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## Keeping Republics Republican

Rob Atkinson

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# Texas Law Review

## *See Also*

Response

Keeping Republics Republican

Rob Atkinson

Several months ago I told Brian Galle I had accepted the offer of *Texas Law Review See Also* to comment on his article, *Keep Charity Charitable*.<sup>1</sup> He remarked, with his typically casual candor, “I’d have asked someone I disagree with more.”<sup>2</sup> The title of Professor Galle’s article nicely identifies our common ground: he now believes, very much as I once believed, in the wisdom of keeping charity charitable and meeting a wide range of basic social needs through nonprofit or “third sector” organizations, as opposed to for-profit firms on the one hand and government agencies on the other. Professor Galle’s article addresses a position with which he and I both disagree: one that would cede a more-or-less large portion of the traditional field of charity to for-profit firms—in this particular dustup, those who favor “for-profit charity” over “charitable charity.”<sup>3</sup>

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1. Brian Galle, *Keep Charity Charitable*, 88 TEXAS L. REV. 1213 (2010).

2. This exchange took place in my office at the Florida State University College of Law. I should say at the outset that Professor Galle is a former faculty colleague of mine with whom I have always been on the most cordial, if not the closest, of terms. Discount my comments accordingly. Professor Galle’s observation itself—particularly the premise “someone I disagree with more”—needs elaboration. To put it a bit more positively, he and I have agreed on a wide range of the issues he addresses in his article and elsewhere. To put it a bit more precisely, his position on those issues is quite close to the position I maintained over the last two decades or so—until, indeed, very recently. For an example of Galle’s critiques of contemporary theories on charity, see Brian D. Galle, *Foundation or Empire? The Role of Charity in a Federal System* (Fla. State Univ. College of Law, Pub. Law Research Paper No. 394, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473107](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473107).

3. See, e.g., M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 604 (2009) (arguing that corporations should engage in philanthropy if they have a cost or quality advantage over nonprofit organizations and the government); Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2064–67 (2007) (proposing that tax benefits designed to promote charitable activities should not be conditioned on the nonprofit form); Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 253 (calling for “the creation of private, for-

In the first Part of this Response, I place Professor Galle's debate with this pro-profit position in a larger context, to better see this debate as one battle in a larger—and largely successful—defense against a peculiar kind of for-profit irredentism.<sup>4</sup> In the second Part of this Response, I take up my differences with Professor Galle—differences which are, I should admit here at the outset, the result of my own change of positions. Make no mistake: I have not gone over to the cause of our common opponents on the right, the for-profit irredentists. I have instead defected to the left, the side of charity's older, if less popular, competitor—the governmental sector. I have come to believe that a large part of charity's domain should be ceded, not to the for-profit sector, but to the state. Professor Galle, by contrast, defends that frontier of charity as well, though more in other articles than in this one.<sup>5</sup>

In the third and final Part, I invite both you and Professor Galle to join me in my new position, where I suggest we will all find ourselves much more at home. At very least, here we will have the best of hosts: The University of Texas, which, notably, is neither a new-fangled for-profit charity nor a traditional charitable charity, but rather a republican philanthropy in the classical tradition of both republicanism and philanthropy.

#### I. Cannons to the Right of Him: Locating Prof. Galle's Gallant Charge Against "For-Profit Charity" in a Larger Theatre

As Professor Galle notes, both his argument for charitable charity and the arguments of his opponents for for-profit charity have a common source: the work of the legal economist Henry Hansmann. In three articles in the early 1980s, Professor Hansmann determined the course of debate on philanthropy, at least in law schools and economics departments, for the better part of three decades. The first article gave an impressive economic account of the role of nonprofit organizations as responses to particular forms of market failure.<sup>6</sup> The other two articles drew out of that descriptive account its normative implications for the duties of nonprofit fiduciaries<sup>7</sup> and an argument for the exemption of nonprofits' income from taxation.<sup>8</sup>

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profit, monitoring companies . . . that would contract with nonprofit entities for the right to sue them to enforce charitable obligations, fiduciary duties, and certain members' rights").

4. In this campaign, as Professor Galle's remark rightly implied, he and I have long been allies.

5. See Galle, *supra* note 2, at 77 (arguing that nonprofits improve the quality of public goods by providing needed competition for the government).

6. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980).

7. See Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 504 (1981) (explaining that in circumstances of market failure, nonprofit firms appropriately act as fiduciaries for their donors because they can give donors "greater assurance that the services they desire will in fact be performed as they wish").

8. See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 72 (1981) (arguing that nonprofit exemption from income taxation "serves to compensate for difficulties that nonprofits have in raising capital, and that such a capital subsidy can promote efficiency when employed in those industries in which nonprofit firms serve consumers better than their for-profit counterparts").

Nonprofit firms, in Hansmann's descriptive theory, do what all private firms are supposed to do—give consumers what they want at the lowest possible cost—in conditions of what he called “contract failure.”<sup>9</sup> These conditions, typically information asymmetries between for-profits and their patrons, or external benefits to third parties, create opportunities for for-profit firms systematically to exploit consumers by failing to deliver goods or services of the quality or quantity promised.<sup>10</sup> Nonprofit firms, Hansmann noted, offer an inherent efficiency advantage in precisely these conditions. The nondistribution constraint, which defines nonprofit firms by denying private persons any proprietary claim on their net revenues,<sup>11</sup> means that nonprofits' managers simply have no legal incentive to skimp on quality or quantity of production as a means of increasing distributable profits.<sup>12</sup> This special market-correcting, contract-reinforcing role of nonprofits, in turn, warrants both especially favorable tax treatment<sup>13</sup> and especially rigorous fiduciary duties.<sup>14</sup>

All serious subsequent scholarship on these issues has disagreed with Hansmann, in either of two predictable directions. One group of scholars, myself among them, has argued that both the function of philanthropy and the basis for its favorable tax treatment lie in its advancement of non-efficiency goals, especially wealth redistribution<sup>15</sup> and non-consumerist definitions of the common good.<sup>16</sup> The other group, led in the legal literature by Mark Hall and John Colombo, have accepted Hansmann's focus on efficiency and offered refinements of his basic market-correcting hypothesis.<sup>17</sup> Taking Hansmann's efficiency criterion as their own makes

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9. See Hansmann, *supra* note 6, at 844–45.

10. See Hansmann, *supra* note 8, at 69 (explaining that “[c]ontract failure arises when . . . the purchasers of the service . . . are likely to have difficulty in (1) comparing the quality of performance offered by competing providers before a purchase is made, or (2) determining, after a purchase is made, whether the service was actually performed as promised,” allowing for-profit corporations “to charge excessive prices for inferior service”).

11. *Id.* at 56.

12. *Id.* at 69.

13. See *id.* at 74 (arguing that where nonprofits are more efficient than their for-profit counterparts, “the cost of the capital subsidy provided by corporate tax exemption may be more than compensated for by the efficiency gains deriving from the expansion of nonprofit producers that the subsidy encourages”).

14. See Hansmann, *supra* note 7, at 524 (suggesting that nonprofits should be allowed only gradually to expand beyond the areas in which they are established because in these areas, the normative constraints that “assur[e] that nonprofits adhere to their fiduciary obligations” are weaker).

15. See, e.g., Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 633–34 & n.373 (1990) (positing “a redistributive element as a precondition of exemption of organizations engaged in particular activities” and noting that the recent trend away from such a requirement has not gone unchallenged).

