RECENT DEVELOPMENTS IN COMMUNITY FOUNDATION LAW: THE QUEST FOR ENDOWMENT BUILDING

MARK SIDEL*

In the United States, most of the attention paid to individual community foundations is given to the larger organizations—such important players in American philanthropy as the Chicago Community Trust, the Cleveland Foundation, and the New York Community Trust. These were the philanthropic offspring of early twentieth century elites and the growth in their endowments has made them wealthy and powerful institutions in American philanthropy and social policy. For example, at the close of 2008, after significant losses, the Chicago Community Trust had an endowment of $1.59 billion, the Cleveland Foundation had $1.6 billion, and the New York Community Trust had $1.53 billion.[1]

This endowment growth and the historical memory of the origins of the community foundations have helped shaped our sense of the community foundation sector. For the relatively few Americans who have any real idea what a community foundation is, at least until recently, the history, size and power of these foundations and a few others meant that we thought of community foundations are large, elite, self-perpetuating endowments working for local communities and the common good.

But of course our modern notion of community foundations, while still positive, should now be considerably more nuanced. At the local level in the United States, for the Americans who encounter a community foun-

* Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa; President, International Society for Third Sector Research (ISTR). Earlier versions of this article were delivered at the American College of Trust and Estate Counsel (ACTEC) symposium on the Law of Philanthropy in the Twenty-First Century at Chicago-Kent College of Law in October 2009, and at the Association for Research on Nonprofit and Voluntary Organizations (ARNOVA) in November 2009. My thanks to Putnam Barber, John Colombo, Nick Deychakiwsky, Tom Gallanis and other colleagues for their cogent comments, to ACTEC for initiating and supporting the symposium at Chicago-Kent, and to Professor Anne-Marie Rhodes, Chicago-Kent, and the editors of the *Chicago-Kent Law Review*. Nothing in this article represents the views of any particular community foundation or foundation employee or of any party to the litigation discussed below.

1. CMTY. FOUND. INSIGHTS, COLUMBUS SURVEY 2008 RESULTS: GUIDEPOSTS FOR GROWTH AND GRANTMAKING 12 (2010), http://www.cfinsights.org/home/index.php?s=file_download&id=78. They were not the highest, of course: The Tulsa Community Foundation had $3.8 billion in assets at the end of 2008. *Id.*

dation, they see, and may seek grants from, an entity that looks far different from the elite institutions of the early twentieth century.

The data helps show us this. The 717 community foundations documented by the Foundation Center at the close of 2007 that now dot virtually every corner of the United States had total endowment assets of $56.68 billion. But those endowments are very unevenly held, resulting in significant under-capitalization in much of the American community foundation sector. Of the 717 community foundations recognized by the IRS and the Foundation Center in 2007, the top twenty-five of those by asset holding held about $27.08 billion in endowment, about 47.78 percent of the $56.68 billion in community foundation assets in the United States.[2]

That left 692 community foundations to share the remaining approximately 52.22 percent of the assets, or about $29.59 billion. Those 692 foundations averaged an endowment of approximately $42.76 million, providing roughly an average of $2.13 million per year per foundation for grant-making (assuming a five percent payout rate).[3] And recall that these are all 2007 figures. Most of these endowments fell in 2008—among a selected group of community foundations surveyed by the Council on Foundations, assets in that group fell by twenty-seven percent in 2008.[4]

Even an average of $42.7 million in assets for the community foundations below the top twenty-five in assets in some sense overstates the situation. According to the Council on Foundations, roughly 300 American community foundations had assets under $5 million in 2007, and about 425 had endowments of $5 million and over. So the median endowment of American community foundations likely hovers at between $5 and $10 million.

The situation is exacerbated when we consider affiliates of small local community foundations—the smallest of the small, what might be called "micro community foundations." Their endowments are often no higher than $100,000–$500,000, and often they are much lower than that. Affiliate funds and endowments are calculated as part of the "parent" community foundation endowments for reporting purposes, and are not broken out by the IRS or most other organizations. But in many cases they are very small, and one could analyze them as reducing the endowment fully available to the "parent" community foundations.

2. *See* Foundation Center, *Key Facts on Community Foundations*, http://foundationcenter.org/gainknowledge/research/pdf/keyfacts_comm_2009.pdf (May 2009).

3. *Id.*

4. Foundation Center, *Assets of U.S. Community Foundations Fell 27 Percent, Report Finds*, PHILANTHROPY NEWS DIGEST, Oct. 15, 2009, http://foundationcenter.org/pnd/news/story.jhtml?id=269100016.

In many American communities, then, community foundations are not the philanthropic heavyweights of New York, Chicago and Cleveland, but instead small, under-funded institutions, making relatively small grants for a very wide and diverse range of local projects. In many cases they are unable to focus on programmatic priorities to the exclusion of other grants, or to make larger or combined grants for major projects—diverse and important needs, cautious boards and divided community expectations prevent that. They are sometimes perceived as the poor cousins of United Ways that may, in precisely the same communities, raise millions of dollars a year. They may also be perceived as the poor fundraising siblings of very effective local schools, churches, service clubs, charities, and community organizations, not to mention national institutions.

Several years ago, I joined the board of a small community foundation. I have seen all of this firsthand—the small endowment, the pressure to make many small grants throughout the community, the difficulty in raising funds in competition (even if everyone shies away from that term) with sophisticated players that range from the United Way to commercial charitable gift funds to a local multi-billion dollar university to high schools, service clubs, congregations, and other long-time, sophisticated mobilizers of resources in the community. Other than the multi-billion dollar university, my community and my community foundation are fairly typical of many American communities with community foundations. And my community foundation is doing reasonably well in endowment terms, at least compared with most other community foundations in the same state of Iowa, where ninety percent of the state's community foundations had an average endowment size of under $4 million in 2008.[5]

Given this situation, it can come as little surprise that community foundations are sometimes seeking to use judicial and legislative processes to build assets and endowments, and even, at times, to try to gain a competitive edge over other groups seeking to mobilize community resources. At a time when, other than the donor-advised fund portions of the Pension Protection Act of 2006, there has been relatively little recent attention paid to developments in community foundation law,[6] this article analyzes several focused judicial and legislative attempts by community foundations to accelerate resource mobilization in an environment of intense competition for individual and corporate giving.

5. *See id.*

6. The key work in community foundation law is CHRISTOPHER HOYT, LEGAL COMPENDIUM FOR COMMUNITY FOUNDATIONS (1996), which has set the standard in the field. All of us who have an interest in the law affecting community foundations are indebted to Professor Hoyt for his important work.

I. THE STRUGGLE FOR ENDOWMENT IN THE JUDICIAL ARENA

Community foundations want to control their endowed funds, or what they perceive to be their endowed funds. And they will fight to do so—even, in a case I explore here, where a trust settlor used an earlier trust model to place the funds in trusteeship at a bank, with only the income going to the community foundation for charitable distribution. What happens when a community foundation tries to obtain from a trustee bank the funds that a trust settlor placed in that bank, many years earlier, for investment, limiting the community foundation to distributing the income to charitable grantees?

