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A Grave Injustice: The Uncharitable Federal Tax Treatment of Bequests to Public Cemeteries

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A GRAVE INJUSTICE: THE UNCHARITABLE FEDERAL TAX TREATMENT OF BEQUESTS TO PUBLIC CEMETERIES

INTRODUCTION

Under current case law, the living may make tax-deductible contributions to public cemeteries,[1] but the dead may not. It is not at all clear, however, that in framing the Internal Revenue Code, Congress intended this incongruity. Moreover, the case law cuts off public cemeteries from an important class of potential benefactors—a result hardly compatible with the public interest in maintaining our cemeteries as dignified and beautiful resting places for those who gave us life.

The Code's estate tax provisions permit a deduction from the deceased's taxable estate of any bequest "to or for the use of any corporation organized and operated exclusively for . . . charitable" and other enumerated purposes.[2] Eight federal courts have considered whether a bequest for the general maintenance or operation of a public cemetery qualifies for this deduction.[3] All have answered in the negative.[4] Each of these courts based its decision on an analysis of one or more of three aspects of the federal tax laws: the framework of the Code's charitable provisions,[5] the meaning of the word "charitable" in the Code,[6] and the

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1. Throughout this Note, the term "public cemetery" denotes a burial ground that is organized and operated by a nongovernmental, nonprofit association, company, or corporation and is held open to the use of the public. This definition is recognized in the common law. *See, e.g.*, Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 87, 58 A. 467, 469 (1904); Davie v. Rochester Cemetery Ass'n, 91 N.H. 494, 495, 23 A.2d 377, 378 (1941); 14 C.J.S. *Cemeteries* § 1 (1939 & Supp. 1989).

2. *See* I.R.C. § 2055(a) (1986). It reads in pertinent part:

> [T]he value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests . . . (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition . . . , and [sic] the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual . . . .

3. *See* Mellon Bank v. United States, 762 F.2d 283 (3d Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986); Child v. United States, 540 F.2d 579 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Gund's Estate v. Commissioner, 113 F.2d 61 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940); Robertson v. United States, 87-1 U.S. Tax Cas. (CCH) ¶ 13,712, at 87,935 (M.D. Tenn. 1987), *aff'd*, 838 F.2d 1215 (6th Cir.), *cert. denied*, 109 S. Ct. 245 (1988); Smith v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 13,595, at 86,203 (W.D. Mo. 1984); Bank of Carthage v. United States, 304 F. Supp. 77 (W.D. Mo. 1969); Estate of Amick v. Commissioner, 67 T.C. 924 (1977); Wilber Nat'l Bank v. Commissioner, 17 B.T.A. 654 (1929).

4. *See supra* note 3.

5. *See Mellon Bank*, 762 F.2d at 285-86; *Child*, 540 F.2d at 581-82; *Gund's Estate*, 113 F.2d at 63-64; *Robertson*, 87-1 U.S. Tax Cas. (CCH) at 87,936; *Bank of Carthage*, 304 F. Supp. at 80-81.

6. *See Child*, 540 F.2d at 582-84; *Gund's Estate*, 113 F.2d at 63; *Bank of Carthage*, 304 F. Supp. at 80; *Estate of Amick*, 67 T.C. at 927-30; *Wilber Nat'l Bank*, 17 B.T.A. at 660-62.

requirement that qualified entities be organized and operated "exclusively" for charitable purposes.[7]

Despite the weight of precedent, the issue is not a settled one. Dissents to denial of certiorari in two recent cases have strongly questioned the framework analysis of some of the earlier holdings.[8] Doubt is cast on other holdings by the pronouncements of the Supreme Court in *Bob Jones University v. United States*[9] with respect to the meaning of the word "charitable" in a federal tax context.

This Note argues that continued denial of the estate tax charitable deduction for bequests to public cemeteries is unjustified. Part I presents background on the content and framework of the relevant Code provisions, the tax meaning of the word "charitable," and the application of the Code's exclusivity doctrine. Part II challenges the federal courts' analyses in the public cemetery cases based on each of these criteria. The public policy grounds for granting charitable treatment to such cemeteries are set out in Part III. The Note concludes that public cemeteries as a class are exclusively charitable entities within the meaning of the Code and that the federal courts should therefore reexamine whether bequests to such cemeteries are entitled to the benefit of the estate tax charitable deduction.

I. BACKGROUND: PROBLEMS OF INTERPRETATION OF THE CODE'S CHARITABLE PROVISIONS

A. *Content and Framework of the Relevant Statutes*

Since their inception, the federal tax laws have accorded special treatment to certain nonprofit organizations.[10] Under several provisions of the Internal Revenue Code, including the income tax exemption,[11] the income tax charitable deduction,[12] and the estate tax charitable deduction[13] sections, qualified entities receive both direct and indirect benefits.[14] Analysis of whether bequests to public cemeteries are eligible for

7. *See Child*, 540 F.2d at 582-84; *Smith*, 84-2 U.S. Tax Cas. (CCH) at 86,206-07; *Estate of Amick*, 67 T.C. at 927-28.