16. See, e.g., *id.* at 619 (arguing that altruism as the basis for the tax exemption of nonprofit organizations is “a deliberate social policy choice that must be made on non-efficiency grounds”).

17. See Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 387–89 (1991) [hereinafter

this second group of critics the more sympathetic; rejecting that criterion makes the first group the more radical. Because both Professor Galle and his opponents belong to the more sympathetic critics, they will be our initial focus.

Hansmann himself, very much to his credit, anticipated and acknowledged this second source of criticism. Hansmann was extremely careful in making his original claims for the greater efficiency of nonprofits; in particular, he noted two critical qualifications. First, the nondistribution constraint, which predictably cuts in nonprofits' favor in conditions of market failure, is a dangerously two-edged sword. On the one hand, it removes the incentive of nonprofits' managers to skimp on quality or quantity of production as a means of increasing distributable profits, since nonprofit managers have no legal claim on net profits.<sup>18</sup> But, on the other hand, the nondistribution constraint threatens to undercut any such nonprofit advantage by removing, along with the temptation to exploit consumers, a major incentive to minimize production costs: the very prospect of passing those cost savings along to themselves in the form of higher net revenues.<sup>19</sup> The nondistribution constraint, in other words, is no guarantee against slacking, nor, in the absence of adequate enforcement mechanisms, is it a guarantee against outright theft. For nonprofits to be truly more efficient, then, even in the conditions of contract failure in which Hansmann shows they are likely to arise, either nonprofit managers must be virtuous or their predictable vices (slacking and stealing) must be contained by regulation.<sup>20</sup>

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Hall & Colombo, *Charitable Status*] (critiquing Hansmann's capital subsidy theory on efficiency grounds); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1389-1421 (1991) [hereinafter Hall & Colombo, *Donative Theory*] (using market theory to rationalize the subsidization of donative institutions).

18. See *supra* note 12 and accompanying text.

19. See Hansmann, *supra* note 6, at 878 (explaining that the profit motive improves managerial efficiency).

20. See Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 466 (1996) (arguing that the "nondistribution constraint alone cannot assure the patron that his donation (or fee) will achieve his intent"); Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 904-05 (2007) (advocating the creation of an enforceable duty of obedience for nonprofit organizations that requires directors to strive for charitable goals); see also BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 14 (1988) (noting that "restriction[s] on [nonprofits'] freedom to pay out profits" undermines an important motive for productive efficiency). Lack of information is a major source of dissatisfaction with the proprietary form of institution. Nonprofits are thus preferable on efficiency grounds to for-profit alternate suppliers only when this efficiency loss is more than offset by the efficiency gains the contract failure theory predicts. See WEISBROD, *supra*, at 14-15 (noting that the "special advantages granted to nonprofits carry the potential for achieving private gain without social benefit"); Hansmann, *supra* note 6, at 877-79 (noting that the protection afforded by the nondistribution constraint only gives nonprofits a competitive edge if it outweighs the disadvantages that nonprofit firms face in terms of limitations on raising capital, the possibility of cross-subsidization, and the lack of incentives for managerial efficiency and entry and growth).

This brings us to Hansmann's second qualification: To say that nonprofits, even under these optimum conditions, are more efficient than for-profits is not to say that nonprofits are the most efficient alternatives in any absolute sense. Hansmann, with his typical care, always noted other alternatives: professionalization and other forms of government regulation of for-profit providers,<sup>21</sup> legal prohibition of for-profit suppliers,<sup>22</sup> and even government provision of products marked by contract failure.<sup>23</sup>

A fairly large literature has explored Hansmann's first qualification, the risk that nonprofits will simply squander or steal any efficiency gains associated with the nondistribution constraint.<sup>24</sup> Another fairly large literature has explored Hansmann's second qualification, the prospect that alternatives to nonprofit suppliers may provide more efficient means of addressing contract failure in private firms. A subset of this second literature explores mechanisms that for-profit firms themselves might use to overcome contract failure. Some of those to whom Professor Galle addresses his article belong to this second school.<sup>25</sup> Much of their work, particularly in its earlier phase, focused on what would seem to be an anomaly under Hansmann's contract failure theory: for-profit firms engaging in paradigmatically charitable activities.<sup>26</sup>

On closer inspection, however, these anomalies tend at least as much to confirm Hansmann's model as to undercut it. Particularly in the case of

21. See, e.g., Hansmann, *supra* note 7, at 543–44 (explaining how codes of ethics have provided effective regulation of the legal profession).

22. See, e.g., *id.* at 545 (noting a proposal to eliminate for-profit nursing facilities).

23. See, e.g., Hansmann, *supra* note 6, at 894–95 (discussing the advantages that governmental organizations have in the provision of public and private services); see also Michael Krashinsky, *Transaction Costs and a Theory of the Nonprofit Organization* (suggesting that warranties and middlemen are alternatives to the nondistribution constraint), in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 114, 117 (Susan Rose-Ackerman ed., 1986).

24. Some of this work has been empirical, examining whether nonprofits in particular industries are, in fact, more efficient. See Richard Steinberg, *Economic Theories of Nonprofit Organizations* (noting mixed empirical data on the extent to which nonprofit managers incur high administrative costs and engage in managerial emoluments), in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK* 117, 127–28 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006). Hansmann himself has done some of this work. See Henry Hansmann, *The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit Versus For-Profit Firms*, 40 *NAT'L TAX J.* 71, 79 (1987) (finding that empirical results support the proposition that tax exemptions offer nonprofit firms “significant advantage[s] in establishing market share”). Some of this work has been more theoretical, examining the various mechanisms nonprofits might use to guard against their besetting sins, waste and theft. See, e.g., Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 *J.L. & ECON.* 327, 341–45 (1983) (analyzing mechanisms that nonprofit firms have developed to address agency problems created by private donations).

25. Galle, *supra* note 1, at 1213–14 (responding to those who would “open[] philanthropy to potential profiteering”). But as we shall see, some of those to whom Galle's article is addressed belong to a more aggressive school. See *infra* notes 33–34 and accompanying text.

26. See Galle, *supra* note 1, at 1213 (citing Malani & Posner, *supra* note 3, at 2019–23) (explaining that Malani and Posner “argue that philanthropic services could be carried on equally well by for-profit firms” and point to the charitable work of Google and other for-profit firms as examples).

information asymmetries, one would expect, as Hansmann has always noted, a mixture of for-profit and nonprofit suppliers.<sup>27</sup> The reason for this mixture is entirely consistent with Hansmann's theory: some consumers may suffer less from information asymmetries than others; to the extent that consumers know more (or think they know more) about the goods and services they are buying, they need worry less about buying them from for-profits.<sup>28</sup> Stated somewhat differently, the more that consumers trust either their own evaluations or their suppliers' reliability, the more consumers will tend to patronize for-profits rather than nonprofits. This latter factor may well account for the tendency of "popular" firms like Google and Starbucks to attract "donors."