As community foundations moved from the trust form to the corporate form, many banks that held and invested trust funds in which the income was to be distributed by community foundations voluntarily turned those funds over to their local community foundations so that the management, investment, and charitable use of those funds could all be accomplished by the foundation. But in at least one case, a trustee bank refused to turn over these trust funds, arguing that the trust settlor intentionally employed a tripartite structure in which the designated trustee bank would manage and invest the funds, the local community foundation would select, manage and disburse charitable funds from that endowment as investment returns were transferred from the trustee bank to the community foundation, and the charitable grantees would carry out programs. Should the community foundation be permitted to alter that original tripartite structure and to take over the management and investment of those funds?

That is the question that faced three levels of courts in Colorado when the Denver Foundation, a community foundation established in 1925, sought judicial authority to manage and hold sizable assets originally held, managed and invested by Wells Fargo Bank. Wells Fargo was the successor bank to the original trustee bank, United Denver Bank, which had been entrusted with the task of managing and investing a large endowment by Charles and Dorothy Elder Sterne decades earlier.[7]

At root this judicial struggle—probably the most important recent case affecting community foundations—was waged by a bank trustee to preserve the settlors' intent that the trust funds be administered by a bank trustee in perpetuity, and by a community foundation for control of assets and

7. Denver Foundation v. Wells Fargo Bank, 163 P.3d 1116, 1119 (Colo. 2007); *rehearing denied by* Denver Foundation v. Wells Fargo Bank, N.A., Colo. LEXIS 700 (Colo. 2007) (mem.). The Supreme Court's decision reversed the Colorado Court of Appeals' decision in *Denver Foundation v. Wells Fargo Bank, N.A.*, 140 P.3d 78, 79–80 (Colo. App., 2005), which in turn reversed the decision of the Denver probate court.

endowment. This occurred in a broader environment in which community foundations seek to build assets for work in the community, in which more than a few community foundations may believe that they can invest those assets most effectively, and at a time when foundation leaders are evaluated, at least in part, on asset and endowment growth.[8] In turn the trustee banks, like Wells Fargo, take their trustee responsibilities very seriously in preserving settlors' intent. Other banks and financial institutions may also seek to build their portfolios of charitable capital in order to cross-market their services to individuals, corporations, and nonprofits undertaking charitable and philanthropic work.

Thus the stage was set for the battle over the Sterne endowment. In 1976 Charles Sterne and Dorothy Elder Sterne created a charitable trust that provided, upon their deaths, a portion of their estate "for the uses and purposes of The Denver Foundation, a philanthropic community trust, to be held in trust by the United Bank of Denver." The Denver Foundation was established in 1925 to serve "charitable, educational, and benevolent needs" in Denver by "afford[ing] an opportunity alike to persons of wealth and persons of moderate means to make their several gifts to different trustees of their own selection" while meeting "the changing needs for such gifts with flexibility in the power of distribution."[9]

The arrangement that the Sternes used in 1976 to create their trust had been common in the United States since the founding of the Cleveland Foundation in 1914. The Denver Foundation's 1925 Declaration of Trust established a mechanism long known to community foundations and those who study them. Donors, generally trust settlors, would establish funds in trustee banks, which would in turn hold, manage and invest those funds and disburse the annual income from that principal to the Denver Foundation. The Foundation's role was to

> distribute a portion [or all] of that income to various community 'beneficiaries' identified and selected by an impartial and changing committee knowledgeable about the charitable needs of the time. The Foundation would then reinvest the remainder in the Foundation's endowment, which is comprised of several component funds subject to separate accounting and community recognition.[10]

The situation was somewhat complicated by the wide powers that the Foundation—like most community foundations and trusts—had under its

8. I note that I served as an external consultant to the attorneys for one of the parties in this matter. *See Denver Foundation*, 163 P.3d at 1116. Only information available in the public judicial record has been discussed here.

9. *Id.* at 1119.

10. *Id.*

original Declaration of Trust and amendments in later years. As the Colorado Supreme Court explained,

> [f]rom its inception as a community trust, The Denver Foundation has enjoyed expansive powers not generally accorded to traditional beneficiaries. For instance, The Denver Foundation's 1925 Declaration ensured it was free to modify restrictions in trust gifts that had ceased to serve the best interests of the Foundation's charitable beneficiaries.[11] That Declaration also granted the Foundation the power to direct transfers of income and principal,[12] and to conclusively construe, if in good faith, any provision contained in the Declaration.

The Sternes followed this traditional tripartite pattern for establishing a fund with a community foundation. "Drawn to the Foundation's mission and unique structure for charitable giving,"[13] Mr. Sterne created a trust in 1976 "for the uses and purposes of The Denver Foundation," and appointed United Bank of Denver as trustee. Three years later his wife, Dorothy Elder Sterne, established a similar trust. According to the Court,

> [t]he Sterne-Elder Trust provided that upon the Sternes' deaths, the principal of the Trust should be held by the United Bank of Denver, and The Denver Foundation would receive and then distribute the income from the principal to various charities. The Sternes intended their gift as a permanent endowment. . . . [T]he Sterne-Elder Trust agreement provided that '[n]either The Denver Foundation nor its Distribution Committee is authorized to direct disbursement of principal, or invade the principal, of such Trust.' The Sterne-Elder Trust incorporated by reference the Foundation's Declaration of Trust, along with any future amendments to the Declaration.[14]

In 1983, the Denver Foundation moved to the modern community foundation structure by establishing a nonprofit corporation "capable," in the words of the Colorado Supreme Court,

> of carrying out the same functions that had theretofore been performed by trustee banks—holding and investing trust principal as the Foundation's permanent endowment.[15] . . . Since 1983, most settlors have cho-

11. "Article II of the 1925 Declaration allows the Foundation to deviate from an instrument containing any gift if circumstances have so changed 'as to render unnecessary, undesirable, impractical or impossible a literal compliance' with its terms." *Id.* at 1119 n.2. This is a version of the by now well-known variance power. *See* Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1155–1156 (2003).

12. The Court noted: "Article IV(4) of the 1925 Declaration provides, in part, that 'the Trustees shall pay and disburse such portions of the net income or of the principal of the property held by them respectively, at such times and in such amounts as shall from time to time be ordered or directed by the Distribution Committee. . . .'" *Denver Foundation*, 163 P.3d. at 1119 n.3.

13. A somewhat curious phrase for the Colorado Supreme Court to use given its eventual judgment.

14. *Denver Foundation*, 163 P.3d at 1119–20.

15. The Court continues here: "Once the Foundation's nonprofit corporation was organized, the corporation assumed the role of the common governing body of the Foundation, and each trust held by

> sen to make their gifts directly to the corporation, streamlining the charitable giving process by eliminating the middle-man trustee banks, although settlors are still free to give a gift to be held in trust by a participating trustee bank."[16]

Beginning in about 1997, when the Foundation adopted an amended and revised Declaration of Trust, it began bringing endowment funds into the Foundation from the trustee banks. As the Court put it, "the Foundation determined that it could better serve the charitable needs of its community beneficiaries if it centralized management of its endowment in its nonprofit corporation."[17] The Foundation began asking the trustee banks to transfer the trust principal to the Foundation for management and investment, and most of the trustee banks—complied with most of the funds.

