropriate even in the presence of unabashed individual profit-making. On the other hand, some historically presumptive charitable activity, such as theoretical scientific research, is no longer universally viewed as automatically consistent with the public good from a non-financial viewpoint. Our changing context dictates that the quantitative notion of charity underlying the prohibition of private benefit assume much greater importance, to the extent the qualitative differences between altruistic “good” activities and their theoretical opposite—individual profit-seeking activities—become indistinguishable or subject to question.

¶25 Understandably, lawmakers and judges’ serious consideration of the private benefit doctrine does not extend even as far back as the seventeenth century.⁵³ Lawmakers—primarily judicial and executive branch lawmakers—were forced to devote serious consideration to the private benefit doctrine during the mid- to late-1980s. Though effectuated on fair financial terms, consolidations and other financing techniques involving tax-exempt health care organizations provoked stakeholders from all sectors to

⁵⁰ There is almost nothing that would, by contemporary standards be referred to as “legislative history” with regard to the original enactment of the charitable tax exemption. See Jones, *supra* note 8, at 591 (describing the scant legislative materials accompanying the original predecessor to I.R.C. § 501(c)(3)). See Gustafsson, *supra* note 36, at 618 (“Congress gave no indication when it passed an income tax in 1894, 1909, or 1913 of the appropriate definition of charitable for purposes of the exemption provisions nor when it provided for the deductibility of charitable contributions in 1917.”).

⁵¹ A good example of the acceptance of the profit motive as the primary means of providing for human welfare is seen in China’s transition from a Socialist to a Capitalist society. See A. Doak Barnett, *China’s Modernization: Development and Reform in the 1980’s*, in CHINA’S ECONOMY LOOKS TOWARD THE YEAR 2000 (VOL. 1), S. REP. NO. 99-149, at 6 (1986).

⁵² See *supra* note 27 and accompanying text.

⁵³ This is not to say that American judges had not previously referred to the Statute of Charitable Uses. American courts have frequently acknowledged the Statute as a sort of genesis of American tax exemption. See Lars Gustafson, *supra* note 36, at 609-13.

ask whether such consolidations were nevertheless contrary to the public good.⁵⁴ In particular, tax-exempt health care organizations began to adopt the very same marketing and operational processes used by taxable health care organizations.⁵⁵ In doing so, they made it more qualitatively difficult to distinguish “charitable” activities deserving of tax exemption-financing from profitable activities. As noted earlier, the American successor to the Statute of Charitable Uses provides no guidance in this regard. I.R.C. § 501(c)(3) does not even contain an explicit reference to the private benefit doctrine.⁵⁶ Nor does it define operative terms such as “charitable” or “educational.” Reading a private benefit prohibition into the statute is therefore neither illegitimate nor illogical, to the extent there is consensus that “charitable” ought to embody public rather than individual benefit. The Statute of Charitable Uses, though it provides no guidance as to how to actually determine public benefit, at least confirms that “charitable” necessarily embodies some sort of public benefit. It is not only reasonable to read the Statute for tax exemption as implicitly raising the private benefit prohibition, it is *necessary* in light of the increasing inability to identify a qualitative definition of charity.

¶26 The relevant interpretative regulation is somewhat more explicit than I.R.C. § 501(c)(3) with regard to articulating the private benefit doctrine, although ultimately it merely restates the axiom that tax exemption is premised on public betterment and is presumptively inconsistent with individual accessions to wealth:

¶27 An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) (listing the seven exempt purposes specifically mentioned in I.R.C. § 501(c)(3)) unless it serves a public rather than a private interest. Thus, to meet the requirements of this subdivision (i.e., the requirements for charitable tax exemption), it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly by such private interests.⁵⁷

¶28 The quoted provision represents the sum and substance of the private benefit doctrine as presently articulated. Except for the inclusion of the phrase, “designated individuals,” the regulation actually seems most concerned with the private inurement prohibition, which is explicitly stated in I.R.C. § 501(c)(3), rather than a separate notion of quantitative charity.⁵⁸ The regulation thus provides no guidance beyond the admonition that charity implies public rather than private benefit.

⁵⁴ Indeed, even a cursory review of recent developments will show that changes in the health care industry that began roughly twenty years ago have had significant, perhaps disproportionate impact on tax exemption jurisprudence. Most, though not all, of the significant cases and new legal doctrines in the last 2–4 years have involved or been motivated by the health care industry. *See, e.g.*, Rev. Rul. 98-15, 1998-1 C.B. 718, (relating to hospital joint ventures), I.R.C. § 4958 (2003) (motivated, in part, by the use of revenue sharing arrangements in the health care industry), *IHC Health Plans, Inc. v. Comm’r*, 82 T.C.M. 593 (CCH) (2001) (relating to exemption for health maintenance organizations).

⁵⁵ For an overview, *see* Darryll K. Jones, *Tax Exemption Issues Facing Academic Health Centers in the Managed Care Environment*, 24 J.C. & U. L. 261 (1997).

⁵⁶ *See infra* note 47.

⁵⁷ Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990).

⁵⁸ *Id.* Even the inclusion of the phrase, “designated individuals,” does not necessarily suggest otherwise, if the phrase is defined by reference to the other specified persons whose interests are not to be benefited by the organization.

¶29 *American Campaign Academy v. Commissioner*⁵⁹ provides the most widely cited, and often criticized analysis by which to determine whether an organization is operating for the public benefit rather than for a private interest. In that case, the Tax Court held that an educational organization benefited private interests and therefore did not deserve tax exemption because the organization intended that all of its graduates work for one particular industry participant.⁶⁰ Had there been no intent that the organization’s operations benefit an identifiable individual or group, according to the Tax Court, the organization might have been entitled to tax exemption.⁶¹ The conclusion seems entirely reasonable even to the disinterested. Certainly, it is consistent with the assumptions underlying tax exemption—exemption is appropriate in the absence of individual gain and only when the public benefits. To its credit, *American Campaign Academy* raises the point that some degree of individual gain is necessary to achieve the public good.⁶² It fails only in that it provides no method or analysis by which to determine when individual gain from an activity overtakes public benefit and thereby forfeits the right of tax exemption financing.

¶30 There are three distinct logical steps in *American Campaign Academy* that should be made explicit because those steps contribute to a method of analysis conducive to an ultimate resolution. The first step has already been mentioned: in order to exclusively benefit the public, an organization must necessarily confer a benefit on particular individuals. The Tax Court’s example is that an educational institution must educate and therefore confer a benefit on particular individuals in order to benefit the public.⁶³ In other words, the public is composed of individuals and particular individuals must receive or make use of public goods if the public is to benefit. The second step from *American Campaign Academy* is that if a secondary benefit is reserved for a select individual or group unnecessarily, the secondary benefit is “non-incidental” and therefore “impermissible.”⁶⁴ The Court did not give a specific illustration but assume, for example, that an educational organization provides aeronautical training. The public benefits when individuals are trained and, secondarily, private airline companies also benefit from the accomplishment of the organization’s purpose. But if training is provided only for family members of people who work for a single airline company, there is a reservation of that secondary benefit for a select individual (in this case, the airline corporation). The organization’s primary purpose—education—could be viewed as a qualitative “good” deserving of tax exemption in the abstract, but the reservation of individual betterment to a select group (a reservation unrelated to the accomplishment of the charitable goal) belies any conclusion that the organization is operating to benefit the public exclusively.⁶⁵

⁵⁹ 92 T.C. 1053 (1989).

⁶⁰ “[W]e find that petitioner conducted its educational activities with the partisan objective of benefiting Republican candidates and entities.” *Id.* at 1070.

⁶¹ “Had the record established that the Academy’s activities were nonpartisan in nature and that its graduates were not intended to primarily benefit Republicans, we would have a different case. We are not, however deciding such a case.” *Id.* at 1079.

⁶² *Id.* at 1074.

⁶³ *Id.*

⁶⁴ *Id.* at 1074-75.

⁶⁵ The Service’s argument, with which the Tax Court specifically agreed, was as follows:

where the training of individuals is focused on furthering a particular targeted private interest, the conferred secondary benefit ceases to be incidental to the providing organization’s exempt

To state the matter in the vernacular adopted in this article, education is qualitatively “charitable” but the provision of education in this hypothetical instance fails the quantitative imperative because a few individuals obtain special benefit unnecessarily.

