THE MEANING OF CHARITY: ONE DEFINITION OR TWO?

Miriam Galston

The purpose of this nugget is to begin to answer the question, should the definition of charity be the same for trust law purposes and federal income tax purposes.[1] I consider three component questions that must be resolved before the larger question can be answered: 1) the respective purposes of granting the trust law "break" and the federal income tax "break";[2] the extent to which these purposes are limited by public policy considerations that relate to trusts and those that relate to sections 170/501(c)(3); and the types of internal and external controls governing charitable trusts and those governing section 501(c)(3) entities.

---

[1] It may well be that the conclusions reached with respect to charities under the income tax provisions of the Internal Revenue Code can be extended to the estate tax provisions of the Code. I do not, however, affirmatively make that claim because of my limited knowledge of the estate tax provisions.

[2] I include both the section 501(c)(3) exemption and the section 170 deduction in the federal income tax break, despite the fact that strong arguments can be made to distinguish the two as different types of break or even to challenge the proposition that the exemption and/or the deduction in fact constitute tax breaks. Obviously, if you believe that entities exempt under section 501(c)(3) do not have taxable income as an economic or conceptual matter anyway, the nugget will not be persuasive with respect to exemption from federal income tax. If you believe that, and in addition believe that section 170 does not provide a tax break, this nugget will self-destruct and your time would be better spent watching G.W. beat the

By and large, my analysis proceeds on a normative level. However, by way of introduction, I will summarize the thinking of the judiciary and other sages as to the state of the law on the question, one definition or two?[3]

I. INTRODUCTION

The majority of courts and commentators assert or assume that the same definition of charity applies for both trust law and federal income tax purposes. The Service has endorsed the same view explicitly in its regulations and rulings, although arguably its practice has on occasion been inconsistent with its utterances.

1. The courts. To take the most visible illustration of the judicial attitude, the Supreme Court in Bob Jones based its holding (that a racially discriminatory sectarian educational institution was not entitled to federal income tax exemption because it engaged in racial discrimination in its admissions practices) on its finding that racially discriminatory trusts are invalid under state charitable trust law.[4] Most courts agree that the meaning of charity is the same for purposes of both

---

[3] There is very little commentary on the normative question, but what there is gets folded into the normative discussion that follows.

[4] ___ US ___, 103 S.Ct. 2017, 2032-34 (1984).

bodies of law.[5] A few courts have taken the opposite view, arguing either that the two bodies of law are separate and distinct or that trust law provides at most a "strong analogy" for federal income tax purposes.[6]

In support of its one-definition thesis, the Supreme Court in Bob Jones cited numerous state law cases invalidating charitable trusts that contained racially discriminatory provisions.[7] All of the cases cited, however, invalidated the trusts in question on state action grounds, and not based upon

---

[5] ? Girard Trust Co. v. Commissioner, 122 F.2d 108, 110 (3d Cir. 1941); Pennsylvania Co. for Ins. of Lives and Granting Annuities v. Helvering, 66 f.2d 284, 285 (D.C. Cir. 1933); National Alliance v. United States, 81-1 U.S.T.C. (CCH) ¶ 9464, at 87,343 (D.D.C. 1981) (although conceding that charity has the same meaning for trust law and federal tax purposes, arguing that being charitable is not a condition of an educational entity receiving exempt status under section 501(c)(3).

[6] Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd mem., 644 F.2d 879 (4th Cir. 1981), aff'd sub nom. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (denying tax-exempt status to a racially discriminatory private school based upon the public policy associated with section 501(c)(3) and the more general public policy of the Code as a whole); Green v. Connally, 330 F. Supp. 1150, 1157, 1160-61 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971) (denying tax-exempt status to a racially discriminatory private school because of the public policy of the Code as a whole; and stating that trust law, which would not necessarily deny charitable status to a racially discriminatory school, provides at most a strong analogy for what is charitable under the Code); Girard Trust Co. v. Commissioner, 122 F.2d 108, 110 (3d Cir. 1941) (although the charitable trust cases "furnish a strong analogy" to federal tax cases, they are "not directly controlling"); See also Watson v. United States, 355 F.2d 269, 273 (3d Cir. 1965) (refusing to grant federal estate tax exemption to a trust recognized as charitable under state law); Estate of Leeds v. Commissioner, 54 T.C. 781, 790-91 (1970) (assering that charitable status for federal estate tax purposes is a question of federal, not state law).