After the Sternes died in 2003, the Denver Foundation asked that Wells Fargo (successor trustee to the United Bank of Denver) "transfer the Sternes' trust principal to The Denver Foundation's nonprofit corporation to hold for management and investment." Wells Fargo declined, "claiming the Sternes' trust document prohibited such a transfer." A Denver probate court granted summary judgment for the Denver Foundation, holding that a joint reading of the Sternes' 1976 trust agreement and the amended 1997 Denver Foundation Declaration "granted the Foundation the power to direct Wells Fargo to transfer the Sterne-Elder Trust principal to the Foundation's nonprofit corporation." The probate court gave primacy to the Foundation's Declaration which, as construed exclusively by the Founda-

the corporation for the uses and purposes of the Foundation was to be treated by the Internal Revenue Service as a 'component part' of the Foundation." *Id.* at 1120.

16. *Id.* The detailed mechanism as adopted in 1997 was laid out by the Court: "In 1997, The Denver Foundation adopted an Amended and Restated Declaration of Trust ("1997 Declaration"), the operative document governing the Foundation and its activities at present. The 1997 Declaration continues to allow for alternative plans, administered either by the corporation or by trustees of settlors' own selection. All gifts, however, are governed by the 1997 Declaration, which contains many of the same types of provisions as those in the 1925 Declaration. For instance, the 1997 Declaration provides, in Article 2-3, a broad power to modify designations and restrictions on the "use or distribution of funds." Article 3-1.1, titled "Transfer of Funds to Corporation," mandates that "[e]ach Trustee Bank shall, within ten days after the last day of each calendar quarter, pay and disburse to the Corporation such portion of the net income and principal of each trust held by it hereunder as the Board of Trustees shall direct." Article 7-8.3 reiterates The Denver Foundation's power to conclusively construe the Foundation's Declaration, and Article 7-8.5 allows the Foundation to "[a]mend any of the terms or provisions of this Declaration . . . provided, however, that no change shall be made to this Declaration of Trust that modifies, enlarges, or restricts the powers, duties or liabilities of any Trustee Bank." (Footnotes omitted.) *Id.*

17. The Court also noted a statement by the Denver Foundation that is probably wrong: "The Denver Foundation concluded it was and continues to be positioned advantageously to invest the principal of the Sterne-Elder Trust because it has access to investment vehicles only available to foundations or to entities capable of investing large sums." *Id.* at 1120 n.8.

tion, "empowers the Foundation to compel the transfer of principal to its nonprofit corporation."[18]

The Colorado Court of Appeals reversed, holding for Wells Fargo that the Foundation could not direct Wells Fargo to transfer the funds to the Denver Foundation. The Court of Appeals ruled that the Sternes created the structure that they wished: "The Sternes' intent . . . was to create a perpetual trust managed by a bank trustee for the benefit of the Foundation in a standard tripartite relationship. . . ." The Foundation's Declaration of Trust and the powers it gave the Foundation were applicable "only to funds available to The Denver Foundation**,** which included the Trust's income but not its principal." The Court of Appeals also invalidated the portion of the Foundation's 1997 Declaration that gave the Foundation "exclusive authority' to construe that Declaration, calling that "unfettered discretion" against public policy, and it "speculated," in the words of the Supreme Court, "that the transfer of principal to the Foundation would terminate the Trust because its legal and beneficial interests would merge."[19]

The Denver Foundation appealed, and the Colorado Supreme Court reversed once again, holding that "the Sternes' intent was to establish a perpetual gift and a permanent endowment for the uses and purposes of the Foundation" and that "the Sternes' trust instrument does not forbid the transfer of the trust principal to The Denver Foundation's nonprofit corporation and, indeed, that the Sternes' intent in establishing the trust would be best effectuated by such a transfer" to the Denver Foundation for management and investment.[20]

The Court gave two key reasons for its decision: first, the foundation was entitled to conclusively construe, in good faith, any provision of its own Declaration. Second, the Foundation's interpretation allowing for the transfer of the trust corpus to the Foundation's nonprofit corporation corresponded with the settlors' intent and essential purposes in executing the trust agreement.

In specific terms, the Court ruled that the provision in its Declaration that authorizes transfers of principal and income from trustee banks to the corporation is valid, though the provision in its Declaration governing distribution of funds was made subject to restrictions contained in trust instruments such as the Sternes'. The result, according to the Court, is that the transfer of the trust corpus was permitted because (1) the Foundation was entitled to construe its Declaration (unless that interpretation was arbi-

18. *Id.* at 1121.
19. *Id.*
20. *Id.* at 1118–19.

trary or capricious, and the Court said it was not), including the provision authorizing transfers of principal and income from trustee banks, and (2) because the "Denver Foundation's interpretation, which allows for the transfer of the Trust corpus to the Foundation's nonprofit corporation, corresponds with the Sternes' intent and essential purposes in executing their 1976 Trust Agreement." And, according to the Court, the Sternes agreed that the Foundation could construe its Declaration when it incorporated the Foundation's 1925 Declaration and later amendments into its Trust Agreement.[21]

Did the Sternes intend to establish a trust as "a permanent gift for the benefit of the [Denver] Foundation," as the Denver probate court held, or did they intend to "create a perpetual charitable trust managed by a bank as trustee" as the Court of Appeals ruled? That conflict between community foundation models—who gets to hold, manage and invest the funds, whose books the endowment lies on—is at the core of the case. For the majority of the Supreme Court, the Denver Foundation was the key actor here:

> the Sternes granted The Denver Foundation unique powers affording it the flexibility to adapt to changing circumstances in the realm of charitable giving in perpetuity . . . [including] broad powers of amendment, modification, distribution, and construction, which evince their general wish that The Denver Foundation exercise substantial discretion in the administration of their gift. That the Sternes chose to entrust to The Denver Foundation crucial responsibilities and a wide array of discretionary powers not generally accorded to traditional trust beneficiaries reflects the fact that *the usual tripartite trust relationship was of significantly less import to them than the existence of a perpetual trust administered by the Foundation*. Accordingly, we cannot read the Sternes' essential purpose in creating the Trust to hinge on the traditional triangulated trust form. Instead, that tripartite form was merely the mechanism by which to achieve their essential purpose in giving the gift.[22]

And this judgment led clearly to the majority's holding: "In light of this overriding purpose and the circumstances existing in 1976 that prevented the Sternes from appointing The Denver Foundation to act as trus-

21. *Id.* at 1123.

22. *Id.* at 1124–25 (emphasis added). The court continued:

> This conclusion is borne out by the fact that the Sternes could not have designated The Denver Foundation as a trustee at the time of the execution of the Trust Agreement. In 1976, The Denver Foundation did not have a corporate entity capable of holding and administering assets; thus, at that time, a transfer of principal from the Sterne-Elder Trust to The Denver Foundation would have to have been distributed to end-user charities and the permanent endowment would have been lost, in contravention of the Sternes' wishes. Now, given structural changes permitting The Denver Foundation to hold and manage endowments, it is capable of administering the Trust principal as trustee of this permanent endowment without violating the Sternes' most essential purpose—that the Trust 'become part of the Denver Foundation.'