¶31 This implication also seems entirely reasonable as it enforces the notion that tax exemption is inappropriate without exclusive public betterment. The first two steps from *American Campaign Academy*, then, are easily rationalized in light of the assumptions underlying tax exemption. The third step, however, is that although individual betterment may be non-incidental, it is nevertheless consistent with tax exemption, provided that the non-incidental individual betterment is insubstantial relative to whatever public good the organization otherwise pursues or achieves.⁶⁶ For example, an educational organization that conducts several aeronautical education programs, only one of which is reserved for family members of a particular airline, would be conferring a private benefit and still be entitled to tax exemption, assuming the private benefit is insubstantial. Thus, the Tax Court’s overall analysis with regard to the private benefit doctrine involves a consideration of necessary individual betterment, unnecessary individual betterment, and a *de minimis* exception that injects an apparent cost-benefit standard into the inquiry. The cost-benefit portion of the inquiry represents a determination that more harm would arise from the denial or revocation of tax exemption than from the allowance of tax exemption despite the presence of a small amount of private benefit.

III. THE SERVICE’S INFORMAL ARTICULATION OF THE PRIVATE BENEFIT DOCTRINE

¶32 The Internal Revenue Service pointedly disagrees with the idea that public betterment justifies or excuses relatively insignificant private benefit. The Service states and demonstrates its analysis most clearly in a 1978 non-binding administrative communication, General Counsel Memorandum (“GCM”) 39,862.⁶⁷ GCM 39,862 begins by acknowledging that some degree of individual betterment is necessary to achieve the public good.⁶⁸ The Service’s example involves a tax-exempt hospital: private physicians must be provided with certain privileges beneficial to their individual practices if the hospital is to serve the public good.⁶⁹ From this point, however, the Service’s analysis diverges from that employed in *American Campaign Academy*. *American Campaign*

purposes. By contrast . . . when secondary benefits are broadly distributed, they become incidental to the organization’s exempt purpose.

Id. at 1074.

⁶⁶ *Id.* at 1066, stating:

Thus, should petitioner be shown to benefit private interests, it will be deemed to further a nonexempt purpose under section 1.501(c)(3)-1(d)(1)(ii), Income Tax Regs. This nonexempt purpose will prevent petitioner from operating primarily for exempt purposes absent a showing that no more than an insubstantial part of its activities further the private interests or any other nonexempt purposes.

Section 1.501(c)(3)(1), Income Tax Regs.

⁶⁷ General Counsel Memorandum 39,862 cites to a previous administrative ruling, General Counsel Memorandum 37,789 as precedential authority. The latter ruling does, indeed, represent the Service’s first articulation of its view of the private benefit doctrine, but GCM 39,862 is most often cited as the source of the doctrine.

⁶⁸ *Id.*

⁶⁹ *Id.*

Academy holds that all necessary private benefit is “incidental” and therefore consistent with tax exemption.⁷⁰ Conversely, the Service’s analysis states that even when the private betterment is necessary to the accomplishment of a public good, the private benefit may be so immense, compared to the public good achieved solely by the activity conferring the private benefit, that tax exemption is unjustified. In particular, the analysis states:

¶33 Any private benefit arising from a particular activity must be “incidental” in both a qualitative and quantitative sense to the overall public benefit achieved by the activity if the organization is to remain exempt. To be qualitatively incidental, a private benefit must occur as a necessary concomitant of the activity that benefits the public at large; in other words, the benefit to the public cannot be achieved without necessarily benefiting private individuals. Such benefits might also be characterized as indirect or unintentional. To be quantitatively incidental, a benefit must be insubstantial when viewed in relation to the public benefit conferred by the activity. It bears emphasis that, even though the exemption of the entire organization may be at stake, the private benefit conferred by an activity or arrangement is balanced only against the public benefit conferred by that activity or arrangement, not the overall good accomplished by the organization.⁷¹

¶34 The Service does not explain the assertion that even necessary individual benefit may be too great to tolerate (i.e., that private benefit must be necessary and “insubstantial”). It may mean that stakeholders should ask in any particular case whether the public good is important enough to justify tax subsidization of the private betterment, however necessary that betterment may be to the accomplishment of the exempt purpose.⁷² A second possible way of phrasing this inquiry is by asking whether the individual betterment is of such magnitude that tax subsidization is unnecessary.

¶35 The difference between the two assumed formulations seems slight, but they focus on distinct, yet equally important, considerations. The first question focuses on whether the public good is of such importance that the political imperative of dispersing tax subsidized betterment equally to the body politic should be sacrificed.⁷³ This question concentrates on the political appropriateness of the tax subsidy in light of the significant

⁷⁰ *Am. Campaign Acad.*, 92 T.C. at 1066, 1073-74.

⁷¹ Gen. Couns. Mem. 39,862 (Dec. 18, 1978).

⁷² The question has most often arisen in the context of nonprofit hospitals that pursue ties with for-profit hospitals or even to convert to for profit status. See, e.g., Kevin Donohue, *Crossroads in Hospital Conversions—A Survey of Nonprofit Hospital Conversion Legislation*, 8 ANNALS HEALTH L. 39 (1999); Shelley A. Sackett, *Conversion of Not-For-Profit Health Care Providers: A Proposal for Federal Guidelines on Mandated Charitable Foundations*, 10 STAN. L. & POL’Y REV. 247 (1999).

⁷³ The political notion of equality as relevant to private benefit analysis was first raised in one of my previous articles. See generally Jones, *supra* note 10 at 132. The argument, largely intuitive, is stated as follows:

It seems obvious, though, that the intent is to ensure that a publicly funded entity be conducted in a manner such that “everybody” is better off. After all, everybody is paying the entity’s cost. So when just a relative few are better off, or if those relative few are so much more better off than everybody else, it makes sense that tax exemption should be denied or withdrawn. Everybody shouldn’t have to pay when only a few are better off, or when a few are especially better off. Private benefit is best understood, therefore, as a political doctrine demanding a level of public equality from publicly funded entities.

Id. at 131. Intuitive though it may be, the argument is not without support in our constitutional system of government that relies upon “equal protection of the laws” as one of its fundamental principles.

individualized betterment.⁷⁴ The second question focuses on the economic observation that the government should not use public funds to subsidize an activity for which there is a potential profit motivation so that the activity would occur without the subsidy.⁷⁵ This second question concentrates on the economic necessity of tax subsidization. If an activity is imbued with the hope of profit, it might be assumed that the activity will be provided for in the capitalist marketplace and therefore tax exemption financing is unnecessary.⁷⁶ A private betterment is incidental, according to the Service, only when it is both necessary and not of such a magnitude that it calls into question the legitimacy of tax exemption. The Service's analysis provides no indication as to legitimacy of tax exemption so we are left to speculate, starting from the assumptions and historical theories underlying charitable tax exemption. But first, with regard to the third implication of *American Campaign Academy*, the Service states that unnecessary or excessive private benefit will preclude tax exemption regardless of the extent to which the organization is achieving or pursuing the public good in other respects.

¶36 There is a certain level of appeal and even apparent regulatory support for the *American Campaign Academy* cost-benefit approach. But the appeal is only superficial and the regulatory support is questionable at best. A cost benefit, *de minimis* standard such as that adopted in *American Campaign Academy* implies a necessary cost without which the benefit could not be obtained. Yet the *American Campaign Academy* approach applies a *de minimis* excuse after already determining that the private benefit is in fact unnecessary.⁷⁷ So long as an organization is devoting its public subsidy to the public good for the most part, it may divert an undefined smaller portion of that subsidy, even if unnecessarily, to private benefit.⁷⁸ Admittedly, there is apparent, though certainly not definitive, regulatory support for a cost-benefit approach. The relevant regulations, in implementing the requirement that charities be “exclusively” operated for an exempt purpose, allow for a *de minimis* deviation from that requirement.⁷⁹ The word

⁷⁴ Judge Posner, in his opinion in *United Cancer Council, Inc. v. Comm'r* stated the question:

And maybe tax law has a role to play in assuring the prudent management of charities. Remember the IRS's alternative basis for yanking [United Cancer Council (“UCC”)]'s exemption? It is that as a result of the contract's terms, UCC was not really operated exclusively for charitable purposes, but rather for the private benefit of W&H as well. Suppose that UCC was so irresponsibly managed that it paid W&H twice as much for fundraising services as W&H would have been happy to accept for those services, so that of UCC's \$26 million in fundraising expense \$13 million was the equivalent of a gift to the fundraiser. Then it could be argued that UCC was in fact being operated to a significant degree for the private benefit of W&H, though not because it was the latter's creature. That then would be a route for using tax law to deal with the problem of improvident or extravagant expenditures by a charitable organization that do not, however, inure to the benefit of insiders.