[7] See ___ US ___, 103 S. Ct. at 2029-31.

the meaning of charity or even on public policy grounds.[8] Most works on charitable trust law at the time of the decision took the position that such trusts could in fact contain racially discriminatory provisions without losing their charitable status (unless the state became affirmatively involved in the administration or enforcement of the trust).[9]

In suppport of the two-definition characterization of current law, courts assert as empirically valid the kinds of ob+servations I shall make normatively in the body of this essay. 2. The commentators. Most commentators have assumed or argued that, as a matter of law, there is one definition of charity for state trust law and federal income tax purposes.[10] A

---

[8]

[9] Bogert and Bogert, The Law of Trusts and Trustees § 375 at 123-24 (2d ed. 1964).

[10] Allen, The Tax-Exempt Status of Segregated Schoolds, 24 Tax L. Rev. 409, 427-28 (1969); Neuberger and Crumplar, Tax Exempt Religious Schools under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229, 237 919 (1979); Spratt, Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation, 12 Wm. & Mary L. Rev. 1, 11 (1970); Comment, Charitable Exemptions to and Deductions for Donors to Racially Segregated Private Schools Are Disallowed as Contrary to a Strong Federal Policy against Segregation, 41 U. Cinn. L. Rev. 481, 482 (1972); Comment, Tax Exemption for Educational Institutions: Discretion and Discrimination, 128 U. Pa. L. Rev. 849, 863 (1980). See Roy M. Adams, Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions, 25 Cleveland State L. Rev. 1, 8-9 (1976) ("The fact remains that exclusionary charitable trusts have not been dealt with by a threshold refusal to classify such trusts as charoitable.").

small but fierce minority disagrees.[11] The prominence of Bob Jones and its progeny may, however, transform the mix of legal precedents to such an extent in the years to come that the Bob Jones decision become a self-fulfilling prophecy.

3. The Service. The Service adopted the one definition view in 1959 when it promulgated Treas. Reg. § 1.501(c)(3)-1(d)(2), which states that "charitable" in section 501(c)(3) is used in its "generally accepted legal sense." This phrase is usually interpreted by the Service and others as referring to charitable trust law.[12] The Service has reinforced the impression that it equates the meaning of charity in the two bodies of law by frequently citing the two main treatises on trust law--Scott and Bogert--in its tax rulings.[13]

II. COMPARISON OF THE RESPECTIVE PURPOSES OF STATE TRUST AND FEDERAL INCOME TAX TREATMENTS OF CHARITY

---

[11] Steven R. Swanson, Discriminatory Charitable Trusts: Time for A Legislative Solution, 48 U. Pittsburgh L. Rev. 153, 158, 160-70 (1986) (reviewing state decisions involving racially and sexually discriminatory trusts and concluding that to date discriminatory charitable trusts have been upheld on trust law grounds, while educational institutions have been denied tax exemption on public policy grounds); Miriam Galston, Public Policy Constraints on Charitable Organizations, 3 Va. Tax Rev. 291 (1984) (same).

[12] See Rev. Rul. 71-447, 1971-2 C.B. 230 (denying charitable status to racially discriminatory private schools because they are not charitable in the trust law sense of the term). DG get ruling

[13] See, e.g., Rev. Rul. 81-28, 1981-1 CB 328, 329; Rev. Rul. 69-545, 1969-2 CB 117, 118. See also Rev. Rul. 67-325, 1967-2 CB 113, 116 (the income, estate, and gift tax provisions of the Code "do not reflect any novel or specialized tax concept of charitable purpose").

1. What is the state law break for charitable trusts and how is the break justified? People who create private trusts to benefit their family members or friends are limited in the types of restrictions they can impose on the trust property by four rules designed to limit restraints on the alienation of trust property.[14] The most famous of these rules, the rule against perpetuities, prohibits the creator of a private trust from creating contingent interests that do not vest within a certain period of time.[15] The related rules prohibit trust terms that prevent future generations from enjoying or disposing of the trust property.[16]

Various policy reasons have been advanced to explain the rule against perpetuities. First, restraints on alienation

---

[14] In this essay I have lumped all four rules together under the general heading of rules opposed to restraints on the alienation of property because it is my understanding that all four reflect the same type of policy considerations. In lumping all four rules under the one heading, however, I disobey the good advice of Bogert & Bogert, Trusts and Trustees § 341.