But, as Professor Galle argues, we must be careful of the implications we draw from this. In particular, we need to notice two sets of non sequiturs: one descriptive, the other normative. As a descriptive matter, the fact that some for-profits seem to enjoy a reputation for reliability does not mean either that they are in fact reliable or that, even if they are reliable, they are the rule rather than the exception.<sup>29</sup> The very prominence of firms like Google and Starbucks may mean that third-party monitors (like the press) predictably police them at no cost to those who rely on them for goods and services that they are not themselves in a good position to monitor. If Starbucks rips people off, that is worthy of the front page of the *New York Times*; if your local latte shop does the same, it is not as likely to attract similar attention.<sup>30</sup>

If what passes as for-profit charity can be this easily explained within Hansmann's theory itself, then why is so much being made of it? It would seem to warrant, at very most, the equivalent of an epicycle or two in Ptolemy's cosmology, not a Copernican revolution that puts formerly peripheral for-profit charity at the center of a new descriptive and normative theory of charity. And many, perhaps most, of the proponents of for-profit

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27. See Hansmann, *supra* note 8, at 70 (noting that cases of complex personal services, such as day care and residential nursing care, "may be quite difficult for some consumers to evaluate with confidence, thus leading those consumers to seek out nonprofit providers as a form of protection against exploitation").

28. *Id.*; see also Hansmann, *supra* note 6, at 843 (explaining that consumers choose profit-seeking firms when they can make a reasonably accurate comparison of products and prices and reach a clear agreement with chosen firms concerning goods and services).

29. See Galle, *supra* note 1, at 1221–22 (asserting that arguments that for-profits are more efficient in general overlook the possibility that they will be less efficient than nonprofits in their charitable activities).

30. More generally, we must bear in mind the possibility that even the savviest can be fooled some of the time and that some can be fooled—will perhaps even welcome being fooled—all of the time. The most ruthlessly dishonest promisors of delivering relief to the poor may produce the highest levels of donor satisfaction by the simple expedient of diverting all donations from real relief work to fake but heart-warming before-and-after brochures. See, e.g., Hansmann, *supra* note 6, at 878 (acknowledging the possibility that nonprofits may lack incentives to eliminate unnecessary expenses). And this is not to mention diploma-mills—yet.

charity are willing to leave things pretty much at that. They are interested only in cataloguing, or at most encouraging, the admittedly exceptional cases where for-profits manage to overcome the kinds of contract failure Hansmann has identified. As we have seen, this places them well within an old and established branch of Hansmann's critics, a branch that Hansmann himself acknowledged as a needful supplement, even corrective, to his contract-failure account.

Not all proponents of the new for-profit charity, however, are nearly so modest. The more aggressive proponents of for-profit charity take aim at the core of Hansmann's theory itself. They argue that, contrary to Hansmann's fundamental thesis, the work now being done by even the most distinctive of nonprofits like overseas relief organizations could be done more efficiently by for-profit firms.<sup>31</sup> The great promise of Hansmann's work was an economic account of the role of nonprofits in a basically capitalist market economy; on his hypothesis, they arise in a number of special cases of contract failure as more efficient alternatives to for-profit firms.<sup>32</sup> The more aggressive of Hansmann's new critics take issue with that position. In their words: "An underlying theme of this Essay is that nonprofit firms are less efficient than for-profit firms."<sup>33</sup>

Professor Galle nicely maps out the problems that would flow from denying Hansmann's position and, on that basis, extending the charitable deduction to gifts made to for-profit charities.<sup>34</sup> So effectively does he trace these consequences that he leaves us with a lingering, even discomfiting, question: If Hansmann's more aggressive critics have so little to offer, why did they offer it? To get the answer, we must turn from the direction of Professor Galle's critique, which looks to the problems that flow from making gifts to for-profit charities tax deductible, and look upstream for the source of the notion that for-profits can consistently outperform nonprofits, even under conditions of contract failure.

What, then, is that source? Answering that question takes us immediately to a major division between the aggressive and moderate proponents of for-profit charity and, beyond that, between the aggressive proponents of for-profit charity and all prior economic analysts of

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31. See, e.g., Henderson & Malani, *supra* note 3, at 590 (positing that corporations are able to produce some kinds of altruistic goods more efficiently than nonprofits); Malani & Posner, *supra* note 3, at 2020–22 (explaining inefficiencies linked with nonprofits and arguing that for-profit firms would be more efficient).

32. Hansmann, *supra* note 6, at 843–45.

33. Malani & Posner, *supra* note 3, at 2055. In the interest of fairness, this is the remainder of the quoted sentence: ". . . and that if the law permitted for-profit firms to compete in charitable markets, charitable activity would become more efficient." *Id.* The law, we might note, does not generally forbid for-profits to compete with charities in the provision of any goods or services, though it does deny for-profit competitors many of the benefits, under the tax law and elsewhere, that it allows nonprofits.

34. Galle, *supra* note 1, at 1218–30.

philanthropy. The first step in that direction is to recall that economists might criticize Hansmann's model from either of two related directions. First, they might argue that charities waste, by sloth or theft, any advantage the nondistribution constraint offers them as means of addressing contract failure.<sup>35</sup> Second, economists critical of Hansmann might argue that alternative suppliers, including specially structured for-profit firms, can overcome contract failure more efficiently than nonprofit suppliers.<sup>36</sup>

Either of these two reciprocal arguments—the latter for the greater efficiency of for-profits, the former for the lesser efficiency of nonprofits—might draw from two sources. One source, as we have seen, is essentially empirical: evidence from studies of either for-profits or nonprofits that cast new light “from the field” on their relative efficiency under conditions of contract failure. Again, this is the source from which Hansmann's more moderate critics have generally drawn.<sup>37</sup> Consistent with the basic insight of his theory, these moderate critics have explored situations where for-profits perform better or nonprofits perform worse than his theory would predict.

But this is not the source from which Hansmann's more aggressive critics draw. They do, to be sure, take a bow in the direction of empirical research on relative efficiency, but it is a very low bow indeed. They cite a single article in the *Harvard Business Review*.<sup>38</sup> And even that article stands more as an addition to the moderate critique of Hansmann than as a foundation for any more aggressive critique. This is evident even from their own summary (which, it has to be said, is the fullest treatment they give):

Former U.S. Senator Bill Bradley and consultants from McKinsey & Company have estimated that the nonprofit sector wastes \$100 billion of value annually. They argue that it is possible to recover approximately \$60 billion of that loss by improving management and cutting administrative costs.<sup>39</sup>

As this summary rightly reports, the *Harvard Business Review* article suggests that nonprofits may squander any efficiency advantage due to operational inefficiencies, a possibility that Hansmann himself admitted in his first article. But the *Harvard Business Review* article itself gives little systematic empirical evidence of this possibility. What is more, the article

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35. See Steinberg, *supra* note 24, at 126–28 (discussing “voluntary failure” by nonprofit managers and the temptation to “choose higher-cost perk-laden means of production”).

36. See *supra* notes 33–35 and accompanying text.

37. For empirical studies of the relative efficiency of for-profits and nonprofits in particular industries, see Steinberg, *supra* note 24, at 118, 127–30, and Hansmann, *supra* note 25, at 79.

38. Bill Bradley et al., *The Nonprofit Sector's \$100 Billion Opportunity*, HARV. BUS. REV., May 2003, at 94.

39. Malani & Posner, *supra* note 3, at 2022 (citing Bradley, *supra* note 38, at 102) (citations omitted); see also *id.* at 2056 (“Yet the study by former Senator Bradley and consultants from McKinsey & Company suggest[s] otherwise [than the conclusion that nonprofits are not very efficient]. They find that the nonprofit sector wastes \$100 billion of value annually.” (citation omitted)).

suggests that the remedy for this possible problem is what one branch of Hansmann's moderate critics have long suggested: improving the efficiency of nonprofits themselves.