Id. at 1125.

tee, and given The Denver Foundation's power to conclusively construe its own Declaration in good faith, we conclude that the 1976 Trust Agreement does not restrict The Denver Foundation from directing the transfer of principal to its nonprofit corporation to be held as part of the permanent endowment of The Denver Foundation community trust." And the Foundation was prohibited from transferring or distributing the corpus of the Sternes' Trust to end-user charities.[23]

The Court rejected Well Fargo's argument that the transfer of the trust principal from the trustee bank to the community foundation would "merge all legal and beneficial interests in the foundation, thereby extinguishing the trust" because the trust agreement still named two specific beneficiaries to which the Denver Foundation was required to distribute charitable income, and the "general public" remained "an indefinite beneficiary with enforceable rights."[24]

Three Justices dissented, focusing on the settlors' intent and the bank's role in upholding it. In their view, the Sternes set up the trust arrangement they wanted and neither the Denver Foundation nor the Court was free to change it. Justice Eid wrote that

> [c]ontrary to the express terms of the 1976 Trust Agreement, the majority permits The Denver Foundation to transfer the principal of the Sterne-Elder Trust to itself and thereby become trustee over the Trust. . . . In my view, The Denver Foundation cannot contradict the express terms of a trust agreement, and therefore cannot, through the vehicle of incorporation, give itself authority to transfer the principal of the Sterne-Elder Trust and become trustee of the funds. Under the majority's rationale, no provision of a trust instrument is safe from such revision by incorporation. . . .[25]

The dissenters pointed to several mistakes in the Court's analysis: First,

> the vast deference it pays to the Foundation's interpretation of a settlor's trust agreement. The Foundation may have the authority to conclusively construe *its own governing documents,* but it does not have such expansive authority over interpretation of *trust instruments* under which it is designated as one of many beneficiaries. The fact that the trust instru-

23. In a footnote, the Court notes that,

> At oral argument, counsel for the Denver Foundation invited us to make explicit that our ruling in no way authorizes The Denver Foundation to transfer or distribute the corpus of the Sterne-Elder Trust to end-user charities. We accept that invitation and make clear that our holding goes no further than to read the Trust instruments to permit transfer of the principal to the Foundation's nonprofit corporation. We do not read the Trust instruments to permit or to embody an intent to allow distributions of the principal to end-user charitable organizations.

Id. at 1125 n.15.

24. *Id.* at 1126. The Supreme Court also affirmed the Court of Appeals' decision to overturn the probate court's admission of extrinsic evidence because the terms of the trust were not ambiguous.

25. *Id.* at 1127 (Eid, J., dissenting).

> ment in this case incorporates by reference the governing documents of The Denver Foundation does not change this result. . . . The Foundation cannot give itself powers under the 1997 Declaration that, by incorporation, would contradict the plain terms of the 1976 Trust Agreement.[26]

And the dissenters find that the Court has done exactly that: in the dissenters' view, the Sternes' Trust Agreement prohibited the Foundation from "disbursing" the principal of the Trust under the provision of the 1997 Declaration which gave the Foundation "the power to direct a trustee bank to 'disburse' the principal of a trust to the Foundation."[27] Thus, the dissent argued, the principal has been "disbursed" by the Court in violation of the Trust Agreement.

> [T]he 1976 Trust Agreement governs this case. The Denver Foundation is not free to abide by it in some instances and not in others. . . . [T]he question here is not one of The Denver Foundation's good faith; rather, it is whether the Foundation can override the language of the 1976 Trust Agreement by amending its governing documents incorporated into that Agreement. In my view, The Denver Foundation does not have the authority to revise a trust document's provisions through incorporation.[28]

But that "disbursal" argument is probably overdrawn, as even the dissenters recognize. If it is—"if the Foundation is correct that the prohibition on disbursement of principal applies only to disbursements made to end-user charities"[29]—then in the view of the dissenters

> there is a more fundamental problem in its interpretation. By permitting The Denver Foundation to disburse the trust principal to itself 'to hold for management and investment,' . . . the Foundation becomes the new trustee of the Sterne-Elder Trust. This arrangement is clearly contrary to the language of the 1976 Trust Agreement, which names the United Bank of Denver (and Wells Fargo as its successor) as trustee. . . .[30]

For the dissenters, the majority's notion of the trustee bank as "merely the mechanism" for the Sternes' "most essential purpose" of "establishing a permanent endowment" for the Denver Foundation is "problematic." The Sternes chose that mechanism, and "there is no indication from the 1976 Trust Agreement that the Sternes did not care whether Wells Fargo served as the trustee."[31] On the contrary, their trust agreement "demonstrate[s] that the Sternes carefully and thoughtfully considered the issue of which entity would serve as the trustee of their Trust."[32]

26. *Id.* at 1127–28 (Eid, J., dissenting).
27. *Id.* at 1128 (Eid, J., dissenting).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

The majority says that the Sternes could not have named the Denver Foundation as trustee in 1976 because the Foundation's structure did not allow it, and that is why they chose the tradition tripartite structure that it did. "But," notes the dissent, "the Foundation obtained the power to act as a trustee in 1983, and there was nothing preventing the Sternes from selecting the Foundation to serve as trustee after that time."[33] And the Foundation still recognizes the tripartite trust form and allows donors to make a gift to the Foundation held in trust by a trustee bank. "That The [sic] Denver Foundation continues to permit such a choice demonstrates the fact that the selection of a trustee is an important one."[34]

The dissenters clearly choose the specific, structural decisions that the trust settlers made over a current-day court's view of the trust's purposes. Or, as they put it somewhat more mildly, "[i]n the end, the majority's rationale demonstrates the dangers of elevating a trust's purpose over its language."[35]

Discussion

Why do we care who holds, manages and invests this endowment? Beyond ultimately unproductive arguments over which of two very sophisticated organizations—the Denver Foundation and Wells Fargo Bank—might provide better investment returns, at the end of the day it probably does not make too much different to the ultimate charitable grantees and to doing good community work whether the management and investment of this endowment rests with the Foundation or with the bank. At the end of the day, the Denver Foundation—a highly regarded community foundation with a long record of effective service in Denver—will determine the charitable grantees for the investment returns from the Sterne endowment.

But which organization manages and invests this endowment appeared to make a significant difference to the Foundation and the bank—worth a multi-year judicial battle. In general terms—not necessarily in this dispute[36]—a community foundation might wish to show significant and growing endowment funds and their effective management and investment as well as distribution, and a bank would hold strongly to the need to hew to settlors' intent and might also wish to show charitable funds under management and market its services to other charities. For a community foundation, autonomy might be important—it might wish to handle all

33. *Id.*

34. *Id.* at 1129.

35. *Id.*

36. I want to re-emphasize that I do not know and make no inferences as to the motivations of the parties in the Denver Foundation/Wells Fargo case whatsoever.

endowments internally, and make decisions internally, rather than going back to a trustee bank on investment and management issues. For a trustee bank, and certainly for Wells Fargo in this case, the expressed intent of the trust settlors was crucially important.

In this case, the Colorado Supreme Court had to decide what the primary objective of the donors was and how that could be reconciled with the modern role of community foundations and trustee banks. Was the primary objective to benefit the community foundation and its charitable grantees by turning over investment and management of a very sizable endowment to the foundation, or was it to combine the donors' charitable intent with the structural choices donors made in an earlier era by maintaining management and investment of the funds in a trustee bank? The community foundation won that judicial battle for control over the management and investment of an endowment.