165 F.3d 1173, 1179 (7th Cir. 1999). While the excerpt is without question geared towards the financial appropriateness of the transaction, it does suggest two relevant points. First, that tax law has some role, undefined as of yet, in the governance of exempt organizations. Second, that directors or trustees of exempt organizations have an obligation to act with providence vis-à-vis the public trust. To the extent the public is interested more than just in the financial bona fides of a given transaction, the Service's rather provocative analysis (i.e., even a necessary private benefit may be intolerable) seems appropriate.

⁷⁵ See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980) (asserting that nonprofit organizations exist to cure “market failure”).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990).

⁷⁹ I.R.C. § 501(c)(3) (2003) requires organizations to operate “exclusively” for exempt purpose. See

“exclusively” in the statute is defined as “primarily” in the regulations, thus allowing for insubstantial deviation from a charitable purpose.⁸⁰ But that deviation does not go without recompense to the public. Instead, the deviation comes at a cost to the organization in the form of an unrelated business income tax, and, therefore, the *de minimis* allowance pertaining to the exclusivity requirement does not condone an uncompensated transfer of the tax exemption financing to a private individual.⁸¹ The exception merely acts as a compliment to the unrelated business income tax, allowing an organization to engage in small amounts of commercial activities with tax subsidized capital but at the cost of taxable liability.⁸² The public is therefore compensated for the deviation. The exception does not logically suggest, as *American Campaign Academy* concludes, that the public must accept even a *de minimis* diversion of the tax subsidy without recompense.

¶37 *American Campaign Academy* and GCM 39,862 are consistent, however, in at least two important respects. First, both the case and the GCM define private benefit as a relative concept. They both look to whether a select individual or group is particularly better off relative to the betterment conveyed on the body politic. *American Campaign Academy* uses the phrase “advantage, fruit, privilege, gain, or interest” to articulate the underlying theory.⁸³ That articulation, though, essentially represents a dissimilar list of words conveying no common meaning.⁸⁴ But if the phrase is read in conjunction with the court’s focus on the conferral of some sort of betterment—not necessarily financial—on “targeted”⁸⁵ individuals an underlying theory becomes discernable: Public benefit, following the unorganized reasoning of the tax court, implies a conferral of benefit on the non-select body politic. The word “non-select” is another strange term the Tax Court used in *American Campaign Academy*.⁸⁶ Private benefit therefore arises when select identifiable members of the body politic are unnecessarily made comparatively better off than the body as a whole. GCM 39,862 implicitly and, indeed, necessarily agrees with this much of *American Campaign Academy*’s formulation.

¶38 Second, it is instructive to note that neither *American Campaign Academy* nor GCM 39,862 involved financially unfair transactions between the exempt organizations and the private individuals who were determined to have improperly benefited. In fact, GCM 39,862 explicitly found that the transfers were made for fair market value.⁸⁷

supra note 47. The regulations, however, require only that an organization operate “primarily” for an exempt purpose. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1990). *See also* *Better Bus. Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279 (1945) (holding that an organization may deviate from its exempt purpose(s) only insubstantially and still retain tax exemption).

⁸⁰ “Exclusively” was first re-written to read “primarily.” *Better Bus. Bureau*, 369 U.S. at 286.

⁸¹ *See* I.R.C. § 511 (2003) (imposing a tax on the net income derived from trades or business unrelated to the exempt purpose).

⁸² In actuality, the allowance of a small deviation from an organization’s exempt purpose preceded enactment of the unrelated business income tax and therefore could not have been intended to compliment I.R.C. § 511, though that is its effect today. More likely, the *de minimis* exception was a judge-made rule that allowed charitable organizations to engage in small scale economic activity to help fund charitable activities. *See id.*

⁸³ 92 T.C. at 1065-66 (1989), *citing* *Retired Teachers Legal Fund, Inc. v. Comm’r*, 78 T.C. 280, 286 (1982).

⁸⁴ *Jones*, *supra* note 10, at 132.

⁸⁵ 92 T.C. at 1075.

⁸⁶ *Id.* at 1077.

⁸⁷ The memorandum involved a reconsideration of three prior private letter rulings that approved of

Financial unfairness may still prove an unnecessary individual betterment, but such unfairness is not the entire violation. Instead the violation is embodied in allowing a select individual or group to unnecessarily capture the organization's "invariable beneficial ripple effect" for itself. "Invariable beneficial ripple effect" refers to the fact that a tax-exempt organization exists within a broader economic context and will necessarily confer valuable benefits on persons not properly within the intended charitable class.⁸⁸ To feed hungry people, for example, a soup kitchen must obtain food and supplies from somewhere. To the extent it purchases those things (using donated money, for example), it is creating a valuable beneficial ripple effect to commercial vendors. If the organization unnecessarily purchases all of its food and supplies from a single vendor, a question arises whether tax exemption financing of that franchise is appropriate because that single vendor is comparatively better off than the rest of the public. Thus, GCM 39,862, *American Campaign Academy*, and other cases and rulings implicating the private benefit doctrine,⁸⁹ have focused not on the economic fairness of the financial transaction, but on whether the transaction or activity unnecessarily placed select individuals in an advantageous or privileged status relative to the non-select body politic.

¶39 There are, however, two generic types of cases that seem directly to challenge the theory of quantitative charity. The first type involves homeowners' associations, while the second involves Health Maintenance Organizations ("HMOs"). The homeowners' challenge is best represented by *Columbia Park & Recreation Ass'n v. Commissioner*,⁹⁰ in which the Fourth Circuit confirmed the denial of tax exemption even though the organization provided municipal services⁹¹ to large numbers of persons of different financial means.⁹² The organization provided such services to 110,000 people of differing economic and racial categories. Nevertheless, the Tax Court determined that the organization conveyed a private benefit because non-members were allowed to use the services and facilities only on a less advantageous basis than members.⁹³ The underlying reasoning for the conclusion is somewhat difficult to discern given the large number of members and the notion that those members would have relied on government for the same services if the organization did not exist.⁹⁴ As a matter of private benefit theory as articulated in this article, the case seems based on the notion that individual advantage, even one provided to an obviously large group of people, was unnecessary to benefit the entire body politic—the advantage was not required if the goal was simply to

revenue sharing arrangements. The memorandum stated, with regard to each of the three prior rulings that the transactions were effectuated under fair financial terms.

⁸⁸ Jones, *supra* note 10.

⁸⁹ See, e.g., *Redlands Surgical Servs. v. Comm'r*, 113 T.C. 47 (1999); *Aid to Artisans, Inc. v. Comm'r*, 71 T.C. 202 (1978).

⁹⁰ 88 T.C. 1, 24 (1987), *aff'd*, 838 F.2d 465 (4th Cir. 1988).

⁹¹ Such services are essentially synonymous to "charity" from a quantitative standpoint because they are identical to public services provided by governments.

⁹² The organization was set up to provide municipal services to approximately 110,000 people. *Columbia Park*, 88 T.C. at 3-5. The Tax Court noted that the unincorporated area constituted the second largest population in the State of Maryland and was approximately the size of Manhattan. *Id.* at 17.

⁹³ *Id.* at 26.