The *Harvard Business Review* article is thus, at best, tenuous support for the proposition that for-profits are likely, across the board, to be more efficient suppliers than nonprofits under conditions of contract failure. The article stands for the proposition that nonprofit performance can be improved, not for the proposition that for-profits can deliver the same goods and services better than nonprofits as they are, much less as they might be modified. Thus, Hansmann's more aggressive critics do not attempt to refute his contract-failure theory with evidence that for-profits are more trustworthy or nonprofits less efficient than his theory suggests; they must, it would seem, simply reject his theory on the basis of their own competing theory.

What competing theory is this? Note first that it has to be significantly narrower than the economic analysis of law. To appreciate that point, we must step back a bit further and look at the history of economic analysis of law. Two academic generations ago, its proponents offered a unified field theory of all of law, normative as well as descriptive.<sup>40</sup> From its very inception, critics have argued that economic analysis of law was either circular, reductionist, or both—especially in its normative claims.<sup>41</sup> But even its critics conceded its elegance,<sup>42</sup> and it had both answers for these critics and powerful appeal to a second generation of scholars.<sup>43</sup>

These latter, in their turn, expanded the basic principles of economic analysis to the far horizons of law, even to areas where the insights of economics seemed, at best, deeply counterintuitive: family law, constitutional law, and nonprofit law. Hansmann's work in this last field is a paradigm of this second generation of economic analysis. He offered a plausible, if counterintuitive, theory of nonprofit firms as a complement to the emerging economic "theory of the firm."<sup>44</sup> His claim to fame, as a scholar of nonprofit organizations, was to explain the function of nonprofit firms in terms of economic efficiency. Even as Adam Smith pointed out that it is not the generosity of the baker and other tradesfolk that supplies our daily bread, so Hansmann explained that the function of even relief

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40. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972). This was nothing if not impressive and appealing.

41. E.g., Arthur Allen Leff, *An Economic Analysis Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

42. Leff, *supra* note 41, at 459.

43. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 107–15 (1981) (responding to Dworkin's critique of wealth maximization).

44. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 245 (1996) (presenting the idea that "[a]s owner control becomes increasingly attenuated in a formally owned firm, the difference between such a firm and one that is formally unowned (that is, nonprofit) tends to vanish," revealing that "nonprofit firms are not sharply different from firms that are investor-owned").

organizations like CARE is best understood as efficiently supplying the demands of their donors.

Hansmann's more aggressive critics are themselves economic analysts, but of a much narrower school—one much closer to the Austrians than to Adam Smith. In the view of the Austrian school, for-profit firms are always the most efficient providers, even in cases of garden-variety market failure.<sup>45</sup> The basic reason is that government can never be relied upon to correct the kind of market failures Hansmann has identified, nor any others.<sup>46</sup>

More precisely, Hansmann's more aggressive critics suggest an especially aggressive form of the Austrian antiregulatory school of economics. In its original form, the Austrian school left open the possibility, at least in principle, that charities and other third-sector organizations that are neither for-profit firms nor state instrumentalities might correct market failures.<sup>47</sup> The new and more aggressive Austrianism seems determined to foreclose that prospect.<sup>48</sup> The old Austrian school assumed that government was too unreliable to correct market failures, leaving for-profit firms of admittedly suboptimal performance the winners by default; the new Austrian school assumes that for-profit firms can overcome market failures on their own.<sup>49</sup> In the old school, for-profit firms, though sometimes beset with market failures, are thus a second-best solution; in the new school, for-profit firms do not experience market failures nor can they correct those failures themselves.<sup>50</sup> For-profits thus offer not just the best of all possible worlds, but the best of all imaginable worlds.

Full exploration of that fantastic world will have to be done elsewhere; in a comment we can only note three salient points. First, the new Austrianism gives little if any empirical data as the basis for trusting for-profits more or nonprofits less. Second, this expanded faith in for-profits—a faith that sees for-profits as superior not only to the state but also to charity—

45. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 659–60 (3rd ed. 1966) (asserting that, when governments interfere in the market, “[o]utfits producing at higher costs are brought into existence or preserved while other outfits producing at lower costs are forced to curtail or to discontinue their production,” resulting in “consumers . . . not getting more, but less”).

46. See *id.* at 657–58 (conceding the problem of external costs but insisting that “[i]t could be removed by a reform of the laws concerning liability for damages inflicted and by rescinding the institutional barriers preventing the full operation of private ownership.”); *id.* at 736 (“Corruption is a regular effect of interventionism.”).

Remember Alan Greenspan (not to mention his mentor, Ayn Rand)? Edward Rothstein, *Considering the Last Romantic, Ayn Rand*, at 100, *N.Y. TIMES*, Feb. 2, 2005, at E1 (noting that Greenspan was an acolyte).

47. See VON MISES, *supra* note 45, at 837–40 (discussing charitable organizations’ traditional role of caring for the indigent despite funding problems resulting from government interference).

48. See Malani & Posner, *supra* note 3, at 2022 (proposing new tax measures that “may encourage a vast increase in the production of community-benefit goods and services by for-profit firms”).

49. See *supra* note 3 and accompanying text.

50. See Malani & Posner, *supra* note 3, at 2035–39 (suggesting that for-profit firms can overcome market failure by creating contracts with donors).

comes at a most opportune time: precisely when everyone else in the world is aghast at the havoc apparently wreaked on the entire global economy by the very kind of unregulated private firms that the older Austrian school called for. One can but stand in awe of those who would not only reaffirm but actually expand such a faith at such a time in the face of such evidence. Each of us, of course, must draw his or her own conclusions here. Some have seen the burgeoning of for-profits in higher education and the extension of federal loans to their students as the parallel, in both structure and extent, of the subprime mortgage fiasco. As for me, please pardon a quote from the ever-dark Hardy: “[W]ith this bright believing band I have no claim to be.”<sup>51</sup>

Finally, even those willing and able to make this leap of faith with the more aggressive proponents of for-profit charity might balk at the prescriptive conclusion they draw from their descriptive premise. Even if some or all for-profits are reliable suppliers in situations where Hansmann predicts contract failure, it does not follow that they warrant a tax subsidy. On the one hand, maybe charities are special, as some have argued, in ways that have little if anything to do with greater efficiency.<sup>52</sup> On the other hand, even if we assume efficiency to be the sole criterion of comparison, and even if we conclude for-profits fare better than nonprofits under that metric, it does not follow that we should extend favorable tax treatment to them. We might achieve equal treatment in the opposite direction, by “rounding down” rather than “rounding up”: rather than extend the tax subsidy to for-profit charity, we would deny the tax subsidy to nonprofit, “charitable” charity. Equal treatment of for-profit and nonprofit charity, in other words, could be an equality of tax neutrality instead of an equality of tax preference.

Indeed, on the premise that for-profit charities are systematically more efficient than charitable charities, it would seem that we would do even better to withdraw the exemption from charitable charities even as we extend it to for-profit charities. We should, in other words, pour good money after good, not bad, by placing foregone tax revenues in the hands of efficient for-profit charities, not their inefficient charitable competitors. But on the implicit Austrianism of for-profits’ more radical proponents, even that would be a distant second-best. Given *ex hypothesi* that both government (as supplier and purchaser) and charities are less efficient than for-profits, we would presumably do best to not subsidize production and, in the bargain, lower taxes as much as possible.<sup>53</sup>

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51. Thomas Hardy, *The Imprecipient*, in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1935 (M. H. Abrams & Stephen Greenblatt eds., 7th ed. 2000).