II. THE STRUGGLE FOR ENDOWMENT IN THE LEGISLATIVE ARENA

In *Denver Foundation v. Wells Fargo*, the Denver Foundation sought to use the courts to build their endowment and extend control over endowments held by trustee banks, and Wells Fargo sought to uphold the trust settlors' intent and to retain control over the management and investment of those funds. Community foundations have also used legislative means to seek to increase endowments at a time of strong competition for endowment and other gifts. Here I outline several of those strategies that have resulted in statutory support for community foundation endowment-building at the state level. As the economic situation improves, we are likely to see more attempts to use state legislatures as endowment-building forces for community foundations.

A. Preferencing Community Foundations Through Tax Credits for Community Foundation Endowment Building

Several states have adopted (and in some cases sunsetted) legislation that preferences community foundation endowment-building through state tax credits. These programs began to accelerate in the 1990s, an era of welfare reform and devolution of government services from federal to state and from state to charities. By the end of the 1990s approximately twenty states provided various kinds of tax credits to support various kinds of charities in a series of initiatives, sometimes called "compassion tax credits," that were

strongly supported by religious and conservative groups.[37] One of those states—Michigan—focused the credits initially on community foundations.[38]

Michigan. Between 1989 and 1997, Michigan's state legislature provided an annual tax credit of fifty percent of the amount a Michigan taxpayer contributed during the tax year to the endowment fund of a certified community foundation, up to a maximum credit or $100 for individuals, $200 for joint filers, and, for a resident estate or trust, ten percent of the tax liability for the tax year (prior to any personal income tax credits), or $5,000.[39]

Initial research on the impact of the Michigan program conducted in 1999 showed that

> the size and number of individual and business donations to community foundations were positively influenced by the tax credit, implying that the tax credit was successful in achieving the goal of encouraging giving to these charitable organizations. . . . The law had a positive and significant effect on the total dollar amount of giving to the sample community foundations and on the total number of contributors for both individuals and businesses. The results show that the tax credit increased individual donations an average of $27,393.18 per foundation and business donations an average of $45,396.37 per foundation.[40]

Iowa. Iowa currently has the most extensive tax credit program involving gifts to community foundations, along with an extensive gambling revenue sharing program discussed separately below. The Endow Iowa Program provides a twenty percent tax credit for gifts by individuals, businesses, or financial institutions to permanently endowed funds within qualified community foundations or affiliates,[41] in addition to regular charitable income tax deductions.[42] Annual tax credits are limited to $2 million. Within the state, the tax credit program is regularly cited by community foundations seeking donors and is credited as a major force in rising donations to community foundation endowments.

37. *See, e.g.*, ACTON CENTER FOR EFFECTIVE COMPASSION, STATE COMPASSION TAX CREDITS 1–14 (2004), http://www.samaritanguide.com/pdf/State_Tax_Credits_research.pdf.

38. BEACON HILL INSTITUTE, THE NEXT STEP TOWARD WELFARE REFORM: A MANUAL FOR ENACTING TAX CREDITS FOR CHARITABLE CONTRIBUTIONS 3 (1998), http://www.beaconhill.org/BHIStudies/NextStepWR/nscurrentl.html.

39. For a summary of the Michigan program, see *id.*

40. Donna M. Anderson & Ruth Beier, *The Effect of a State Tax Credit on Giving to Community Foundations*, 43 AM. ECONOMIST 66, 66, 69 (1999).

41. IOWA ADMIN. CODE r. 261-47.1, 261-47.3(2) (2010); *see also* Iowa Community Foundations, Endow Iowa Tax Credits, http://www.iowacommunityfoundations.org/page10753.cfm (last visited Mar. 3, 2010).

42. Iowa Community Foundations, Endow Iowa Tax Credits, http://www.iowacommunityfoundations.org/page10753.cfm (last visited Mar. 3, 2010).

Beyond the state legislative preferencing of community foundations through tax credits, the process by which community foundations are "qualified" for the program is also interesting, for it relies on the national self-regulatory and certification program for community foundations built by the Council on Foundations. This is almost certainly an extended use of the certification program that the Council neither expected nor intended, but they cannot oppose yet another indication of the somewhat surprising strength of that self-regulatory initiative. In order to participate in either the tax credit program or the gambling revenue program discussed below, an Iowa community foundation must either be "qualified" or affiliated with one that is—a requirement that has also helped to spur the development of what I call "micro community foundations," and I do not mean that term entirely positively.

Qualification means that the community foundation must serve a county-wide area, and must either be "confirmed [to be] in compliance with [the] National Standards for U.S. Community Foundations or has been designated as an Endow Iowa Qualified Community Foundation for purposes of the Endow Iowa Tax Credit through a collaborative determination by the Iowa Council of Foundations and the Iowa Department of Economic Development."[43]

As of late 2009, as a result of intense pressures on state revenue, the tax credit program for community foundation endowment-building was under threat in Iowa.

Montana. Since 1997, Montana has offered an endowment tax credit for donors who make a qualifying planned gift to a qualified Montana charitable endowment (a definition considerably broader than community foundation). The history is interesting, for it points out some of the conflicts involved with developing tax credits for various forms of community philanthropy.

In the early 1990s, after support from the Ford Foundation's rural philanthropy initiative, Montana's governor created a Task Force on Endowed Philanthropy, which he charged with examining the nitty-gritty details of what the state could and should do to promote endowed philanthropy.

> The task force's first major effort was to help draft and lobby for a bill for a tax credit for direct gifts to endowments with community foundations. The bill was presented to the 1995 legislature. . . . Although patterned after a similar tax credit in Michigan, and bolstered by the testimony and support of Russell Mawby of the W.K. Kellogg Foundation of Battle Creek and Dorothy Johnson of the Michigan Council on

43. Iowa Community Foundations, Qualified Foundations, http://www.iowacommunityfoundations.org/page10756.cfm (last visited Mar. 3, 2010).

> Foundations, the legislature rejected the first bill for a variety of reasons. One of those reasons was that other types of nonprofits felt it gave community foundations an unfair advantage. Others felt the incentive would diminish giving to annual campaigns.
>
> The task force's work continued. After two more years, [in which the Montana Community Foundation] and partners from other Montana foundations, bankers and financial advisors revised and refined the legislation, a successful bill was passed in the 1997 legislature. It provides for a state tax credit in the amount of [fifty] percent of qualifying contributions, up to a maximum $10,000 credit per year for individuals for certain planned gifts to permanent charitable endowments (not limited to community foundation endowments) and a credit of equal size for gifts from an estate or corporation. . . .
>
> After the legislation passed, Gov. Racicot helped get the word out by encouraging donors to take advantage of the credit by year's end in a televised public service announcement. Although the tax credit was only nine months old when 1997 ended, we saw a significant increase in giving to permanent endowments across the state in that short time. . . .[44]

The credit is forty percent of a planned gift made by an individual, and twenty percent of an outright gift made by a qualified business, both with a limit of $10,000 in credits per year.[45] In 2007, the credit was extended by the state legislature and signed into law by the governor to run until 2013, maintaining the current levels of tax credits but revising the definition of a "'permanent, irrevocable fund' to exclude contributions that are 'expended directly for constructing, renovating, or purchasing operational assets, such as buildings or equipment.'"[46]

In Montana, reviews of the impact of the credit program on endowments continue to be very positive. The Montana Community Foundation noted in 2007 that

> [e]stimates by the Department of Revenue tell us that between $100 and $130 million in permanently endowed funds have qualified for the tax credit. Here at the Foundation, we can attribute nearly $9 million in donations that qualified for the tax credit. 'This is an important tool that nonprofits all over Montana are using to build sustainability,' said Linda Reed, president of the Foundation. 'We'll be using it aggressively over the next six years.'[47]

44. Sidney Armstrong, *Letter from Montana: Here's to Bigger Endowments in the Big Sky State*, FOUNDATION NEWS AND COMMENTARY, Sept.–Oct. 1998, http://www.foundationnews.org/CME/article.cfm?ID=1052.