⁹⁴ The organization provided such services as public transportation, parks, after-school care, community centers and a host of other quality of life services one might find in any incorporated municipality. *Id.* at 5-6.

benefit the public by alleviating some of the burden that would otherwise be felt by government. The organization provided municipal-type services analogous to those presumptively viewed as qualitatively charitable⁹⁵ and in doing so it provided a benefit to the public whose official governments were relieved of the necessity of otherwise doing so.⁹⁶ The Court noted, though, that the “community benefit” could be achieved without providing advantages to the members (as compared to non-members) of the unincorporated area. The argument does not seem completely unreasonable, though neither is it entirely satisfactory. The answer apparently lies in the notion that tax exemption financing must be dispersed in a nondiscriminatory fashion, unless there is a necessity for doing otherwise. The use of different price and priority systems with respect to the organization’s goods and services, one for members and another for non-members,⁹⁷ indicated the conveyance of an advantage to certain individuals comprising the body politic. Without a showing of necessity, the advantage provided to members constituted private benefit.⁹⁸

¶40 The HMO challenge to a qualitative definition of private benefit is best presented by *Geisinger Health Plan v. Commissioner*.⁹⁹ In *Geisinger Health Plan*, the Third Circuit denied tax exemption to a health maintenance organization despite the HMO’s indirect provision of health care (a presumptive public good since at least 1954) to large numbers of financially diverse people who paid membership dues.¹⁰⁰ Again, the reasoning with respect to the private benefit doctrine is difficult to discern. As in *Columbia Park & Recreation Ass’n*, however, there was differential treatment between members and nonmembers because in *Geisinger Health Plan* nonmembers were not entitled to the organization’s services on any basis.¹⁰¹ The Tax Court’s somewhat unsatisfactory reasoning was that the advantage granted to members was unnecessary if the goal was to provide health care to the public.¹⁰² Regardless, the application of the private benefit doctrine seemed inappropriate given the large number of people served in both cases, but ultimately justifiable on the basis that tax exemption financing is inconsistent with unnecessary differential treatment within the body politic.

¶41 This article has used the phrase, “body politic” quite intentionally. If, as has already been argued, private benefit is not merely a financial matter, then it must relate to another societal value. The notion of equity in the tax code suggests that taxation and its

⁹⁵ *Id.*

⁹⁶ Curiously, the Tax Court noted that the organization operated like a city and indeed could obtain tax exemption by incorporating as such, but rejected the idea that the organization assisted in relieving government burdens. *Id.* at 20-21.

⁹⁷ *Id.* at 8 (referring to the lower fees charged to members than those charged to non-members).

⁹⁸ The Tax Court stated:

Were petitioner operating primarily for a public rather than private interest, the people financing its operation would not have a right, based upon property ownership, to receive the benefits it offers. On the contrary, once financed, petitioner would offer its facilities and service programs primarily to those in need regardless of their place of residence. Unlike the instant case, no *quid pro quo* exists in an organization that is operating primarily for a public purpose.

Id. at 19.

⁹⁹ 985 F.2d 1210 (3d Cir. 1993).

¹⁰⁰ *Id.* at 1212-13.

¹⁰¹ *Id.* at 1219 (“The test remains one of community benefit, and GHP cannot demonstrate that it benefits anyone but its subscribers.”)

¹⁰² *Id.* at 1219-20.

opposite, tax exemption, is as much a political construct as it is an economic construct.¹⁰³ The economic view is that tax exemption is necessary to obtain a public good for which there is no economic incentive from which to expect that the good will be provided in the marketplace.¹⁰⁴ The political view holds that charitable tax exemption contributes to and is inherent in the uniquely American democratic society—one based on notions of equality and equal protection.¹⁰⁵ It provides for the diversity of influence and voices in the broad tapestry of American democracy.¹⁰⁶ It does so by empowering those voices that, for whatever reason, are diminished or shut out of the more formal democratic process. For example, when the majority of society excludes or marginalizes views relating to feminism, charitable tax exemption provides for an alternative financial means for those issues to be explored and discussed under the conclusion that even presently disfavored views may ultimately work for the betterment of the body politic.¹⁰⁷ This political basis of tax exemption, therefore, is necessarily premised on tax exemption financing not being diverted to individual gain without justification. To do so is to exacerbate rather than alleviate political inequalities. The political legitimacy of tax exemption fades to the extent charitable exemption is diverted to unnecessary private advantage, since doing so runs counter to equal treatment amongst the public. The private benefit doctrine, then, theorized as a political principle, can be useful in enforcing a fundamental characteristic of charitable tax exemption: charitable tax exemption is appropriate when “everybody” benefits in roughly equal proportion. When only a select few benefit, or when a select few benefit especially, it becomes appropriate to raise the political science question as to the appropriateness of tax exemption. The essential point is that the body politic should financially support an activity only when the activity is intended to provide benefit exclusively to the body politic.

¶42

This essential requirement—exclusive public betterment—informs the further analysis. Since it is impossible to achieve public good without consequently benefiting individuals, it is necessary to determine the acceptable level of inevitable individual betterment (i.e., the degree of individual betterment necessary to accomplish the public good). Private benefit ought to deny tax exemption when individual betterment exceeds that necessary level. It is here that *American Campaign Academy* and GCM 39,862 dramatically differ. As noted earlier, *American Campaign Academy* views any and all individual betterment prerequisite to achieving public good as “incidental” and therefore consistent with tax exemption.¹⁰⁸ If individual betterment, to whatever degree, is inevitably necessary to achieve public good it should be tolerated. This conclusion is where the *American Campaign Academy* analysis ends. The view expressed in GCM 39,862 asks the same question but it takes the analysis one step further. According to

¹⁰³ See, e.g., *Big Mama Rag, Inc. v. U.S.*, 631 F.2d 1030 (D.C. Cir. 1980) (declaring Treasury Regulation 1.501(c)(3)-1(d)(3)(i) (1959) unconstitutional because of its impact on the First Amendment right of free speech).

¹⁰⁴ See Hansmann, *supra* note 23, at 843-45.

¹⁰⁵ For a concise discussion of the political underpinnings of the charitable tax exemption, see BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS*, 11-18 (7th ed. 1998).

¹⁰⁶ On two occasions, the Supreme Court has noted the political underpinnings of charitable tax exemption. See *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 689 (1970) (Brennan, J. concurring); *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 609-10 (Powell, J., concurring).

¹⁰⁷ Cf. *Big Mama Rag, Inc.*, 631 F.2d at 1030.

¹⁰⁸ See *supra* note 70 and accompanying text.

GCM 39,862, inevitable individual betterment is incidental only if it is necessary to achieve some public good *and is* not so great as to raise further questions as to the legitimacy of tax exemption. An individual betterment may be unavoidable but still not non-incidental if it is too much to tolerate. GCM 39,862 however, gives no hint as to how to determine whether that necessary individual betterment is too much to tolerate.

¶43 Relying on the economic and political considerations relevant to tax exemption financing, it might be speculated that GCM 39,862 is asking whether whatever public good obtained is really worth the individual betterment. Economic theory implies that tax exemption-financing is unnecessary when there is sufficient profit potential to assume that the public good will occur in the economic marketplace.¹⁰⁹ Political theory related to tax exemption-financing suggests that tax exemption is illegitimate when it merely exacerbates the suppression of disfavored speech.¹¹⁰ Whether private betterment is too much to tolerate might logically be answered by reference to those two speculations, since the rules relating to tax exemption are presumably designed to enforce the conditions underlying tax exemptions in the first place. However needed to accomplish the public good, tax exemption-financing, should be withheld when the public good can be obtained without doing violence to economic and political considerations underlying tax exemption. The presence of individual advantage or privilege, to use the language of *American Campaign Academy*,¹¹¹ such that individuals might undertake to accomplish the public good without tax exemption financing, is a strong indication that such financing is inappropriate from both an economic and political standpoint.

¶44 Before proceeding, it is helpful to summarize the conclusions thus far by reference to the article's previous contextual examples. When the University of Florida granted exclusive license in Gatorade to Stokley-Van Camp, Inc., it placed select individuals (the shareholders of Stokley-Van Camp) in a privileged or advantageous position relative to the relationship of the body politic with a tax exempt organization.¹¹² Likewise, when the University of Minnesota or the Wisconsin Alumni Research Foundation granted exclusive rights to stem cell technology to private commercial entities, those exempt organizations granted an advantage or privilege to select individuals with regard to tax subsidized technology.¹¹³ It does not matter whether the select individuals paid fair market value since they are in a privileged status relative to the body politic. What matters is whether the grant is necessary to the accomplishment of a public benefit for which tax exemption-financing is granted. The question is whether individual betterment is necessary to achieve the public good. The exempt organizations in each instance could reasonably and logically assert that providing the exclusive license was necessary to ensure the diffusion of new technology into society.