52. See John Simon, et al., *The Federal Tax Treatment of Charitable Organizations* (“The most traditional of the normative arguments for a subsidy theory holds that exemption and deductibility are needed to promote the provision [by charities] of certain kinds of benefits to the public.”), in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 24, at 267, 274.

53. Just to be clear: This last is a *reductio*, not a recommendation.

Galle's article, I should say, does not press these three most salient points against the new Austrians. In dealing with this more aggressive school of charitable charity's critics, Galle has been, in my estimation, too charitable. That charge brings me to the greatest of differences between us: I find Professor Galle much too charitable, not only toward the Austrians' for-profit charity, but also toward his own charitable charity.

## II. Cannons to the Left of Him: Questioning Professor Galle's Quest for More Charitable Charity.

"Everyone," Professor Galle begins his paper, "likes charity."<sup>54</sup> But, as the very presence of the more aggressive proponents of for-profit charity implies, not everyone thinks as highly of charitable charity as he. The more aggressive proponents of for-profit charity question the efficiency of charitable charity, even under conditions of contract failure—and that should also lead them to question its entitlement to a tax subsidy. Nor, I now have to admit, are they alone in that apparently "bah-humbug" position. The prospect of eliminating the favorable tax treatment of Galle's "charitable" charity takes us beyond his disagreement with the proponents of for-profit charity, both moderate and aggressive, and brings us to his disagreement with—pardon the first-person singular—me.

The more aggressive proponents of for-profit charity, as we have seen, might well oppose special tax favors to all charity (or anything else) because they believe nonprofits and government both involve inefficiencies compared to for-profits, charitable or otherwise. But one may join them in opposing tax favors for all charities, charitable or otherwise, for a reason very different from theirs: both for-profit and nonprofit charities displace a third possible supplier of goods and services that are potentially beset by contract failure—government itself.<sup>55</sup> What is more, government may often be a superior alternative to both charitable and for-profit charity. That singularly unpopular position is my own. As a part of what may be a vanishing minority, I question the premise of the joke, "I'm from the government, and I'm here to help you."<sup>56</sup>

Charitable charity has doubters, that is to say, on the political left as well as the economic right. Those on the right include those we have called proponents of for-profit charity; those on the left include proponents of what I would call *republican philanthropy*. These latter include, to name only a

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54. Galle, *supra* note 1, at 1213.

55. See WEISBROD, *supra* note 20, at 31 (noting that "[t]he effect of a donation . . . on the level of tax-financed governmental expenditures is not yet known" and that "increased private donations may decrease what government would otherwise have done").

56. I am indeed from the government—specifically, the Florida State University College of Law—and I truly believe I am here, in this debate about how best to serve the common weal, to help you.

few, George Washington,<sup>57</sup> Thomas Jefferson,<sup>58</sup> the Emperor Trajan,<sup>59</sup> and, at least on the vital issue of education, the philanthropist Warren Buffet.<sup>60</sup> As these examples suggest, doubters of charity cover a huge swath of history and a very wide political spectrum. Viewed more positively, doubting the merits of charity may be seen as an ancient and honorable position among those whose politics are defensibly republican.<sup>61</sup> Their positive point of agreement is in their confidence that the state itself is the preferred provider of a more-or-less wide range of essential goods and services.

This is not the place to spell out in detail the pro-government preference of republican philanthropy.<sup>62</sup> But from that perspective we can see several aspects of Professor Galle's case for keeping charity charitable in a usefully different light. Most obviously, several of his answers to charitable charity's more aggressive, "Austrian" opponents carry little weight with my republican doubters. For example, Professor Galle argues that measures favorable to for-profit charity over charitable charity would strengthen the state against both.<sup>63</sup> That argument would certainly appeal to those mistrustful of the state. But it is hardly persuasive to either social-democratic<sup>64</sup> or neo-classically republican philanthropists, both of whom

57. See Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600–2000* (noting Washington's extensive warnings about voluntary associations in his Farewell Address), in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK*, *supra* note 24, at 32, 35.

58. See *id.* ("Southern states, influenced by Jefferson's concerns about 'un-republican' institutions, were particularly hostile to private corporations, associations, and charities.").

59. See *THE LETTERS OF THE YOUNGER PLINY* 272 (Betty Radice trans., 1963) (explaining, in a letter from Trajan to Hadrian, that government supply of fire-fighting equipment is safer than authorizing of voluntary fire brigades, which, like associations of all kinds, "soon turn into a political club").

60. Donald G. McNeil, Jr. & Rick Lyman, *Buffett's Billions Will Aid Fight Against Disease*, N.Y. TIMES, June 27, 2006, available at <http://www.nytimes.com/2006/06/27/us/27gates.html?scp=39&sq=warren%20buffett%20public%20education&st=cse> (reporting on Warren Buffett's \$31 billion donation to the Gates Foundation, which plans to use the money in part to "create[] model schools that public school systems can use as examples, rather than spending endlessly to pay the expenses of every impoverished American school district").

61. See Hall, *supra* note 57, at 35 ("The centrality and effectiveness of voluntary associations in the Revolution served to kindle hostility toward them after the war, as Americans sought to establish governmental and legal institutions based on democratic principles.").

62. See generally Rob Atkinson, *Philanthropy and the Federal Income Tax: Should Our Republic Underwrite de Tocqueville's Democracy?* (March 2010) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=robert\\_atkinson](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=robert_atkinson).

63. See Galle, *supra* note 1, at 1219 (arguing that monitoring costs would be shifted to for-profit charities under Malani and Posner's model, placing them "at a disadvantage relative to the government sector,"); *id.* at 1225 (indicating that favoring for-profit charities under Malani and Posner's model would decrease the social rewards of working for a charity thereby making charities less efficient in their competition with the government).

64. See Steven Rathgeb Smith & Kirsten A. Gronbjerg, *Scope and Theory of Government-Nonprofit Relations* ("The dominance of this particular ideology [holding that government crowds out initiatives in the other two sectors] is evident in the extent to which arguments to privatize government and reduce taxes carry the day in the political discourse and public-opinion polls."), in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK*, *supra* note 24, at 221, 228.

would welcome not only greater state regulation of for-profits but also displacement of charitable charity's provision of many goods and services by state provision.<sup>65</sup>

Similarly, some of the evidence that Professor Galle adduces in favor of his own position is, from the perspective of those who do not accept the premises of that position, close to tautological. Consider his claim that charitable charities promote diversity.<sup>66</sup> If by diversity we mean multiplicity of views about the public good and the means of its advancement, both the philanthropic sector itself and the likely variety within it certainly adds diversity to the necessarily somewhat monolithic presence of the modern state. Thus, according to one commentator: "The voluntary sector achieves diversity through the very diversity of its institutions."<sup>67</sup>

But what is true in general may well not be true in every case. In a region like the American South where many well-off white children attend white-flight academies, the appearance of yet another white-flight academy, rather than expansion or improvement of a racially integrated public school, is hardly a triumph for diversity by any less circular definition. Similarly, the opening of a NATO-sponsored secular school in Afghanistan would appear to promote diversity in a very different way from the opening of yet another fundamentalist madrassa sponsored by the pet philanthropy of a member of the House of Saud. To those not already committed to nonprofit over governmental provision, automatically equating nonprofit provision with increased diversity seems at least a little circular.