[15] This rule requires that any contingent interst in a trust must become vested, if it ever vests, within 21 years after some life in being at the creation of the interest. On the rule of perpetuities, see Restatement (Second) of Trusts § 62; Bogert & Bogert, Trusts and Trustees §§ 213-14.

[16] This can be directly, by an explicit prohibition against alienating the property, or indirectly, e.g., by creating property interests in unborn or unascertained persons or by conditioning a property interest on a future event that may not occur. See supra note 14. The main state law rules (other than the rule against perpetuities) that limit a settlor's ability to impose restraints on trust property are the rule against accumulations, the rule limiting the duration of trusts, and the rules against restraints on alienation. On accumulations, see Bogert & Bogert, Trusts and Trustees §§ 215-17. On the duration of trusts, see id. § 218. On restraints on

interfere with the goal of free commerce; even indirect restraints can make property difficult, if not impossible, to market.[17] Second, and relatedly, "dead hand" control can result in freezing resources in a manner that is or becomes inefficient and impracticable.[18] Finally, at least when the rule against perpetuities was first applied in this country, in some quarters there was an animus against concentrations of wealth and "aristocratic pretensions."[19] Although the state law rules against limiting alienability of property cannot guarantee that families will not keep their fortunes intact, in the absence of such rules one family member can lock other family members in a posture they would not have chosen for themselves.

Charitable trusts are not in general bound by these rules. With a few exceptions, the creator of a charitable trust can direct forever the use to which the funds in the trust will be

---

alienation, see id. §§ 219-20.

[17] See William R. Fratcher, Perpetuities and Other Restraints 7-8 (1954). The impossibility can be legal or practical--the later when there is simply no market for certain kinds of contingent interests.

[18] On the treatment of charitable trusts in this country in the revolutionary and post-revolutionary period, see James J. Fishman, The Development of Nonprofit Corporation Law and An Agenda for Reform, 34 Emory L. J. 617, 621-29 (1985); Note, The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes, 54 Va. L. Rev. 436 (1968).

[19] See Fisch, Freed, and Schachter, Charities and Charitable Foundations 113 (1974). The concern about aristocratic pretensions is more relevant to the rule against accumulations than the

put .[20] To be entitled to this benefit, charitable trusts have to conform to various requirements of the law of charitable trusts in each state, one of which is that the trust have a charitable purpose. If trust law were completely rational, granting charitable trusts this special treatment should be capable of justification in terms of the rationale for imposing the rule against perpetuities on private trusts in the first place.[21]

2. What is the federal tax law break for charitable organizations and how is the break justified? There is a two-fold federal income tax break in connection with charitable organizations, the underlying exemption described in section 501(c)(3) and the correlative deduction for contributions, authorized by section 170. As a result of the exemption, an

---

rule against perpetuities understood in its technical sense.

[20] Bogert & Bogert, Trusts and Trustees § 342 (pp. 484-85) notes that as a technical matter, the rule against perpetuities is irrelevant to a charitable trust because "there is no occasion to consider whether a beneficiary's interest may fail to vest within the required period of the Rule, since a valid charitable trust has no designated beneficiary." Many state statutes and constitutions as well as state and federal courts use the phrase "rule against perpetuities" generically, as I am doing. In such cases, the constitution, a statute, or the courts have declared that the rule against perpetuities

[21] Many (although by no means all) charitable purposes serve egalitarian rather than aristocratic objectives even if at the same time they enhance the donor's family name. More importantly, such trusts furnish social benefits that are arguably as desirable as the free flow of commerce. Although the dead hand objection can be just as appropriate in the charitable context, the increasing use of the cy pres doctrine will lessen some of the burdens of inefficient

organization is federal income tax exemption on net receipts, whether they are attributable to contributions or exempt function income, and on net investment income. The deductible contribution benefits the organization by enhancing its ability to raise funds, assuming that some donors give more or give in the first place because of the tax incentive.