45. MONT. CODE ANN. §§ 15-30-2328, 15-31-161 (2009).

46. BIG SKY INSTITUTE FOR THE ADVANCEMENT OF NONPROFITS, 2008 GUIDE TO SUPPORTING MONTANA'S LOCAL AND COUNTY COMMUNITY FOUNDATIONS 3 (2008), http://www.bigskyinstitute.org/pdf/08_MTLCFGuide%20-%20Rev%201.pdf.

47. The Montana Community Foundation, *Great News!: Qualified Endowment Tax Credit Extended by Legislature*, INFINITY: THE MONTANA COMMUNITY FOUNDATION NEWSLETTER, Mar. 2007, at 4, http://www.mtcf.org/pdfs/MCF_NL_Mar07.pdf.

Nebraska. The Nebraska legislature established a tax credit program for gifts to qualified permanent endowments in nonprofit organizations (including but not limited to community foundations)[48] in 2006 to encourage local community giving, to take advantage of the generational transition already taking place in Nebraska and to avoid "los[s] to federal estate taxes or to heirs residing outside the state." By July 2009 about $6.5 million in qualifying gifts to nonprofits had been made under the tax credit scheme.[49]

"A study conducted by the Nebraska Community Foundation in 2001 shows an estimated $258 billion, or $5.2 billion annually, will be transferred from one generation to the next by the middle of this century," noted the Nebraska newspaper Prairie Fire. But "[i]n rural Nebraska, twenty-four counties are already experiencing the peak years of transfer, because of aging populations and out-migration of young people. For rural Nebraska, the peak transfer is expected to occur around the year 2015."[50]

The Nebraska charitable tax credit is modeled after similar legislation in Montana, which is touted by a Nebraska newspaper as having "resulted in an additional $74 million for that state's endowments in just five years." The Nebraska program, initially in effect from 2006 to 2009, permitted a maximum annual credit of $5,000 for individuals who make irrevocable planned gifts to Nebraska community foundations, and to Nebraska-taxed corporations that make outright gifts.[51]

The Nebraska program appears to have had strong local support. The largest newspaper in the state, the *Omaha World-Herald*, editorialized in 2007 that

> [t]his type of practical approach to community endowments is crucial to the future of rural Nebraska. Ultimately, the destiny of rural communities will depend primarily on their own efforts, vision and solidarity. An indispensable tool in that effort will be public-spirited pledging that keeps a vital portion of rural income in the communities that need it most. . . .[52]

48. The statute defines "qualified endowment" as follows:

> [Q]ualified endowment means a permanent, irrevocable fund that is used for Nebraska charitable purposes and held by a Nebraska incorporated or established organization that: (1)(a) Is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; or (b) Is a bank or trust company that is holding the fund on behalf of a tax-exempt organization; and (2) Holds the fund as a permanent endowment fund.

NEB. REV. STAT. § 77-27,229 (2006).

49. *Raising Spirits, Raising Money*, LB 405 UNICAMERAL UPDATE (AFP Nebraska, Lincoln, NE), July 2009, at 7, *available at* www.afpnebraska.org/newsletter/pdf/Newsletter%20July%202009.doc.

50. Maxine Moul, *The Nebraska Charitable Tax Credit and Community Endowments*, PRAIRIE FIRE, Dec. 2007, http://www.prairiefirenewspaper.com/2007/12/charitable-tax-credit.

51. *Id.*

52. *Id.*

Now is the time for Nebraskans to spread that word," the editorial said.[53] In 2008, an attempt was made to increase the credit to $10,000, increase the cap on credits to $5 million per year, and extend the program to 2016. That bill did not pass in 2008.[54]

Despite that support, the tax credit in Nebraska sunsetted, at least temporarily, in 2009 because the state legislature has failed to renew it. EndowNebraska, the organization administering and promoting the program, notes that "[t]his has been a particularly difficult [legislative] session because of the economic recession and the pressure on the state's budget" but also notes strong support for the credit and promised a strong effort to renew it in 2010.[55]

North Dakota. North Dakota approved tax credits for individual and corporate gifts to community foundation endowments in 2007. Individuals who make a qualified endowment[56] to the North Dakota Community Foundation or one of its component funds receive a tax credit of forty-percent of the allowable charitable deduction up to a maximum of $10,000 per year per taxpayer or $20,000 per year for each couple filing jointly. The credit may be carried forward for three additional years. North Dakota tax-paying C corporations, S corporations, estates, limited liability companies, and trusts receive a forty-percent credit up to $10,000 for gifts to the qualified endowment fund of the North Dakota Community Foundation or one of its component funds.

The North Dakota Community Foundation calls these "incredible incentives on top of the already great charitable income tax deductions and really offer a great benefit for gifts to the North Dakota Community Foundation and its component funds."[57]

Louisiana. Louisiana is an example of a state where such a state tax credit program has not yet passed, despite strenuous efforts. In 2007 several state legislative bills proposed a tax credit to permanent endowments at community foundations. They would have provided a credit for qualified gifts to qualified community foundations made by individuals, corporations, other business entities, or resident estates or trusts, with the credit

53. *Id.*

54. Howard K. Marcus, *Tax Credit's Full Effect Still Years Away*, OMAHA WORLD-HERALD, Feb. 3, 2008, at 8.

55. AFP Nebraska, The Nebraska Charitable Tax Credit Update, *available at* http://www.afpnebraska.org/ (May 29, 2009).

56. S.B. 2363, 60th Legis. Assemb., Reg. Sess. (N.D. 2007) (enacted), *available at* http://www.legis.nd.gov/assembly/60-2007/bill-text/HBCG0600.pdf.

57. North Dakota Community Foundation, North Dakota's Tax Credit for Gifts to North Dakota Community Foundation Funds, http://www.ndcf.net/Information/NDtaxCredit.asp (last visited Mar. 3, 2010).

limited to $5,000, or $10,000 for a joint return. In order to qualify, community foundations would have to be established before April 1, 2007 or, if established after that date, "operate and serve in a parish of this state which is not served by such a community foundation or it must operate as a geographic component of a community foundation provided for [above]"[58]—a clear attempt to prevent competition with existing community foundations and the establishment of new, competing groups to receive these credits.