None of this is to say that Professor Galle's arguments against for-profit charity are logically flawed. It is, rather, to note that many of them rest on a premise not all opponents of for-profit charity share: that charitable charity is preferable to republican philanthropy. Nor do I mean to fault Professor Galle for not addressing more of *Keep Charity Charitable* to this latter position. He has, again, made his general case for charitable charity elsewhere.<sup>68</sup>

65. See Atkinson, *supra* note 62, at 69 (indicating that under a neoclassical republican philanthropy, the direct state provision of publicly beneficial goods and services would be expanded); Rob Atkinson, *Philanthropy's Future: Questioning Today's Orthodoxies, Re-Affirming Yesterday's Foundations* 45 (March 2010) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=robert\\_atkinson](http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=robert_atkinson) (stating that the Abrahamist Republic "would police, with far more vigor than contemporary governments in either Europe or America, the kind of financial brinksmanship that produced the current recession by systemically unsustainable shifting of private risks onto the public"); *id.* at 47 (indicating that the Abrahamist Republic would have "a very big budget," particularly due to its provision of universal education and public works employment).

66. See Galle, *supra* note 1, at 1215 (noting that the deduction for charitable contributions may be viewed as "a federal subsidy to the recipient firms," which is "justified as a tool for encouraging the production of goods that would otherwise be underproduced by the private market"); *id.* at 1230 (stating that when the for-profit and charitable sectors are mixed, "the diversity of charities' size and focus" is diminished).

67. James Douglas, *Political Theories of Nonprofit Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 43, 46 (Walter W. Powell ed., 1st ed. 1987).

68. Galle, *supra* note 2.

Further, proponents of bigger government, interesting though they may be as a matter of conceptual clarity or historical completeness, are hardly a high priority, practically speaking, in contemporary politics. As a practical matter, republican philanthropy—along with allied ideas like the “public option” in health care—may safely be relegated to footnotes.<sup>69</sup>

### III. Keeping Republics Republican: Remembering the Alamo (and Thanking Goodness for the University of Texas)

The marginal political relevance of bigger-government proponents conceded, allow me to savor a single, but I think singular, irony to be found in the actual locus of this three-way debate about the proper place of charity. The host for this phase of that debate is the University of Texas School of Law, which is neither the kind of charitable charity that Professor Galle defends nor the kind of for-profit charity that he criticizes. It is, rather, an instrumentality of the state, of which, as we have seen, both Professor Galle and his opponents appear to be equally dubious as an alternative source for the kind of goods and services charities have traditionally delivered.<sup>70</sup> For both Professor Galle and his opponents, the state and its agencies are, in the provision of goods like this very debate, presumably seldom better than second-best. For Professor Galle, the best is charitable charity; for his opponents, for-profit charity.

Republican philanthropy sees the *Texas Law Review* in a very different light, not as the second- or third-best, but as the ideal. It is the kind of state instrumentality that not only does the work of traditional charity best but also exemplifies what the state itself should do, even be. To get at that ideal, we need to note a deeper irony: the debate the *Texas Law Review* has sponsored is an almost perfect testing ground for the “twin failure theory” of nonprofit organizations. In that theory, consumers turn to nonprofits for products that, for identifiable reasons, neither for-profit firms nor the state adequately supplies. Nonprofits are thus a response to market failure on the one hand and government failure on the other.<sup>71</sup>

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69. If it is not omitted altogether, along with those of monarchists, Trotskyites, and (until relatively recently) the Austrian branch of neoclassical economics. But I clearly counted the last of these out too quickly. I wrote this section on the second day Senate Republicans blocked all consideration of financial reform, well more than a year after the onset of the current financial crisis. See Edward Wyatt & David M. Herszenhorn, *2 Votes Break Logjam on Financial Overhaul Bill*, N.Y. TIMES, May 6, 2010, available at <http://www.nytimes.com/2010/05/06/business/economy/06regulate.html> (stating that the Senate’s approval of two amendments to a financial regulatory bill “broke a logjam that had paralyzed the Senate floor for much of the last week”).

70. The *Texas Law Review* itself, though formally organized as a tax-exempt charitable organization, is nonetheless an official scholarly organ of the University of Texas School of Law. I owe my editor, Tracey Bamberger, the credit for pointing out this distinction.

71. See JAMES DOUGLAS, WHY CHARITY?: THE CASE FOR A THIRD SECTOR 160 (1983) (referring to early versions of the standard theory of nonprofits’ function as “the twin failure theory”); Steinberg, *supra* note 24, at 119 (referring to “the stream of literature that has become known as ‘three-failures theory’” because it accounts for each social sector—for-profit, nonprofit,

To appreciate the market-failure half of that theory, we need first to follow economic analysis in considering this debate as a product, a good or service to be produced and sold. As soon as we take that perspective, we see that our debate and its constituent scholarly articles are paradigms of products subject to both of the market failures that Hansmann identified as contract failure. On the one hand, our debate involves the problem of information asymmetry. This debate could easily take place on the Web as postings to various freestanding blogs. But those not well versed in the law and economics of charity would be at a distinct disadvantage in following the debate.<sup>72</sup>

Even more than this information asymmetry, the product the *Texas Law Review* is offering in this debate manifests Hansmann's other major source of contract failure: external benefits. As economic analysts of nonprofits after Hansmann have noted, ideas about the common good, which lie at the core of our debate about the proper locus of charity, are among the purer forms of public good.<sup>73</sup> Unable effectively to "charge" all those who benefit from this debate and similar public goods, for-profit firms predictably undersupply them.

These information asymmetries and external benefits, however, are only the market-failure half of the standard twin failure theory of nonprofit organizations. The other half addresses an equally basic question: In the case of information asymmetries and external benefits, why doesn't the government step in to regulate for-profit production in the first case and, if necessary, provide the good or service itself in the second? The answer is that the state often does step in but, in a democracy, only up to the level demanded by the marginal voter. Those voters who want more or better output than what a majority of their fellow citizens are willing to vote for must turn to other suppliers. In markets where for-profits are either unreliable (on account of information asymmetries) or unavailable (in the case of public goods), voters must turn to nonprofit suppliers—Professor Galle's charitable charity.

We have, of course, come full circle. Here, as Hansmann's theory suggests, nonprofits may well be the best available supplier. And so, as he and others have pointed out, many universities are what Professor Galle would call "charitable charities." That, I think it is fair to say, is the "Ivy

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and governmental—as responses to failures of the other two); *see also* BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 16–25, 33–41 (1991) (assessing the relative merits of for-profit firms, then government, and finally nonprofits).

72. Given the vast amounts of information on the Web, they would face a paradox: To find what they need to know, they would have to know it or, at the very least, its reliable sources already. To fully appreciate the arguments involved, they would need to go to law school to become legal scholars themselves.

73. *See* Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 *J. ECON. LITERATURE* 701, 713 (1996) ("Several articles describe a person as a 'pure altruist' who cares only about the benefits flowing to others or about the overall level of some public good.").

