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SYMPOSIUM: WHO GUARDS THE GUARDIANS?: MONITORING AND ENFORCEMENT OF CHARITY GOVERNANCE

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This Article explores and evaluates the disclosure focus of recent legislative proposals for nonprofit reform. It begins by describing legislative proposals under consideration in various states and the U.S. Senate Finance Committee. This summary demonstrates the emphasis these proposals place on disclosure as a technique for enhancing nonprofit accountability. The Article then evaluates the ability of such disclosure mechanisms to achieve nonprofit accountability gains, by improving the behavior of nonprofit actors, facilitating nonprofit enforcement by regulators or others, or both. Unfortunately, due to the structure and characteristics of nonprofit organizations and the resources available for nonprofit enforcement, this analysis reveals that disclosure-based reforms alone will do little to improve nonprofit accountability. Thus, the Article concludes by urging legislators to refocus their reform energies around invigorating enforcement, and to adopt disclosure-based reforms only when they will complement enforcement efforts without undermining nonprofits' ability to pursue their missions.

The federal system of "dual sovereignties" guarantees that most American legal regimes tolerate jurisdictional overlap between the enforcement authority of federal and state agencies. This Article explores interjurisdictional overlap in the context of nonprofit legal supervision. Notwithstanding the common assumption that "states police mission while the IRS polices money," it is suggested here that the overlap has become much broader than generally has been supposed; that over a wide range of common misconduct among the preponderance of organizations in the nonprofit sector, either the Internal Revenue Service or state authorities could, if they wanted to and in no particular order, exercise statutory or common law authority to prosecute nonprofit charities, including their officers and directors. As a policy matter, this overlap has generally been viewed as positive by both state and federal officials, who can defer or shift the burden of supervision to avoid spending scarce resources, to avoid political difficulty, or for other reasons. In many cases, they can build on one another's work, use the legal precedent established by one another's litigation, or act in independent disregard of it. They can act first, second, or not at all. If legislation currently being considered becomes law, furthermore, it may become easier than ever for regulators to coordinate their activities and to share information; but the lines of authority will not (as a general matter) become more sharply drawn. This Article raises several disadvantages that result from the increasing breadth of overlap, including erratic and inconsistent growth in the law, unpredictable law enforcement, a lack of accountability and responsibility for supervision, and some confusion among nonprofit

counselors and the organizations they advise. It offers some suggestions for new lines and for redelineating authority along historical lines.

The traditionally distinct regimes for governing charitable trusts and nonprofit corporations have been conforming. At the same time, by continuing to make distinctions based on organizational form rather than structure and operations, we might be asking the wrong questions. To what extent do trusts and corporations have irreducible legal differences? Key issues that initially appear unique to trust law on closer inspection turn out to apply to some or all corporate charities – and corporate doctrine might be more appropriate for charitable trusts having a broad governing board. In the end, the distinction between "trust law" and "corporate law" might make less sense than identifying what legal principles of governance should apply to charities with multiple, independent fiduciaries, and what (if any) different legal principles should apply to charities governed by only a single fiduciary, or a small number of fiduciaries (particularly if they are related).

What are the legal limits on a charity's ability to change its mission and redirect donations to new purposes? The answer often turns on the charity's legal form, whose essential elements are encapsulated in a few nonmandatory default rules. Absent extraordinary circumstances, a charitable trust's controllers (a.k.a. "trustees") may not deviate from the specific charitable purposes selected by the trust's creator (a.k.a. the "settlor"), unless the settlor expressly expanded the trustees' discretion. By contrast, a nonprofit corporation's controllers (a.k.a. its "board of directors") are typically free to change the charitable purpose and redeploy donations, unless the corporate charter or a gift instrument expressly curtails its authority to do so. In recent years, the wide scope of board discretion has aggravated concerns about nonprofit accountability. To address these concerns, some commentators seek to import more restrictive, trust law default rules into nonprofit corporate law. This Article criticizes this program of "trust law parallelism" on grounds that it will increase the costs of charitable activity and thereby deter philanthropy. It will curtail the diversity of off-the-rack legal forms available for charitable endeavors, and therefore increase the transaction costs of philanthropists who favor more discretion for controllers. Moreover, because many philanthropists will be unaware of the restrictive default rules, they will not know to opt out of them, even if they favor more discretion or have no opinion on the matter. As a result, boards will be restrained to an extent that does not enhance accountability. At bottom significant restraints on board discretion over the mission are socially costly: they impair a board's ability to respond to changing needs and fresh opportunities, which facilitates the application of charitable resources to more socially valuable uses.