In addition, the bills would have required that the community foundation be incorporated or established as a permanent endowment (Senate Bill 141),[59] or that a majority of its funds be established and operated as permanent endowments, at least six months before the beginning of the tax year for which the credit is claimed (Senate Bill 167).[60] The bills set different minimum levels for existing endowment: $25,000 for one, and $250,000 for the other. Qualified foundations would not have been allowed to serve only one nonprofit, and would have been required to make grants to unrelated nonprofits and charities. The bill mandating the $25,000 endowment minimum also required that the foundation "build a permanently endowed value" of $100,000 within eighteen months of establishment and "maintain[] an ongoing program in order to attract new endowment funds by seeking gifts and bequests from a wide range of potential donors in the community or area served."[61]

Both of the 2007 proposals died in committee, and Louisiana legislative officials consider it unlikely that a tax credit scheme for community foundations would be enacted in the current environment that includes a "billion dollar deficit right now. . . ." That is likely to be the short-term response from other states as well. [62]

B. The Prospects for State Legislative Preferencing for Community Foundations Through State Tax Credits and Other Incentives

In the short term, the prospects for a rapid expansion of community foundations' attempts to use state legislatures as endowment-building de-

58. S.B. 141, 2007 Leg., Reg. Sess. (La. 2007) (enacted), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=425827

59. S.B. 141, 2007 Leg., Reg. Sess. (La. 2007) (enacted), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=425827.

60. S.B. 167, 2007 Leg., Reg. Sess. (La. 2007) (enacted), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=425908.

61. S.B. 141, 2007 Leg., Reg. Sess. (La. 2007) (enacted), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=425827.

62. Interview by Laura Johnson, research assistant to Mark Sidel, with Riley Boudreaux, Louisiana State Legislature Chief Revenue Counsel (Oct. 15, 2009).

vices through state tax credits cannot be optimistic. The threats to the tax credit program in Iowa, the sunsetting of the successful state tax credit program for community foundations in Nebraska, and the failure to adopt a tax credit program in Louisiana all illustrate those obstacles ahead. But in the longer term, state tax credits for community foundation endowment-building are clearly on the agenda, and calls for state legislatures to enact them can be expected to multiply as the recession eases.

III. THE NEXT FRONTIER?: COMMUNITY FOUNDATION ENDOWMENT BUILDING THROUGH STATE LEGISLATIVE APPROPRIATION OF STATE GAMBLING REVENUE

Beyond state tax credits, other attempts have been made to persuade state legislatures to become endowment building partners for community foundations. One newer method is to persuade state legislatures to appropriate state gambling revenues for local development through endowment-building at local community foundations—and, at the same time, to secure the political base for casino gambling at the state level.

This process may have had its start in Iowa. In Iowa, the County Endowment Fund Program, established by statute in 2004, provides one half of one percent of the state's revenues from gambling to counties without a state gaming license. Fourteen of Iowa's ninety-nine counties have a state-licensed gaming facility (casino) in those counties and they receive funds directly from gaming revenue for charitable, educational and other purposes; this County Endowment Fund Program serves the other eighty-five counties as a means to spread gambling revenues around the state, promote local economic development and charitable activities, and secure the base for gambling throughout the state through payments to all counties throughout that state.

For our purposes the most interesting feature of the Iowa program is that community foundations and their affiliates at the county level are the statutory designees to receive and program these funds. The County Endowment Fund Program is administered by the Iowa Department of Economic Development, working closely with the Iowa Council of Foundations. By statute the recipient foundations re-grant seventy-five percent of program funds received to charitable projects within their counties and are required to direct the other twenty-five percent to a "permanent endowment fund [such as a community foundation or affiliate], which is

intended to attract other donations and provide a source of permanent funding for charitable projects within the county."[63]

In 2005, more than $5.4 million was distributed to eighty-five community foundations and affiliates around Iowa, with each organization receiving about $63,000 in the initial year of the County Endowment Fund Program. In 2006, more than $5.7 million was distributed, also to eighty-five community foundations and affiliates, averaging $67,000. In 2007, $6.6 million was distributed to the eighty-five community foundations and affiliates, averaging $70,000, and in 2008, $11.5 million was distributed, averaging $131,000 per foundation or affiliate. In 2009, another $11 million was distributed to eighty-five community foundations and affiliates.[64] In Iowa, community foundations at the county level—in some cases established largely to receive and program these funds—are rapidly becoming dependent on such a program, making it politically difficult for a state legislature to end the subsidy, and bolstering casino gambling throughout the state.

IV. SOME THOUGHTS ON LEGISLATIVE PREFERENCING FOR COMMUNITY FOUNDATION ENDOWMENTS, AND USING THE COURTS TO BUILD ENDOWMENTS

At the very least, hopefully I have established that community foundations are actively seeking to use judicial and legislative means to bolster their endowment-building activities at a time of intense competition with sophisticated players that range from the United Way to the Fidelity Charitable Gift Fund to universities, high schools, service clubs, congregations, and other long-time, skilled mobilizers of resources in the community.

Some may have doubts about this process, but, at least on the uses of state legislatures to build community foundation endowments, I do not. From where I sit, community foundations are often the weaker players in the charitable resource mobilizing community. They are directly based in and directly serving communities but they are often many steps behind and many dollars short in a highly sophisticated, even brutal, fundraising envi-

63. Iowa Community Foundations, County Endowment Fund, http://www.iowacommunityfoundations.org/page10758.cfm (last visited Mar. 12, 2010).

64. *See* IOWA COUNCIL OF FOUNDATIONS, 2009 REPORT TO THE LEGISLATURE AND GOVERNOR ON ENDOW IOWA AND COUNTY ENDOWMENT FUND, *available at* http://www.iowacommunityfoundations.org/page10758.cfm; BUILDING IOWA'S COMMUNTIES THROUGH PHILANTHROPY: A SNAPSHOT OF THE 2008-2009 COUNTY ENDOWMENT FUND PROGRAM 4-5, http://www.iowacommunityfoundations.org/page10758.cfm; Governor Culver Announces $6.6 Million for Community Foundations, http://www.iowacounciloffoundations.org/endow.htm (Sept. 11, 2007); Newsline, Communities Pursue Community Development Block Grant (CDBG) Funds, http://www.area15rpc.com/PDF/newsletters/DEC%202005.pdf (Oct. 2009).

ronment. If they try to use state legislatures to catch up through tax credits and gambling revenue, why not?

One "why not" could focus on state gambling policy rather than community foundation law. The gambling industry's support for the use of state gambling revenues to spread endowment and program funds throughout the state (to the eighty-five counties where there are no casinos in addition to the fourteen counties where there are) can be seen as an attempt to secure its political base well beyond the communities where it already provides some additional revenue and some additional jobs.[65] In exchange, it appears, the gambling industry gives up little if anything. I am not aware, for example, that state taxes on the gambling industry were increased to fund the community foundation program.

And what should we think about the uses of a state court system to battle over an endowment when there is perhaps virtually no significant difference in either the investment return depending on whether the community foundation or the trustee bank controls the management and investment of the funds? And when, no matter how the Colorado Supreme Court decided, the income from that fund would be either turned over to the Denver Foundation by Wells Fargo, or directly programmed by the Foundation, for charitable grants in the community, meaning that there should be no demonstrable negative effect on community benefit? If the true goal here was purely institutional, to claim or to retain endowment, and the trust law questions are reasonably evenly divided, one certainly feels some sympathy for the predicament of the Colorado Supreme Court.