League” model. All across New England, and down into the mid-Atlantic states as well, the greater universities and the greater law schools are private, nonprofit institutions—Professor Galle’s charitable charities. Not to choose examples entirely at random, consider both Professor Galle’s law alma mater and mine, Harvard and Yale, respectively. Both those schools, we would do well to remember, had their origins as training grounds for the clergy of a narrow sect of Puritan Protestantism.<sup>74</sup> And so from the principal podium at Yale College, its President, the Reverend Timothy Dwight, urged his flock not to elect the atheist Jefferson President lest “[w]e may see the Bible cast into a bonfire . . . and our children . . . uniting in chanting mockeries against God.”<sup>75</sup>

Reverend Dwight may have overstated citizen Jefferson’s theological unorthodoxy, but the differences in their visions of both higher education and the common weal would have been hard to exaggerate. Jefferson’s ideal university was to be at least nonsectarian, if not secular; it was to be publicly funded and tuition free, at least for the poor<sup>76</sup>; it was to produce statesmen trained, as Jefferson himself had been at the College of William and Mary, more in the classics than in the scriptures, with an eye toward law rather than theology. It was, in short, to produce succeeding generations of Jeffersons, children of the Renaissance and the Enlightenment, citizens working to create a new order of the ages<sup>77</sup> by the light of human reason—not parsing sectarian tracts to discern the divine will to better usher in the millennium. In Jefferson’s republican vision, the Commonwealth and its university were

74. Thus, as Lester Salamon points out:

In colonial Massachusetts, for example, the commonwealth government not only enacted a special tax for support of Harvard College but also paid part of the salary of the president until 1781 and elected the college’s Board of Overseers until after the Civil War. The state of Connecticut had an equally intimate relationship with Yale, and the state’s governor, lieutenant governor, and six state senators sat on the Yale Corporation from the founding of the school until the late 1800s.

*Partners in Public Service The Scope and Theory of Government–Nonprofit Relations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 67, at 99, 100. See also Hall, *supra* note 57, at 34 (“Such institutions as Harvard, William and Mary, and Yale were regarded [in colonial America] as public corporations, subject to legislative oversight and supported significantly in the form of legislative grants of money, real estate, and ‘privileges,’ which included levying special taxes and a monopoly on ferry operations.”); *id.* at 39 (“Both Harvard and Yale, with significant representation of elected officials on their governing boards, were not private as we understand the term, though both would replace the *ex officio*s with elected alumni representatives by 1870.”).

75. See Tim Hackler, *God and Man at Monticello How Jefferson Beat the Religious Right*, WASH. POST, Mar. 28, 1993, at C3 (quoting Rev. Dwight).

76. See DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 243 (1970) (“[T]he goal he hoped ultimately to reach was the establishment of a state-wide system of public education that would provide instruction at all levels.”).

77. A phrase not accidentally inscribed on the obverse side of the dollar bill and the Great Seal of the United States in the language of Cicero and Seneca: *Novus ordo seclorem*. Charles McC. Mathias, Jr., *Ordered Liberty The Original Intent of the Constitution*, 47 MD. L. REV. 174, 174 (1987).

absolutely inseparable, almost indistinguishable. And if Jefferson's standards were not those of the Bible or the prayer book, neither were they the standards of consumer preference or majority will. He famously placed certain principles above political debate; if their foundation is hard to find in his natural law, it is easy to see in the classics of traditional republicanism.

Eventually, of course, even those bastions of Calvinist orthodoxy, Harvard, Yale, and Princeton, came around to Jefferson's secular standards of academic merit. But the struggle about another vital issue—their mode of funding—is very much with us today. From Jefferson's day to ours, the finest university in the Commonwealth of Virginia has been the Commonwealth's own flagship university. In Jefferson's conception, its foundation was the income and capital of the Commonwealth, justly levied and wisely invested, not the spare change of charitable sponsors, individual or corporate, given at whim and spent under the most permissive of standards.

The University of Virginia is the Jeffersonian paradigm and prototype, but it is hardly the sole individual of its species. Higher education across the whole of the South and West bears his mark—nowhere more than here in the Southwest with Texas and its own flagship university. California and Michigan are all but broke nowadays, and the Commonwealth of Virginia has essentially ceded the law school at Mr. Jefferson's own public university to a private elite.<sup>78</sup> The University of Texas stands, if you will pardon the allusion, as virtually the lone star in what was once a firmament of truly Jeffersonian universities, all models of republican philanthropy.

What, we have to wonder, has made Texas special and especially hospitable to republican philanthropy? Why, more specifically, has Texas not succumbed, at least in this regard, to “government failure”? It is surely a long and complex story, but running through it all are the necessary conditions for republican philanthropy: citizens' desire for excellence above both what the market produces (compare the University of Phoenix) and what private philanthropy can provide at affordable prices (compare, again, Yale and Harvard). And what is the proof of that? Think again of this very debate in the real and virtual pages of the *Texas Law Review*.<sup>79</sup>

And remember the Alamo. Colonel Travis's troops there, volunteers though they were, did not serve for free and did not pack their own lunches. Nor did the nascent Republic of Texas raise funds for salaries and supplies with either a veterans' auxiliary bake sale or an alumni phone-a-thon. The Republic the Alamo defended did not rely on the passing of the proverbial

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78. One would not want to press the coincidence too far, but it may be worth noting that, even as Professor Galle's article appears here, the principal paper propounding for-profit charity appears in the *Virginia Law Review*. Malani & Posner, *supra* note 3.

79. Another source of possible bias to disclose: This is not my first time in these pages. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEXAS L. REV. 259 (1995).

hat to fund its defense. It taxed and spent—as wisely and as well as the education of its citizens enabled. And those citizens, in establishing their university, built what must be the ultimate bastion of any real republic. As Jefferson once observed, no people can long remain both ignorant and free;<sup>80</sup> for him it followed *a fortiori* that providing the education necessary to guarantee that freedom is the fundamental duty of the state. If republican philanthropy could be stated in a sentence, that would be it.

This brings me to a final irony. I have said that I find no absurdity in the statement “I am from the government, and I’m here to help you.” You yourself know that that statement cannot be totally absurd; you are reading this, as you have read Professor Galle’s article, in an official organ of the State of Texas. Texas has long been a polity of republican philanthropy, attested not only by your University and your Alamo, but also by your ballets, your operas, and your museums. But I come not *from* Texas but *to* Texas; what is more and worse, I come not from another model of properly republican government but from Florida, which is more nearly the opposite.<sup>81</sup>

In contrast with neoclassically republican Texas, Florida is more a congeries of demographic deadbeats and subverters of the social contract. Many Floridians, having had the taxpayers of Midwestern states educate their children, conveniently absconded to Florida when it came time for them, in their turn, to pay to educate the next generation. And many Floridians, having fled either Communist or Fascist terror elsewhere in the Caribbean Basin, now vote consistently against the kind of state services necessary to sustain America as a republic “with liberty and justice for all.”<sup>82</sup> Their combined votes have helped make America long on negative liberty and nominally equal justice, even as they have drawn our reserves of patriotic fraternity down to zero, if not below. We must forgive them, of course, for they know not what they do, having never studied in citizen Jefferson’s republican schools. But how, we have to ask ourselves, can they appreciate his prophesy: *No people can long remain both ignorant and free.*<sup>83</sup>

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80. Rob Atkinson, *Law as a Learned Profession The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 622 (2001).

81. From this populist Florida, my message thus comes to republican Texas. Thankfully for us all, things have not always run in this coals-to-New Castle direction. The long-time dean of my law school, Donald W. Weidner, is a proper export of the University of Texas School of Law, a veteran of the Texas Law Review. What Jefferson, father of republican public education, hoped to do with every generation of Virginians, your alma mater has done with at least one transplanted Brooklyn boy. Thanks to you and to Dean Weidner, your public university and its republican philanthropy are the model of the law school that he has built, and I have served. May your star ever remain our cynosure.