¶45 Indeed, there is explicit regulatory support for that assertion. The regulatory definition of exempt scientific organizations contains a particularized application of the private benefit doctrine to technology transfer. It begins by asserting that scientific organizations must be operated in the public, rather than private interest.¹¹⁴ It further

¹⁰⁹ See Hansmann, *supra* note 23, at 843-45.

¹¹⁰ See *supra* notes 103, 105-106.

¹¹¹ See *supra* note 83 and accompanying text.

¹¹² See *supra* notes 15-17 and accompanying text.

¹¹³ See *supra* notes 20-21 and accompanying text.

¹¹⁴ Treas. Reg. § 1.501(c)(3)-1(d)(5)(i) (as amended in 1990).

states that a sponsor¹¹⁵ may obtain ownership or control of technology that arises from the sponsored research.¹¹⁶ The scientific organization will not be viewed as operating for private benefit even though the sponsor gains an advantage or privilege vis-à-vis the tax-exempt scientific organization, and relative to the body politic. The apparent justification—one actually offered by at least one of the exempt organizations in our contextual examples¹¹⁷—is that the new technology may never have been obtained or made available to the public but for the incentive embodied in the potential for private ownership and exploitation. This is undoubtedly an expression that individual advantage or privilege—i.e., profit—is necessary to accomplish the public good. The point is even more explicitly stated when the regulations condone the granting of exclusive rights in tax subsidized technology if such a grant “is the only practicable manner” to make the technology available to the public.¹¹⁸ Thus, in at least one instance, the regulations support the argument that individual advantage arising from the transfer of an exclusive license is indeed “incidental” and therefore consistent with tax exemption when and to the extent individual advantage is necessary to accomplish the public good. Curiously, the technology transfer regulations provide a particular application of a private benefit rule that is never generally stated elsewhere in the regulations.

¶46 By leaving the matter at whether exclusive rights are “necessary,” without further inquiry into appropriateness, the regulations lend support to the *American Campaign Academy* approach. The regulations suggest that necessary private betterment, regardless of how significant, is consistent with tax exemption. Thus, the transfer of Gatorade or stem cell technology was and is consistent with tax exemption financing without further inquiry.¹¹⁹ *American Campaign Academy*’s failure to inquire further represents the ultimately irreconcilable difference between the private benefit doctrine as expressed in *American Campaign Academy* and in GCM 39,862. The latter would not end its analysis simply by asking whether an exclusivity arrangement is a necessary means of getting the technology to the public. Assuming an exclusive license is necessary, it would also ask whether the public good justifies the resulting individual advantage or privilege. If exclusive licensing were not actually necessary, GCM 39,862 would deny tax exemption even if organizations were achieving significant public good in all their other activities. The *American Campaign Academy* approach, with at least arguable regulatory support, would allow unnecessary private benefit if the organizations were achieving much more public benefit in its other endeavors.

¶47 The GCM 39,862 approach to completely deny tax exemption-financing, even for insignificant amounts of private benefit, seems miserly at first. If an organization is achieving public benefit in the overwhelming majority of its activities, it might be unreasonable and ultimately harmful to the public good to deny or revoke its tax exemption because of relatively small private benefit. This assertion does not really object to a rule prohibiting even *de minimis* private benefit. Instead, it questions the

¹¹⁵ A sponsor is an individual or entity that provides grant funds for research.

¹¹⁶ Treas. Reg. § 1.501(c)(3)-1(d)(5)(iii)(4).

¹¹⁷ The University of Minnesota justified granting exclusive rights to adult stem cells to Athersys, Inc. by noting that nonexclusive license do not attract corporate interest and thus impede the transfer of the technology to the public. See Pollack, *supra* note 19.

¹¹⁸ Treas. Reg. § 1.501(c)(3)-1(d)(5)(iv)(b) (2003).

¹¹⁹ This assumes, for the moment, that exclusivity is necessary to achieve public benefit.

appropriateness of the complete revocation sanction.¹²⁰ A lesser sanction, one designed to recoup from the organization or more effectively the privately benefited individual an amount roughly equal to the diverted tax subsidy, would be possible and appropriate.¹²¹ Such an intermediate approach is normative in tax exemption jurisprudence.¹²² The choice is therefore between the falsely reasonable approach of *American Campaign Academy* and the apparently miserly approach of GCM 39,862. A workable mechanism exists by which to enforce the social and political underpinnings of private benefit without harming charitable beneficiaries. If it is assumed that *American Campaign Academy* abhors private benefit but allows for a cost-benefit exception only because it does not wish to harm beneficiaries, it might also be assumed that *American Campaign Academy* would prohibit even insignificant private benefit when doing so would not harm beneficiaries. An enforcement mechanism that avoids that harm would therefore render the *American Campaign Academy* and GCM 39,862 more consistent.

¶48

It should also be noted that to the extent GCM 39,862 recognizes the necessity of some individual advantage, it is consistent with a demonstrably more considered approach to restricting the use of tax exemption financing to public rather than private benefit. With regard to tax exempt bond financing, the “private business use”¹²³ rules clearly express that tax exemption financing is inappropriate to the extent such financing results in an advantage for select individuals rather than the body politic.¹²⁴ At the same time, the rules—stated in I.R.C. § 140 to § 145 and their corresponding detailed regulations—contain an objective formula by which to determine the limits of necessary individual advantage or privilege. The objective formula essentially determines that individual advantage is intolerable when more than ten percent of the proceeds from tax-exempt bonds are diverted to individual use.¹²⁵ The tax-exempt bond rules also provide a list of objectively defined exceptions which essentially allow for increased private business use when the private use is necessary to achieve the public benefit.¹²⁶ Even then, there are limits on the amount of necessary private business use that is tolerable.¹²⁷ This is to say that under the tax-exempt bond financing regulations, there comes a point when even necessary individual benefit is too much to tolerate. Although attractive and easy to apply, the same formula is unavailable to tax exemption-financing because it is near impossible to quantify the value of tax exemption’s financial benefit to any particular entity,¹²⁸ and even more difficult to determine its value when diverted to individual advantage or privilege. With tax-exempt bond financing, it is merely a matter

¹²⁰ The economic and political theory underlying the insistence on exclusive public benefit should be enforced, assuming those theories are deemed sufficiently important, but enforcement does not necessarily require revocation of tax exemption (*i.e.*, proverbially “throwing the baby out with the bathwater”).

¹²¹ *Cf.* I.R.C. § 4958 (2003) (providing for “intermediate sanction” for violations of the private inurement prohibition).

¹²² *See e.g.*, I.R.C. §§ 4941–4945 (2003) (imposing a series of graduated excise taxes on private foundations that engage in transactions deemed inconsistent with tax exemption).

¹²³ I.R.C. § 141(b) (2003).

¹²⁴ I.R.C. § 141(b)(6) (defining private business use as use of tax exempt proceeds by any private person).

¹²⁵ I.R.C. 141(b)(2); Treas. Reg. § 1.141-3 (as amended in 2001).

¹²⁶ *See generally* Treas. Reg. § 1.141-3(c)-(d) (as amended in 2001).

¹²⁷ *Id.*

¹²⁸ The amount of tax exemption benefit in any case depends upon the amount of revenues generated by a tax exempt organization.

of determining the proceeds from the bond issuance and then taking ten percent of that amount as the private benefit limit. Nevertheless, GCM 39,862 is consistent with the apparently agreed upon Congressional and Executive policy on the derivation of private benefits from tax-exempt bond financing proceeds.

¶49 The remaining issue separating *American Campaign Academy* and GCM 39,862 is whether private betterment is automatically consistent with tax exemption even if the private benefit is of a very high magnitude. Neither *American Campaign Academy* nor the technology transfer regulations asks that question, while GCM 39,862 requires that the question be asked without guidance as to how it ought to be answered. One can only speculate to the appropriate answer, taking into account economic, political, and social concerns relevant to tax exemption-financing. Economically, tax subsidization is unnecessary to the extent that a public good is associated with or may generate significant individual betterment. When private betterment is significant,¹²⁹ it can reasonably be argued that the profit potential inherent in the activity is sufficient to cause the activity's occurrence without tax subsidy. The political consideration relates to democratic ideals underlying the grant of tax exemption. Achieving the public good necessarily requires seemingly discriminatory private betterment. There comes a point, however, when accomplishment of the public good becomes a negative-sum gain. When private betterment becomes so excessive that it sacrifices democratic ideals, it is legitimate to question whether the harm outweighs whatever public good is sought. At some point, the necessary private betterment is not worth eroding the democratic ideal.