I couldn't possibly rehearse the various reasons that have been put forth to justify the federal income tax break. Rob Atkinson has analyzed these with his customary eloquence in "Altruism in Nonprofit Organizations" and the introduction to the new Warren Gorham and Lamont treatise on exempt organizations.[22] Regardless of which theory one finds most persuasive--the traditional public benefit theory, the market failure and capital disadvantaged theory of Hansmann, the metabenefit donative theory of Hall and Colombo, or the metabenefit altruism theory of Atkinson--the justifcation for charitable exemption revolves around some notion of public welfare, a societal good that compensates for, hence justifies, the loss of revenues to the public fisc.

3. Provisional comparison between the trust law context

---

and impractical charitable trusts in cases where the creator had general charitable intent.

[22] The former appears at 31 B.C.L. Rev. 501 (1990); the latter is forthcoming.

and the federal income tax context. The preceding suggests that if one stays on a high enough level of generality, it is difficult to justify different definitions of charity for trust law and federal income tax purposes. In both cases society gives up something of value in exchange for something of value. The something of value that results from the two breaks is some type of public good, an affirmative endeavor to increase the well-being of some community of persons outside the donor's family or personal circle of friends.

In what follows I shall argue that a series of additional considerations tip the balance against equality of teatment in the two charitable realms.

III. "FOLLOW THE MONEY"[23]

Let me begin with the most obvious difference between the two charitable realms--what happens if the proposed trust, on the one hand, or the proposed organization, on the other, is determined not to be charitable. Call this the result-driven justification for the desirability of two definitions.

If a proposed charitable trust is judged to be not-charitable, the trust property (assuming a bequest) will revert

to other beneficiaries, typically the heirs of the creator of the trust. In other words, if the charitable trust fails (and forgetting the doctrine of cy pres for a minute), a bundle of assets that would otherwise fall into the public domain will fall into private hands. There is thus a prima facie case that a proposed charitable trust of even modest public benefit will increase society's well-being more than would be the case if the charitable trust fails.[24]

It is difficult to take into account the effect of cy pres on the preceding assertion. Technically, a court is not justified in using cy pres to alter the terms of a charitable bequest unless it finds general charitable intent.[25] Thus, if courts adhere to this requirement strictly, they cannot reform a proposed charitable trust that fails because of a lack of charitableness. The cy pres doctrine will,then, not be of much use in keeping the trust assets in the public domain when a

---

[23] See Richard Bernstein and Bob Woodward, _____ (quoting the advice of "Deep Throat").

[24] Someone might counter that this assertion ignores the possibility of a private party receiving this windfall and putting it to a much greater public use than would the failed charitable trust. I concede the possibility, but am of the view that the trust assets would more often be sacrificed to personal consumption than be rerouted to public purposes. I also do not respond to the view that charitable entities typically make an inefficient use of resources, as compared with private entities.

[25] Restatement (Second) of Trusts § 399 comments [a, b] (1959). In addition, cy pres is not justified unless the terms of the trust have become "impossible or impracticable, or illegal to

proposed charitable trust fails on the grounds that its purpose is not charitable.

In contrast, if a proposed charitable organization fails to win exemption under section 501(c)(3), the immediate consequence is that tax revenues otherwise lost to the Treasury will come swimming to it. Thus, there is a prima facie case that can be made in favor of constructing a more rigorous definition of charity in the federal income tax area than in the state trust law area because a finding of charitableness in the former case deprives the public coffers of revenues they would otherwise realize, whereas a finding of charitableness in the latter case deprives private parties of revenues they would otherwise realize. To put it crudely,

To some extent this contrast is disingenuous; in particular, the prima facie argument becomes weaker if one casts the 501(c)(3)/170 benefit as substituting one form of public benefit for another form of public benefit. In other words, the prima facie case just sketched depends in part on the belief that exemption and deductible contributions deprive the public of units of well-being in the same way that private heirs (after a charitable trust fails) deprive the public of units of well-

---

carry out." Id. § 399 comment c.

being. This argument is strongest if one believes that sections 501(c)(3) and 170 merely subsidize a form of private consumption, or if one believes that the element of private selection in the choice of projects funded dilutes the public benefit signficantly. The prima facie argument is weakest if one believes that the aggregate long- and short-term benefits of the 501(c)(3)/170 break[26] equal or exceed the aggregate long- and short-term public benefits from tax revenues flowing directly to the government.