On the legislative initiatives preferencing community foundations, numerous queries can be raised. Why is it a good idea necessarily to increase endowments, as Henry Hansmann and others have asked? Does the focus on increasing endowment for community foundations in the states, and their own focus on increasing endowments, have the effect of reducing startup capital or ongoing donations for charities? For those state programs that preference community foundations over other vehicles, why should we preference community foundations over, for example, operational charities (the kinds of organizations that community foundations support)?[66] Why are we preferencing gifts to community foundations rather than, in effect, providing all individual givers with these incentives and thus devolving decision making to individuals?[67] States will need to address these and

65. How much revenue and what kind of jobs? *See generally* BETH PEARSON & PETER S. FISHER, IOWA FISCAL PARTNERSHIP, CITY REVENUE AND SMART GROWTH, 14 (2008), http://www.iowafiscal.org/2008docs/081113-cityrevs.pdf.

66. I am grateful to John Colombo for raising these questions at the Chicago-Kent symposium.

67. Thanks to Tom Gallanis for raising this particular question at the Chicago-Kent symposium.

other questions in the years ahead, as momentum builds for more legislative initiatives to strengthen community foundation endowment building.

V. BEYOND STATE LEGISLATURES AND COURTS: THE ROLE OF PRIVATE LAW FRAMEWORKS IN COMMUNITY FOUNDATION REGULATION AND ENDOWMENT BUILDING

Finally, in our focus on the use of state legislatures and of the courts by community foundations to build endowments, we should not ignore other private law aspects of the development of community foundation law (or law-like instruments), and their role in building endowments.

Here I mention only briefly the use of self-regulatory standards by community foundations to establish community norms for the community foundation sector in the United States. Within the American philanthropic sector, self-regulation has, for the most part, failed to gain momentum, especially when it comes to private and corporate foundations. The only real bright spot for the proponents of self-regulation in the American philanthropic arena is the community foundation sector, and specifically the National Standards for Community Foundations supported and spread by the Council on Foundations.

American philanthropy has long displayed contradictory reactions to self-regulation. The private foundation component of American giving—independent foundations in an independent sector—did not even begin to embrace self-regulation until forced to do so by scandals in the for-profit and non-profit worlds. The private foundation sector continues to regard self-regulation with at least deep ambivalence and in some cases direct resistance, particularly when self-regulation moves from easy principles to hard implementation, and despite individual cases (like the Getty Trust) in which private foundation self-regulation must essentially be used to change foundation behavior and force the removal of key offending officials.[68]

In a different context, a form of self-regulation imposed by government in the wake of the September 11 terrorist attacks—the federal government's multiple attempts to draw up or rework "voluntary guidelines" on overseas activities from American philanthropic organizations—have elicited a truculent response along with active, self-defensive implementation from the philanthropic community after it became clear that the gov-

68. For an earlier approach to these issues, see, for example, Mark Sidel, *The Guardians Guarding Themselves: Nonprofit Self-Regulation in Comparative Perspective*, 80 CHI.-KENT L. REV. 803, 834–835 (2005).

ernment might move beyond the targeting of Muslim philanthropic organizations into the broader philanthropic sector.[69]

In yet a third context for philanthropic self-regulation—national standards for the specific sub-sector that comprises over 700 community foundations—both the acceptance and implementation of those self-regulatory standards have been much smoother than the response to self-regulation for private foundations or for institutions giving abroad. This section discusses briefly the impact of self-regulation in the community foundation context and its relationship to endowment building.

While self-regulation has not proceeded far with private and corporate foundations, community foundations are a somewhat different story. The Council on Foundations adopted and promulgated the *National Standards for Community Foundations* in 2000[70] intending that they develop into an effective example of detailed and specific self-regulatory norms and implementation. Of the more than 700 community foundations now active in the United States, 456 have self-confirmed their compliance with the Standards and 70 more are working on the compliance process.[71]

Why would they adopt a form of self-regulation—albeit a rather loose form—so readily, particularly when their private and corporate foundation cousins are arguably resisting it with much of their might? The Community Foundations National Standards Board (an affiliate of the Council on Foundations) explains:

> In the United States, community foundations serve tens of thousands of donors, administer more than $40 billion in charitable funds, and address the core concerns of more than 700 communities and regions. With such a presence—nationally and within local communities—comes responsibility. National Standards for U.S. Community Foundations mark an individual and collective commitment and an outward sign that community foundations take this responsibility very seriously.[72]

But more particularly, the existence of standards and compliance with them also helps raise money and build endowment:

69. *See* MARK SIDEL, REGULATION OF THE VOLUNTARY SECTOR: FREEDOM AND SECURITY IN AN ERA OF UNCERTAINTY (2010); Mark Sidel, *Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of "War on Terror" States*, 10 INT'L J. OF NOT-FOR-PROFIT L. 7, 13–14 (2008), http://www.icnl.org/knowledge/ijnl/vol10iss3/special_2.htm;–MARK SIDEL, MORE SECURE, LESS FREE? ANTITERRORISM POLICY AND CIVIL LIBERTIES SINCE SEPTEMBER 11 (rev. paper ed. 2007).

70. Council on Foundations, Community Foundations Home, http://bestpractices.cof.org/community/ (2010).

71. Community Foundations National Standards Board, About National Standards, http://www.cfstandards.org/About_us/about_us.asp (last visited Mar. 29, 2010).

72. Community Foundations National Standards Board, Why National Standards, http://www.cfstandards.org/About_us/why_ns.asp (last visited Mar. 29, 2010).

> In response to a challenged global economy, expensive corporate bailouts, and several high-profile financial misdeeds and mistakes, Americans are more concerned than ever about where to put their money—this extends to their charitable investments. The dollars they set aside for charity are limited and precious. The institutions they choose to support must be credible and trustworthy. As a symbol of excellence and rigor, the National Standards Seal helps cautious philanthropists recognize and choose community foundations as a sound place to give and make a difference.[73]

That relationship between self-regulation and endowment-building efforts goes beyond individual foundation adherence to the National Standards:

> Community foundations use National Standards to distinguish themselves from a variety of competitors that offer traditional community foundation services, such as donor advised funds, in a marketplace that is both local and national. As a field, community foundations engage in collective marketing, pooling resources and co-branding themselves to build awareness of the field for individual community foundation benefit. National Standards reduce the risk of joint marketing by ensuring all participants have met benchmarks for quality in operations and service.[74]

Despite its recent origins—for the *National Standards* were issued only in 2000—the community foundations' standards process is arguably the most successful self-regulatory effort yet undertaken in the American philanthropic arena. Its relative success may be due to its application to a coherent, well-defined and very well-bounded sector of the philanthropic community, a relatively high degree of agreement within that community foundation sector on the importance of standards and self-regulation in a rapidly growing field, an emphasis on education, strengthening accountability, good faith intention, confirmation, and peer review rather than sanctions, strong support from the Council on Foundations (the national umbrella body in the philanthropic arena), and lack of competition from other self-regulatory models, among other factors.

But the *National Standards* are also important because community foundations believe that they will help build assets and endowment by aiding community foundations in being perceived as high-quality, vetted, and as certified members of the American community of community foundations. In all these senses—including their utility in building endowment—the broad private law established by the *National Standards for Community Foundations* has become part of the less formal law of community philanthropy in the United States, in part as an endowment building and a community building device, and considerably more effective than other private

73. *Id.*
74. *Id.*

law, self-regulatory tools in the foundation or broader nonprofit community.