¶50 The social consideration has not been previously explored. The social consideration relates to the use to which a select individual will put the tax exempt advantage or privilege. That use may be so recognizably inconsistent with the broadly defined public good that the grant of exclusive license is socially illegitimate in light of the tax exemption-financing. In other words, it may be consistent with the public good in any particular case that technology be reserved for use by one commercial entity, but the particular recipient may be unsuitable to the sought-after public good because of an inability or unwillingness to further the good in a manner not recognizably harmful to the public good. Suppose, for example, that a license recipient insisted on the rights to any derivative technology and, because of commercial concerns, sought to prevent the diffusion of the derivative technology derived from tax exemption-financing. In that instance, social policy might dictate that the technology not be exclusively entrusted to the single commercial actor. Thus, economic, political, and social considerations are relevant and helpful as to whether and what extent a public good justifies a necessary private betterment. These considerations are implicit in the GCM 39,862 formulation of private benefit but are never raised in the *American Campaign Academy* formulation or in the technology transfer regulations.

¶51 The irreconcilable difference between these formulations requires a selection and defense of one approach over the other. The 'Brave New World', in which private benefit is to be applied, requires the GCM 39,862 approach. Before defending this choice of analysis, it is helpful to clearly restate and refine the approach in the form of a proposed regulation. The following Restatement of the approach articulates the rule derived from the above discussion and then provides examples, proceeding from

¹²⁹ This is an admittedly elusive term outside of the tax exempt bond jurisprudence.

contemporary issues to more difficult contextual issues related to health care and technology transfer.¹³⁰ Thereafter, this article responds to some of the most obvious criticisms.

IV. RESTATING THE PRIVATE BENEFIT DOCTRINE

¶52

Proposed Private Benefit Regulation¹³¹

1.501(c)(3)-1(d)(1)(i): A tax-exempt organization must benefit the public exclusively and may not convey a private benefit. Thus, an organization must not provide an unnecessary advantage to any individual, entity, or group (hereinafter referred to as “individual”). Except as provided in subparagraph (ii), such an advantage results in and constitutes private benefit.

(a) An organization conveys an advantage when it provides greater access to its goods, services, or assets for any individual than it does for the non-select general public. For this purpose, it is irrelevant that the individual pays a fair price for the greater access.

(b) The term “greater access” includes an exclusive license, a franchise, or other similar priority right enforceable against individuals not granted such rights, or the entity itself.

(c) An organization does not convey an advantage merely because it makes its goods, services, or assets available to any and all customers willing to pay a fee or cost therefore.

(ii) Private benefit does not result if the organization conveys an advantage to any individual under the following conditions:

(a) The public benefit to be achieved thereby is within the purpose for which exemption is granted or asserted,

(b) The public benefit cannot reasonably be achieved without conveying the advantage, and

(c) The advantage is insubstantial when viewed in relation to the public benefit sought by the activity that conveys the advantage.

¹³⁰ This Restatement is a refinement of a proposal I have previously put forth. *See supra* note 10, at 138. I have included examples in this refinement at the suggestion of an anonymous peer reviewer to whom I am grateful.

¹³¹ The present edition of Treasury Regulation 1.501(c)(3)-1(d)(ii) is most often cited as the regulatory source of the private benefit doctrine. *See supra* note 57. But as noted, that regulation merely restates the axiomatic proposition that charitable tax exemption is appropriate only when the public benefits. *Id.* The proposed regulation would replace the present version and is intended to provide a method of analysis by which to determine the public good.

(iii) An organization that engages in private benefit violates this section and I.R.C. § 501(c)(3) even though, as an overall matter, the organization is operated primarily for exempt purposes.

(iv) Examples. The following examples demonstrate the principles of this section:

(1) Foodbank, an organization exempt under I.R.C. § 501(c)(3) provides free food and shelter for approximately 3000 homeless persons per day. It also operates a small bed and breakfast that provides food and shelter to any and all paying customers. Foodbank enters into an agreement with Wholesaler to purchase all of its foodstuffs (other than those it receives via in-kind donations); sales to Foodbank constitute five percent of Wholesaler's annual sales. Wholesaler, in exchange for the exclusive arrangement under which Foodbank will purchase all of its food from Wholesaler, sells food to Foodbank at cost and well below market rates. In the absence of the exclusive arrangement, Foodbank would only be able to provide meals for less than one half the persons it presently serves. Wholesaler is in an advantageous position with regard to Foodbank and relative to the general public. Nevertheless, since Foodbank can show that its ability to accomplish its charitable goal would be significantly thwarted without the advantage conveyed to Wholesaler, the advantage will not constitute private benefit. In addition, although the operation of the bed and breakfast may constitute an unrelated trade or business subject to taxation under I.R.C. § 511, it does not convey an individual, tax exemption-financed advantage. Operation of the bed and breakfast does not constitute private benefit because the only limitation on the use of the bed and breakfast is the requirement that users pay for the services.

(2) Karla's Winter Clothing Club operates a state authorized game of chance the proceeds from which are exclusively used to provide winter coats and clothing for poor families, a charitable purpose recognized under I.R.C. § 501(c)(3). Participants buy "tokens" containing numbers and at the end of each week, organizers draw a number. The participant with the number matching the number drawn wins a small cash prize, usually representing approximately fifteen percent of the total amount paid for all tokens during the week. Tokens may be purchased only from a single location owned by Food and Cold Libations, L.L.C., a local bar and grill. Food and Cold Libations' owners organized Karla's Winter Clothing Club, but no longer serve in any capacity with respect thereto. Most of the tokens are purchased by Food and Cold Libations customers, though participants may purchase tokens without ordering food or drinks. All the advertisements seeking participants in Karla's Winter Clothing Club contain some reference to Food and Cold Libations, either as the single location from which tokens may be purchased, or as the original sponsor of the effort to provide winter clothes for poor families. Some

advertisements merely depict Food and Cold Libations' restaurant in the background while others explicitly refer to the restaurant as the place from which tokens may be purchased. Food and Cold Libations stands in an advantageous relationship with respect to Karla's Winter Clothing Club and relative to the general public. Since the advantage conveyed is unnecessary to the accomplishment of the exempt purpose, Karla's Winter Clothing Club is operated for private benefit.¹³²

(3) Home Association provides municipal-type services for its 7000 members, all of whom are and must be homeowners in an unincorporated area adjacent to City. City's population is approximately 57,000. Home Association claims exemption as an organization dedicated to lessening community tensions and combating community deterioration. Municipal services include maintenance of recreation facilities (swimming pools, tennis and golf courses, health facilities, and parks), erecting and maintaining street signs, and providing security for the area. Homeowners are entitled to use the recreation facilities at a fee sufficient to cover operating costs, while non-homeowners may use the facilities on a space available basis (i.e., if homeowners are not using the facilities) and only after payment of a higher fee. Because the organization's goods, services, or assets are made available to homeowners at preferential rates (providing an advantage to select individuals), the organization provides a private benefit and should be denied tax exemption under I.R.C. § 501(c)(3). The size of the group supports an argument that "the public" is exclusively benefited, but the benefit is dispersed in a discriminatory manner.¹³³

(4) HMO is an organization that arranges for health care services for its dues-paying members. Membership is open to any person or group able to pay the membership dues and HMO maintains a financial aid program to assist persons unable to pay the dues. HMO does not provide medical services itself but arranges, via capitation agreements with independent providers, for the provision of such services to its members. HMO's financial aid program helps more than 200 individuals and families, who would otherwise be unable to afford the dues, obtain health care from HMO's contracted health care providers. Since the only requirement for access to HMO's services is the payment of dues, the organization is not conveying a private benefit. It may be, however, that the HMO's failure to directly provide free or indigent care, or otherwise engage in qualitative charitable activities, prevents the conclusion that HMO is operating for a charitable purpose.