Since the economists and tax wizards are still at loggerheads on just this issue, I will refrain from attempting to resolve it here. For purposes of the question, one definition or two, the contrast between the trust law scenario and the federal income tax scenario can be recast as follows. In the federal scenario a finding of charitableness transforms a certain public benefit (the tax revenues) into a speculative public benefit (ranging from minimal to enormous upside potential, depending upon whose theory of charitable organizations you adopt), whereas in the state law scenario a finding of charitableness transforms no public benefit

[26] I believe this is true regardless of which of the theories justifying the exemption and deduction one adopts-- the traditional public good/subsidy theory, the market failure theory, or a

(reversion to the heirs) into a speculative public benefit (ranging from minimal to enormous upside potential).

This contrast seems to me to be more nuanced than the contrast that supported the prima facie argument. At the same time the revised contrast still suggests that it is reasonable to construe charitableness more generously for trust law purposes than for federal tax purposes. We should welcome trading a certain evil for a speculative good more than trading a certain good for a speculative one. The two-definition thesis responds to this intuition if it is also the case that state trust law is more liberal than federal tax law in conferring charitable status.[27]

IV. THE FATE OF THE CHARITABLE PROJECT

A second consideration to be weighed in the calculus is also ultimately traceable to the fact that trust law is concerned with the alienation of property, whereas federal tax law is concerned primarily with generating revenue. Without the federal tax breaks, organizations with charitable purposes could organize and operate in fundamentally the same fashion as they do under current law. For many charities it would be more

---

meta-benefit theory.

[27] It is. This is discussed in part V.

difficult to raise funds without the lure of the charitable deduction, and for charities with net income it would be more expensive to operate. But the basic structure of the charitable endeavor could be carried out precisely as before.

On the trust side, in contrast, the state law breaks make possible a structure of charitable activity that would not be possible without the exemption from the laws discouraging accumulations and restraints on alienation. Without these state law breaks, charitable endowments would have a limited life as a matter of law, and not merely as a matter of financial hardship. This contrast between state and federal law thus suggests that there should be different definitions of charity for the two areas, and that the state law definition should be less restrictive than the federal tax law definition.

This conclusion is less compelling than the conclusion based upon the threat of reversion of trust assets to private parties. Without the state law break, charitable activities using a trust vehicle could still flourish. Further, there is the possibility that subjecting charitable trusts to the same alienation rules as private trusts would be an improvement by reducing the number of charitable trusts governed by terms that

are inefficient or outmoded.[28] Finally, a donor wishing to ensure the perpetual life of a charitable project could endow a nonprofit corporation that would qualify as charitable under federal tax law. To the extent that such a corporation could replicate the charitable mission of a charitable trust under current law,[29] the hardship to donors would be relatively minimal. If this alternative is correct, the fate of the charitable mission does not in the last analysis support the two-definition hypothesis over the one-definition hypothesis.

V. NATIONAL VALUES v. LOCAL VALUES

In the first two sections of this part I review two differences between the state trust law and the federal income tax treatment of charities (under current law) that make sense if there are two definitions of charity, but not if there is only one. In the last section of this part I argue that the

---

[28] Limiting the negative attributes of the dead hand controlling charitable life would, however, have to be balanced against the likely use to which the trust assets would be put if they reverted to the family.

[29] It is unclear to me if this "to the extent that..." can be satisfied. One obvious difference between entities engaged in the identical mission--one as a charitable trust, the other as a nonprofit corporation exempt under section 501(c)(3)--is that different fiduciary standards govern trustees, on the one hand, and officers and directors, on the other. The fiduciary standard for a trustee is more rigorous than the corporate law fiduciary standard applicable to officers and directors. I am uncertain if this is a distinction with a difference. Another difference between the two entities is that the Attorney General enforces state law charitable standards, whereas the Service [the Service and the A-G?] must enforce the charitability of corporations.

legal structure of the United States encompasses both local values and national values, that this situation is desirable, and that the differences discussed in the first two sections can be seen as illustrations of the local/national dichotomy.