Fraudulent behavior by charitable fiduciaries brings universal condemnation. However, disapprobation by itself never has translated into an efficient system for the accountability of charitable assets. This Article examines the nineteenth-century struggle to form a charity commission to oversee English charitable endowments and the ultimately disappointing result. Administrative reform can have an interminable germination as the creation of the Charity Commission demonstrates. Even though the need for reform of charitable trust administration was long recognized and a consensus reached on the structure of the oversight body though not its scope, the resulting agency came under almost immediate criticism and was disliked, disrespected, deprived of resources, and ultimately ineffective.

Why is it so difficult to carry out effective institutional change? Why did the principle of charitable accountability, a nearly unanimously supported ideal, ring so hollow in practice? This Article offers hypotheses about the difficulties of administrative reform through the prism of the nineteenth century that may apply more broadly. Many of the problems that hindered the Charity Commission: inadequate resources, increasing numbers of charities, resistance to increased oversight by affected interest groups, and a lack of influence in government face contemporary regulators of the nonprofit sector.

Act ("IDEA"), the distinction between privately settling plaintiffs and those obtaining court-ordered relief lacks legitimacy. The IDEA was drafted with the purpose of ensuring appropriate educational placement for special-needs children as well as ensuring that disputes regarding such placement be settled promptly and free of unnecessary disruption. Using *Doe v. Boston Public Schools* as an analytical backdrop, this Comment argues that the IDEA's purpose, which is amply reflected in the text and legislative history of the statute, demonstrates that privately settling IDEA plaintiffs should be entitled to recoup their attorneys' fees.

The Establishment Clause prohibits any law "respecting an establishment of religion." One example of a potential Establishment Clause violation is a display of the Ten Commandments on governmental property. The Supreme Court is on the brink of deciding whether such a display violates the Establishment Clause, and one important question to ask when making this determination is whether a reasonable observer would view a Ten Commandments display as a governmental endorsement of religion. The answer to this question will change based on the definition of the reasonable observer.

In *Freethought Society v. Chester County*, the Third Circuit Court of Appeals concluded that a display of the Ten Commandments affixed to a county courthouse did not violate the Establishment Clause because a "reasonable observer" would not view the display as an endorsement of religion. However the Third Circuit used the heightened standard of a more-than-reasonable person. This standard was improper and led to the Third Circuit reaching an erroneous conclusion. The Supreme Court should not use this more-than-reasonable-person standard as it rules on the constitutionality of Ten Commandments displays.

The Federal Circuit has granted en banc review in *Phillips v. AWH Corp.* to decide the appropriate methodology for patent claim construction. This Note examines the different approaches taken by Federal Circuit panels for claim construction: the intrinsic/extrinsic dichotomy, holistic approach, and the "dictionary first" approach. This Note tests these approaches against the policies underlying patent law and concludes that both the holistic approach and the "dictionary first" approach fail to adequately further these policies.

Instead, this Note proposes a modified intrinsic/extrinsic dichotomy. The proposed approach for claim construction looks first to the intrinsic evidence. If the meaning of the disputed term in the claim is clear from the intrinsic evidence, the inquiry concludes. If the term is unclear from the intrinsic evidence, the court would then evaluate the plausibility of the interpretations put forward by each side by examining the supporting evidence introduced by the parties. If one interpretation is unsubstantiated by the evidence while the other is substantiated, the court should adopt the plausible, substantiated interpretation. If, however, both interpretations are equally plausible, the proposed methodology would have the court construe the term against the patentee. This Note argues that this modified intrinsic/extrinsic dichotomy best furthers the policies of certainty and public notice underlying patent law.