82. 4 U.S.C. § 4 (2006).

83. *See supra* note 80 and accompanying text.

The state that employs me spends less per capita on education than any other in the nation.<sup>84</sup> My South Carolinian parents could always say, faced with public schools of the sorriest sort, “thank goodness for Mississippi.” We now have a different byword for the ultimate in educational backwardness. It is the adopted homeland of summer soldiers and sunshine patriots, a fact ironically reflected in its official nickname: The Sunshine State. Floridians are today’s grasshoppers; Texans are the ants of yesterday and tomorrow. We heed the proverbs of neither the classics<sup>85</sup> nor the scriptures;<sup>86</sup> you tax yourselves to teach your children the wisdom of both.<sup>87</sup>

This is not to say, of course, that the Jeffersonian ideal has no place for charitable charity, even in the case of higher education. Some citizens will presumably want to study in the comfort, not to say confines, of their particular religious communities; those communities will doubtlessly want to preserve the traditions of their cult and culture. Charitable charity universities, both sectarian and secular, may also serve as a kind of cultural ark, insurance against a rising populist flood that could conceivably swamp state educational institutions. Even republican Texas, sad to say, is not immune to populist pressures; imagine, for a chastening moment, the curriculum of the University of Texas School of Law being set by the same agency that selects Texas’s primary and secondary school curriculum.<sup>88</sup> The wealthy, with charitable but not republican inclinations, will doubtlessly continue to build institutional monuments to their particular educational preferences.<sup>89</sup> And, of course, the option of admission to elite, if out-of-state, charitable charities like Harvard and Yale may relieve political pressure on

84. Matthew Haggman & Michael Vasquez, *Florida Puts Little Investment Into Its Universities*, MIAMI HERALD (Aug. 22, 2010), <http://www.miamiherald.com/2010/08/22/1787013/florida-puts-little-investment.html>.

85. See JEAN DE LA FONTAINE, *The Grasshopper and the Ant*, in FABLES OF LA FONTAINE I (Elizur Wright, Jr. trans., 1842); JERRY PINKNEY, *The Grasshopper and the Ants*, in AESOP’S FABLES 12 (2000).

86. *Proverbs* 6:6 (Revised Standard Version) (“Go to the ant, O sluggard; consider her ways, and be wise.”).

87. I must, of course, acknowledge an obvious, and entirely fair, objection to all this: It rests on Texas legend, not Texas history. Mine is the narrative of a Texas mythologized most aggressively. But not, I think, egregiously. To see why not, imagine telling a parallel tale about Florida: *Arise, retirees of Del Boca Vista! Take up your croquet mallets and your shuffleboard sticks! Storm the ramparts of mediocrity!* Tales of patriots from the farthest reaches of France rallying to Paris to save the Republic are probably at least a little taller than the historical record can fully sustain. But no imaginable Marseillaise could inspire any such march on Tallahassee. Nor, I hasten to say, is this because the denizens of Del Boca Vista are old; we have no trouble believing that the home guard of Sparta, equally grey, held off an alien army. It is not a matter of age; it is a matter of culture. Florida is not the hinterland, much less the heartland, of any revolution nor, for that matter, even the real homeland of most of its inhabitants. It is rather the last retreat from social obligation; beyond it lies only the sea and the grave. Last retreat, that is, in a southerly direction; there is, much closer to Texas, the equally compelling example of Arizona.

88. See James C. McKinley, Jr., *Texas Conservatives Seek Deeper Stamp on Texts*, N.Y. TIMES, Mar. 11, 2010, at A20 (discussing the extreme politicization of the Texas Board of Education).

89. Examples include Duke, Stanford, Vanderbilt, and, of course, Texas’s own Rice.

Texas's own graduate schools to admit the less than stellar scions of powerful and prominent local families.<sup>90</sup> But again, the Jeffersonian ideal would remain at the center: the institutional equivalents of the University of Texas.

#### IV. Conclusion: Give Me That Old Time Republic (of Texas)

The basic challenge for nonprofit theorists has long been to create a model that explains the role of nonprofits vis-à-vis for-profit firms on the one hand and governmental agencies on the other.<sup>91</sup> Professor Galle's *Keep Charity Charitable* nicely corrects one reductionist distortion of that model—one that assumes, on the thinnest of evidence if not wholly a priori, that for-profit firms are typically more efficient than both traditional charity and republican government. In doing so, Professor Galle draws on his own more positive contribution to that larger project. In that contribution, he may commit the opposite error of those whom he corrects here; he may, that is, favor nonprofits over both for-profits and government without adequate evidence of his own.

Thankfully, the very appearance of his fine article in the *Texas Law Review* reminds us of the profoundly important role of a philanthropy that is neither private nor for-profit but properly public, neoclassically republican. Properly republican institutions—those run by the best qualified in pursuit of public ends, *res publica*, above both majority will and consumer satisfaction—sometimes deliver what they alone can dare to promise. Thanks to *Texas Law Review*, we have Professor Galle's excellent work in hand; the dialogue it has sponsored keeps the public good—the ultimate end of both his charitable charity and my republican philanthropy—firmly in view. That dialogue is the foundation of every republic, all the way back to Plato's.

Our forum being higher-tech than Plato's, picture with me a final PowerPoint slide: Delacroix's *Liberty Leading the People*. My republicanism being neoclassical but not antiquarian, you will forgive a little Photoshopping. I will have transplanted Ms. Liberty and her beleaguered band of republican brothers from the barricades of Paris to the ramparts of the Alamo. Also, I will have "cut" the French tricolor in Liberty's up-thrust arm and "pasted" in its place the Lone Star Flag.<sup>92</sup> Now, with a nod to

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90. George W. Bush was rejected from the University of Texas School of Law, but he was accepted into Harvard Business School. *Frontline The Choice 2000 George W. Bush Chronology*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/choice2000/bush/cron.html>.

91. See, e.g., Steinberg, *supra* note 24, at 119–27 (documenting the three-failures theory).

92. Cf. Maureen Dowd, *A Blue Burka for Justice*, N.Y. TIMES, Jan. 30, 2002, at A27 (indicating that Attorney General John Ashcroft "had decided to throw the equivalent of a blue burka" over the statue of Justice, which is "buxom and partly nude under a toga"). Given the likely number of neoconservative, as opposed to neoclassical, republicans among *See Also's* readership, perhaps also

multimedia messages, hear, just above the strains of the Ninth Symphony, this voice-over:

Pack your oxymoronic “private charity,” both for-profit *and* nonprofit, back into the carpetbag it came from. Thank you just the same but we’re not buying. We’ll keep what is truly and rightly ours already: the republican philanthropy nowhere better embodied than in the University of Texas.

Then last, and a little louder, “*Vive la Republique!*”—which is, of course, just French for “*Hook ‘em Horns!*”<sup>93</sup>

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add a chastening and immaculate sash across Liberty’s unabashedly naked breasts in Delacroix’s original.

93. Finally, again in the name of full disclosure: I heard that phrase most recently from my daughter, Jane, just back from her apartment-hunting visit to Austin in preparation for her enrollment in the Master’s in Social Work program at the University of Texas, not surprisingly one of the finest of its kind in the world. She plans to specialize in international social work; that has to mean taking UT’s message of republican philanthropy to the far corners of the earth. Surely both Sam Houston and Lyndon Johnson would join me in saluting that.