1. Charity v. social welfare. Section 501(c)(4) includes among exempt organizations "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare...." Treas. Reg. § 1.501(c)(4)-1(a)(2) elaborates:

> An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements. A 'social welfare' organization will qualify for exemption as a charitable organization if it falls within the definition of 'charitable' set forth in paragraph (d)(2) of § 1.501(c)(3)-1 and is not an 'action' organization as set forth in paragraph (c)(3) of § 1.501(c)(3)-1.

Although the phrase "social welfare" is about as amorphous as a label can be, the existence of the section 501(c)(4) exemption as separate and distinct from the charitable exemption suggests strongly that the drafters of the Code did not equate charitable activity with all activity that improves social welfare.[30] The most significant difference between the federal

[30] In contrast, any charitable entity would also qualify as a social welfare organization. See I.R.C. § 504. The section 501(c)(4) exemption was added in 1913, Tariff Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172. For the legislative history, subsequent history, and analysis of this

income tax treatment of the two types of organization, namely, that only the former are entitled to deductible contributions,[31] reinforces this suggestion.

It is tempting to distinguish the two categories on the basis that charitable organizations cannot be "action" organizations,[32] whereas social welfare organizations can.[33] This temptation must be resisted for three reasons. First, the Treasury regulation quoted above states that a social welfare organization will qualify as a charitable organization if two conditions are met: if the organization "falls within the definition of charitable" and if it is not an action organization. The text of the regulation thus makes clear that to fall within the definition of charitable requires more than merely avoiding status as an action organization.

Second, the Service has expressly taken the position that charitable status and social welfare status differ by more than "action" organization activities and, on several occasions, it

---

provision, see Note, IRS Denial of Charitable Status: A Social Welfar Organization Problem, 82 Mich. L. Rev. 508, 519-24 (1983) (noting that the legislative history is sparse and inconclusive and arguing that contributions to social welfare organizations should be deductible if they are not action organizations).

[31] I.R.C. § 170(a)(1), 170(c).

[32] Treas. Reg § 1.501(c)(3)-1(c)(3).

[33] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

has denied charitable status to an aspiring organization based upon the distinction between social welfare and charity. For example, in Rev. Rul. 66-179 the Service distinguished two garden clubs, one entitled to charitable status, the other entitled only to social welfare status.[34] Some courts have endorsed the Service's point of view,[35] while several have rejected it.[36]

Third, and most importantly, the distinction between social welfare and charity responds to a visceral sense that some of us have that not all good works are equal. According to this intuition, the notion of good works can be likened to a series of concentric circles radiating out from a core notion of

---

[34] 1966-1 C.B. 139. The charitable garden club, which was open to the public, was formed [to instruct the public about gardening and to increase the beauty of the area; the noncharitable garden club engaged in a "substantial" amount of activities directed toward the benefit, recreation, and pleasure of its members.] [Private?] Although the latter's social functions were not its primary purpose, the second club was not entitled to a charitable exemption. See also Rev. Rul. 70-4, 1970-1 C.B. 126 (an organization formed to promote "the health of the general public by encouraging all persons to improve their physical condition and ...fostering by educational means public interest in a particular sport for amateurs" was not charitable but was a social welfare organization); Rev. Rul. 59-310, 1959-2 C.B. 146 (not every nonprofit organization organized and operated "solely 'to the promotion of social welfare' should be classified as charitable).

[35] CITES

[36] See Consumer Credit Counseling Service, Inc. v. U.S., 78-2 U.S.T.C. (CCH) ¶9660 (D>D>C> 1978); Monterey Public Parking Corp. v. U.S., 321 F.Supp. 972 (N.D. Cal. 1970), aff'd, 481 F.2d 175 (9th Cir. 1973); Northern California Center Service v. U>S>, 591 F.2d 620 (Ct. Cl. 1979); Peters v. Comm'r, 21 T.C. 55 (1953); Turnure v. Comm'r, 9 B.T.A. 871 (1927).

improving the condition of the disadvantaged (economically, culturally, medically handicapped, and the like) to less urgent community benefits. Feeding the destitute seems qualitatively different from providing public swimming facilities in a middle class neighborhood. Both projects are desirable, and both should be encouraged, but none of us would have any difficulty in ranking them in importance. To be sure, it would be impossible to establish a legal barometer that could measure the precise amount of charitable content in any given activity. But this practical problem does not undermine the integrity of the conceptual distinction; it merely means that in this matter, as in many others, the application of legal standards will be fuzzy at the periphery.