(5) University is recognized as tax exempt under I.R.C. § 501(c)(3). It enters into a contract with Soft Drink under which Soft Drink obtains

¹³² This example is based on the facts in *KJ's Fund Raisers, Inc. v. Comm'r*, 74 T.C.M. (CCH) 669 (1997), *aff'd*, 166 F.3d 1200 (1998).

¹³³ This example is based on *Columbia Park & Recreation Ass'n, Inc. v. Comm'r*, 88 T.C. 1 (1987).

exclusive rights to sell its beverages at athletic events conducted by University. Soft Drink compensates University via a royalty of X percent of gross sales revenue. The amateur athletic events are exempt functions and the sale of soft drinks on an exclusive basis is customary and convenient to the conduct of athletic events, whether amateur or otherwise. Since the granting of exclusive pouring rights is a customary business practice related to the conduct of athletic events, it may be presumed that the advantage to Soft Drink is necessary to the accomplishment of an exempt purpose and does not constitute a private benefit. The presumption may be overcome by showing that the royalty paid to the University is substantially less than fair market value, or that the grant of exclusive rights is manifestly inconsistent with the public good under the particular facts and circumstances. It is appropriate in this and all other examples to look to non-tax policy considerations such as the appropriateness of allowing commercial influence in amateur athletic events.¹³⁴ Whether such exclusive pouring rights results in unrelated business taxable income is to be determined under I.R.C. § 511.

(6) Cancer Institute, an organization recognized as exempt under I.R.C. § 501(c)(3), seeks new treatments for cancer. On January 1, it enters into an exclusive agreement with a commercial fundraising organization, Fundraiser. The agreement provides that Fundraiser shall be paid an amount equal to ten percent of all monies raised and be reimbursed for mailings and other reasonable expenses. During the year, Fundraiser raises \$1,000,000 from gifts and donations made to Cancer Institute. After deduction of its fee and reimbursement for its reasonable expenses, Fundraiser remits \$175,000 to Cancer Institute. Fundraiser is an individual that enjoys an advantage or privilege relative to Cancer Institute. Although raising funds is necessary to the accomplishment of the charitable goal, the public good accomplished by the fundraising activity is too insignificant, relative to the private betterment, to justify continued tax exemption. Of the \$1,000,000 raised on behalf of Cancer Institute, only \$175,000 went to the accomplishment of the purpose for which exemption is asserted. The advantage conveyed to Fundraiser is too great in comparison to the benefit conveyed on the general public. The conclusion would apply even if Cancer Institute engaged in several other activities, none of which conveyed a private benefit.¹³⁵

(7) Hospital is recognized as tax exempt under I.R.C. § 501(c)(3). It relies on gifts, grants, donations and income from paying patients to provide free health care for indigent and uninsured patients. Due to factors relating to the emergence of managed care and the increased commercialization of health care (including the presence of increased profit-making physician

¹³⁴ See I.R.C. § 514(i).

¹³⁵ This example is based on *United Cancer Council v. Comm'r*, 165 F.3d 1173 (7th Cir. 1999).

practice groups), Hospital's paying customer base has decreased to such an extent that it has been forced to substantially decrease or eliminate the amount of free health care it provides. To reverse this trend, Hospital enters into a joint venture with a for-profit hospital on commercially reasonable terms. A consortium of physician practice groups owns the for-profit hospital. The joint venture agreement provides that the Hospital will conduct all of its health care in conjunction with the for-profit hospital, except when neither partner offers the necessary health care service or possesses the required expertise. The physician practice group constitutes an 'individual,' which, by virtue of the joint venture agreement, is granted an advantage, relative to Hospital, greater than that enjoyed by the general public. Since Hospital can show by objective and verifiable evidence that the joint venture is necessary for the provision of indigent care and that such joint venture activities are neither unreasonable nor imprudent in the prevailing business context (i.e., ordinary and customary in the health care industry) it may be presumed that hospital is not operating for private benefit. The presumption may be overcome by the presence of facts and circumstances indicating that the joint venture provides more advantages to the physician practice group than are necessary to the accomplishment of the charitable goal or that earnings derived by the physician group partners exceed those available to physician group partners in a joint venture not involving a tax-exempt health care organization. The same analysis would apply if hospital entered into a joint venture agreement with regard to only a few of its available services. Although the hospital will not be operated for private benefit, assuming it presents adequate evidence of necessity, the terms of the joint venture agreement may support the conclusion that it is not *organized* for an exempt purpose.¹³⁶

(8) Research Organization is recognized as tax exempt under I.R.C. § 501(c)(3). It engages in both independent and sponsored research as part of its charitable goal. Research Organization develops a "performance enhancing" soft drink and grants an exclusive license to a commercial food and drink manufacturer. It also enters into a sponsored research agreement for the development of revolutionary genetic technology that can produce new human organs and perhaps whole new human beings. The sponsor is granted the exclusive rights in the resulting technology. It is normal and customary that new technology be made available to the public via exclusive licenses because nonexclusive licenses decreases the chances that commercial providers will recoup the significant costs incurred in marketing new technology. Thus, it may be presumed that the grant of exclusive licenses in technologies developed by Research Organization does not constitute private benefit. The presumption must give way, however, in the presence of other factors indicating harm to the

¹³⁶ See Rev. Rul. 98-15, 1998-1 C.B. 718.

public interest. Factors to be considered include the length and scope of the license. For example a broader exclusive license that includes both research and commercial uses of the technology is more likely to be consistent with the public interest when granted for relatively short periods of time. A nonexclusive license will normally not be contrary to the public interest. Likewise, the presumption might be overcome in the face of evidence that the organization has not taken sufficient steps to ensure the license is appropriately granted, and that the technologies will be made available to the public in a reasonable time in light of the prevailing commercial circumstances. Such steps depend on the nature and importance of the technology and may include terms in the licensing agreement akin to “march-in rights” under the Bayh-Dole Act¹³⁷ if the licensee fails to use or implement the technology within a reasonable time period taking into account applicable and relevant circumstances, the nature, importance and risks associated with the technology and other considerations not related solely to the maximization of profit. In any event, the considerations to be taken into account include those evolving and emerging standards of a civilized society.

¶53

The goal of any formal articulation of legal doctrine is to capture and understandably convey the principles deemed important enough to mandate via governmental authority. Throughout the discussion, this article has assumed that tax exemption is premised on the absence of individual advantage¹³⁸ and the presence of purely public benefit. Yet logic shows that public benefit cannot be achieved without individual gain since the public is merely an aggregation of individuals. This article has noted also that public financing such as that embodied in tax exemption is necessarily imbued with political notions of equality. The proceeds from taxation and likewise tax exemption ought to be dispersed as equally as possible throughout body politic. Tax exemption is thus inconsistent with special advantage (as is demonstrated in the proposed

¹³⁷ 35 U.S.C. 203 (2002). The Act provides:

(a) With respect to any subject invention in which a small business firm or nonprofit organization has acquired title under this chapter, the Federal agency under whose funding agreement the subject invention was made shall have the right, in accordance with such procedures as are provided in regulations promulgated hereunder to require the contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor, assignee, or exclusive licensee refuses such request, to grant such a license itself, if the Federal agency determines that such—

- (1) action is necessary because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
- (2) action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees;
- (3) action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the contractor, assignee, or licensees; or
- (4) action is necessary because the agreement required by section 204 has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to section 204.

¹³⁸ Individual advantage has been broadly defined to include more than monetary increase.

Restatement). In blackletter terms, private benefit requires (1) the grant of a “franchise”—explicitly or implicitly—with respect to a primary or secondary ripple effect that is either (2) unnecessary to the accomplishment of a public benefit deemed qualitatively worthy of tax exemption or (3) too significant relative to the public benefit derived solely from the activity. The Restatement refers to the franchise (implying some exclusivity relative to the general public), as an “advantage.” For this reason, the mere fact that tax exemption financed goods or services are made available to the purchasing public is insufficient to create private benefit, though the entity may be otherwise disqualified from tax exemption. If anybody can purchase the goods or services there is no franchise. Example 4 in the proposed Restatement demonstrates this principle. Examples 1, 3, and 5 through 8 involve explicit franchises, while Example 2 involves an implicit franchise. Those examples proceed to analyze the second and third blackletter factors mentioned above to conclude that private benefit is or is not present. In doing so, they apply the previously identified fundamental principles deemed important enough to articulate a distinct legal doctrine.