How does this issue bear on the question, one definition or two? The federal tax code did not have to make the distinction between social welfare and charity a cosmic tax divide, in the sense that no moral law or natural law precept demands this much. But the distinction is a reasonable one, wholly within the power of Congress to enact. At the same time, it is equally reasonable for charitable trust law to make the opposite determination, that social welfare activities deserve to be

---

[All from Mich note]

characterized as charitable for state trust law purposes. If you read the cases, this is exactly what has happened. The reason, to return to our initial theme, is obvious: the state courts and legislatures have balanced the harm to society from permitting charitable restraints on the alienation of property against the harm to society from having such assets revert to private parties, and they have concluded that the balance favors a liberal interpretation of charity. The federal authorities, in contrast, have balanced the harm from lost tax revenues against the harm from not providing an incentive to donate to charitable or social welfare projects, and they have concluded that the balance favors a somewhat narrower definition of charity.[37]

2. Difference between charitable trust law treatment of political activities and federal income treatment.

3. National versus local values. A final reason for endorsing the two-definition thesis focuses on the federal character of the United States. Since the beginning of our history, what in some countries is a dichotomy between the individual and the government has been a triangular relationship

[37] Mindful of Prof. Clark's observation that ___, I am not taking the position that the current definition of charity is narrow, but only that it is narrower than either the definition of social

between the individual, state or local government, and the national government. Increasingly the national structure--whether legal, economic, or cultural--has dominated the counterpart local structures. Yet in certain areas we have agreed to disagree. In corporate law, we have resisted federalizing corporate standards, except in the area of securities, at the expense of promoting greater uniformity, consistency, and predictability of corporate law norms. In judicial matters, we continue to recognize the need for two layers of legal norms, despite the harm caused by forum shopping and inconsistent rulings. We routinely craft and redraft uniform commercial codes, but we leave it to the localities to choose whether or not to adopt them. The result in all these ares has been a patchwork quilt of state laws--endless variants of the first uniform code, endless variants of the revised uniform code, and states that opt to create their own codes out of whole cloth, based on one or another common law tradition, or some mix.

We have decided that, on balance, this diversity of legal structures is a good thing, despite its many inconveniences, largely because of the diversity of the underlying population.

---

welfare or the definition of charity for trust law purposes.

If this decision is appropriate in commercial matters, when the centrifigal pull toward uniformity is so great, it is much more appropriate in questions of charity, which partake heavily of personal and ethical norms. It is a truism that the meaning of charity is evolving.[38] It should also be a truism that the personal and ethical considerations that prompt charitable activity often vary by region. If charity has different meanings for state law and federal income tax purposes, this will permit our legal system to express rather than repress the heterogeneity of local values at the same time that it asserts that for certain purposes we have and will enforce national values. It may well be that in another hundred years, the regional differences will have been swallowed up by a growing national consensus on matters previously deemed regional. But for the time being, the two-definition thesis is more faithful to the underlying reality the law should reflect.

[38] CITE.

APPENDIX

If you believe that courts will resort to reforming a charitable trust in this fashion only infrequently--when the original trust terms have become impossible to carry out and, in addition, the general charitable intent is unambiguous-- For example, if a proposed charitable trust to fund scholarships for Caucasians were to fail because a court concluded that the purpose was racist, hence not enforceable,[39] the same court might well also conclude that the settlor did not have general charitable intent. If you believe that courts will in the future use the cy pres doctrine more generously, the doctrine could be a method of keeping trust assets in the public domain .

[39] In point of fact, as was noted earlier, courts typically uphold the charitable nature of discriminatory trusts and find them enforceable as long as there is no state action involved in carrying out the terms of the trust.