¶54 There are quite naturally various points of criticisms with regard to the proposed Restatement. First and foremost is the notion that “too much” private betterment should preclude tax exemption. The standard begs the question, “how much is too much?” For some, answering that question by making references to the particular facts and circumstances is clearly unsatisfactory.¹³⁹ The unsatisfactory feeling results from the instinct for definitive outcomes about which there is little or no reasonable disagreement. The same criticism and unsatisfactory feeling is also provoked by the suggestion that private benefit requires a weighing of economic, social and political considerations. That too begs the question as to whose judgment is to prevail. Any standard that seeks to accommodate human complexity and the desire for pluralism brings with it subjectivities that are the source of uncertainty. The Restatement, however, seems to be almost exclusively subjective in this regard.

¶55 The Restatement’s subjectivity is not just a matter of necessity. It is also a matter of intentional preference. Certainly no standard can account for human complexities and diversities but, even if it were possible to eliminate subjectivity in the Restatement, it would not be wise to do so. A demand for certainty of that sort admits of a fundamental misunderstanding of the charitable sector. A completely objective standard implies a level of regularity to which all actors within the charitable sector must ascribe. But the fundamental essence of the charitable sector is nonconformity—a characteristic that helps maintain a diversity of social and political existence and the lack of which created the absurdity in Huxley’s *Brave New World*.¹⁴⁰

¶56 From a social standpoint, charitable organizations are similar to each other only to the extent that they all contrary to economic or political norms. Indeed, the charitable sector’s contribution to society is embodied in its contrary instincts. Charities instinctively choose different paths from those taken by the political and business sectors and from other charities. A consideration of the body of tax law related to charities would thus reveal no single identifiable characteristic or methodology other than those

¹³⁹ Judge Posner’s retort to counsel in *United Cancer Council* that a facts and circumstances approach is “no standard at all” is therefore manifestly wrong at least in the area of tax exemption jurisprudence. 165 F.3d at 1179. As I explain in the text, a facts and circumstances approach is a standard at the extreme.

¹⁴⁰ HUXLEY, *supra* note 1.

related to the fundamental assumptions of tax exemption (no individual wealth and exclusive public betterment). Beyond these assumptions, charities are left to define the public good themselves, and to determine the best method of achieving their own definition of that good.

¶57 Subjectivity, even to an extreme degree, is consistent with the essential characteristic of charitable organizations. Objectivity, particularly in an attempt to standardize the definition of “public benefit,” would interfere with the value of diversity and pluralism in determining the public good. It should be noted here that this discussion is moving from the primary concern of the private benefit doctrine—defining charity from a quantitative standpoint—to the broader concern defining charity from a qualitative standpoint. Exemption in Example 4 of the proposed Restatement is not denied because of quantitative concerns—rather it is because what the entity is doing is not a qualitative good worthy of tax exemption. Once the private benefit doctrine asks whether the private advantage is too great, it begins an overlap into notions of the quantitative question of charity. Admitting that does not detract from the articulated standard, it merely confirms that the whole of tax exemption is intertwined. The point, nevertheless, is that a single, clearly objective standard of public good would eviscerate the democratic ideals that underlie the grant of tax exemption—to a greater degree than would any subjective standard.

¶58 If it is indeed preferable that private benefit be defined and determined by each individual charity, then it makes sense to question the need for a private benefit standard at all. Why should intellectual energy be expended articulating a seemingly unenforceable standard? The question is legitimate enough, but a subjective standard is not entirely unenforceable. A subjective standard is enforceable even if only at the extremes. A subjective standard allows for the diversity of viewpoints that is essential to and characteristic of the charitable sector and, at the same time, it allows for majority oversight at the very extremes. Charities can make a reasonable, if arguable, determination regarding the public good, but when that determination becomes extreme—defined as universally, or nearly universally objectionable—a subjective standard allows for the imposition of majority control and oversight. There is and ought to be a wide, tolerable variation with regard to public benefit; a subjective standard recognizes that variation. However, the variable scope is not without limitations. In the absence of even a subjective standard there would be no extreme boundary.

¶59 The value in encouraging alternative visions of the public good, while also setting extreme limits, supports a subjective, process-oriented standard. An objective standard would be more appropriate if society wanted to dictate a certain identifiable method or result in every case. But the charitable sector is valuable precisely because it allows for experimentation with regard to methods and results. A subjective standard therefore allows for experimentation, but also sets forth the factors and processes that ought to inform each charity’s determination of the public good. The law does not (and could not) dictate a certain result with regard to determination of public benefit. Yet it is neither unreasonable nor impractical that the law require that each charity consider a universal set of factors—necessity as regards the grant of an advantage, as well as economic, social, and political ideas. While the imposition of a sort of due diligence cannot guarantee that a charity will always come to a universally agreed upon determination of

public benefit, it can—like any due diligence standard—dramatically decrease the likelihood that a charity’s determination will be manifestly unacceptable.

¶160 The notion that the tax standards imposed on charities are voluntary is implicit in the preceding discussion. Some might object to this admission, but such voluntary standards in the Tax Code are neither surprising nor unusual, since the Code generally relies on self-compliance for its effectiveness. Hence, tax law is very often more aspirational than self-enforcing, despite being written in mandatory terms. Aspirational, difficult-to-enforce standards are even more appropriate to a societal sector that views itself as “do-gooders.”¹⁴¹ Hence, the proposed Restatement provides guidance on the assumption that charities will look to and apply that guidance in good faith. Clearly, this standard is preferable to one that imposes a definite methodology and result on a sector whose value lies in its experimental, contrary diversity.

V. CONCLUSION

¶161 This article is not about technology transfer *per se*. It is about the legal rules that ensure the best use of publicly-financed technology. The present-day potential effect of technology transfer on the public good is undoubtedly a catalyst for change and improvement in many areas of law. Tax exemption jurisprudence is no exception. Advances in technology, particularly advances developed via tax exemption-financing mandate restatements in potentially outdated Twentieth Century legal principles. The goal is to insure that outcomes, even if they remain the same in the Twenty-first Century, are nevertheless beneficial to society.

¶162 It is entirely possible, indeed probable, that the resolution of the private benefit doctrine in this article would not prevent the granting of an exclusive license to Gatorade or even the more crucial technology arising from stem cell research. Granting exclusive private ownership to public goods is not the harm with which this article is concerned, however. Enforcing the public good is not a matter of prohibiting any particular end result, because the “public good” is not a concept that can or should be standardized. Instead, the Harm is the lack of logically articulated standards by which to consider whether an end result is consistent with the public good. It may indeed be the rare exception that the lack of standards actually results in Harm. In rare occasions, however, the Harm might be catastrophic. The chance of Harm increases as exempt organizations are entrusted with increasingly more important tax exemption-financed assets with unlimited promise, such as stem cell research products.

¶163 Historically, exclusive licensing of tax-subsidized technology has been the default approach. Perhaps that approach should continue to apply, particularly in a society that views profit potential as the best means to provide goods and services to society. Granting exclusive license to a soft drink formula, however, is substantially far less momentous than granting exclusive license to technology relating to the creation and maintenance of life itself. Yet, from the time Gatorade was invented until stem cell research became a present-day reality, the prevailing private benefit doctrine has never provided a sufficient, logical analytical process by which to determine appropriate uses of tax exemption-financed assets.

¹⁴¹ I do not use the term in the pejorative sense.

¶64

It is impossible and unwise to formulate a standard of private benefit that leads to a singular resulting public good. It is entirely appropriate and not at all inconsistent with the eclectic nature of the charitable sector that the law require a well-defined and articulated process by which charitable organizations determine the public good. This should be a sort of due diligence that will make it less likely that the public good will be sacrificed for private gain. The resolution of the private benefit doctrine in this article does not create issue with any particular outcome vis-à-vis the public good, but seeks to articulate and explicate a standard methodology by which tax-subsidized organizations may determine the public good by which that determination may be evaluated at its extreme boundaries.