8. *See* Robertson v. United States, 109 S. Ct. 245 (1988) (Blackmun, J., dissenting to denial of certiorari); Mellon Bank v. United States, 475 U.S. 1032 (1986) (O'Connor, J., dissenting to denial of certiorari).

9. 461 U.S. 574 (1983)

10. *See* B. Hopkins, The Law of Tax-Exempt Organizations § 1.2, at 5 (5th ed. 1987).

11. I.R.C. § 501 (1986).

12. I.R.C. § 170 (1986).

13. I.R.C. § 2055 (1986).

14. I.R.C. section 501 exempts qualified organizations from payment of income tax. Sections 170 and 2055 give the direct benefit of the charitable deduction to contributors to qualified organizations, but provide a substantial indirect benefit to the organizations that qualify as transferees under them. Professor Feldstein has estimated that if the income tax charitable deduction were eliminated, total giving to charity by individuals would decline about 20 percent. *See* Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Organizations*, 28 Nat'l Tax J. 209, 224 (1975). He notes, however, that if giving to religious organizations,

the estate tax deduction requires a brief review of these three sections.

With roots in the Tariff Act of 1894,[15] the organizational income tax exemption is the oldest, as well as the broadest, of the three provisions. Because Congress has never offered a definitive rationale for the exemption,[16] various theories have been advanced to explain it, including historical precedent,[17] public policy,[18] the influence of special interests,[19] and a poor conceptual fit between the idea of "income" and the purposes and operations of institutions that do not seek private profit.[20]

In its modern form, the exemption section relieves from the burden of federal income taxation twenty-five classes of nonprofit corporations, societies, trusts, and other entities.[21] Among them are cemetery companies and membership associations that are

> not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.[22]

Of all the types of organizations exempted from payment of income tax, only those enumerated in Code section 501(c)(3) are generally regarded

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which is much less price sensitive than giving to most other charities, is removed from the equation, the negative impact of such an elimination becomes far greater. *See id.* at 223-24. According to Professor McNulty, while no similar analyses have been undertaken to estimate the effect on charities of eliminating the estate and gift tax charitable deductions, "anecdotal evidence as well as an intuitive understanding of the law . . . [suggest] that the presence of the deductions does increase the amount of charitable giving." McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 Va. Tax Rev. 229, 249 (1984); *see also* Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects and Remedies*, 5 Va. Tax Rev. 1, 3-4 (1985) (appearance on I.R.S. list of entities eligible to receive tax-deductible donations "essential to successful fundraising for most charitable organizations").

15. Ch. 349, § 32, 28 Stat. 509 (1894). The 1894 Act imposed a federal income tax but exempted religious, charitable, educational, and fraternal organizations and certain mutual savings banks and insurance companies. *See id.* at 556-57. The entire Act was struck down in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895), as a nonapportioned direct tax in violation of Article I, section 9, of the United States Constitution. *See id.* at 637. The exemption reappeared in expanded form in the Tariff Act of 1913, ch. 16, § IIG(a), 38 Stat. 114, 172 (1913), the first federal income tax law enacted after the passage of the sixteenth amendment to the Constitution, which gives Congress unfettered power to impose income taxes.

16. *See* Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L.J. 299, 301-04 (1976).

17. *See* B. Hopkins, *supra* note 10, § 1.2, at 5-6; McGovern, *The Exemption Provisions of Subchapter F*, 29 Tax Law. 523, 526 (1976); Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A.J. 525, 526 (1958).

18. *See* B. Hopkins, *supra* note 10, § 1.2; P. Treusch, Tax Exempt Charitable Organizations, ch. 1-B.02 (3d ed. 1988).

19. *See* McGovern, *supra* note 17, at 527.

20. *See* Bittker & Rahdert, *supra* note 16, at 307-14.

21. *See* I.R.C. § 501(c) (1986).

22. I.R.C. § 501(c)(13) (1986).

as "charitable" in the legal sense of the term.[23] This section extends the exemption to entities that are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals . . . ."[24] While there has been debate about the precise meaning of "charitable" in the Code,[25] section 501(c)(3) is almost universally referred to as the "charitable exemption."

The income tax charitable deduction section was first enacted in the War Revenue Act of 1917,[26] apparently prompted by concern that war taxes would diminish contributions to nonprofit organizations serving important public purposes.[27] This section currently permits individuals and corporations to deduct from their taxable income contributions to all but one of the types of organizations enumerated in section 501(c)(3),[28] as well as to certain additional entities.[29] Nonprofit cemeteries were added to this list[30] when Congress amended the tax code in 1954.[31]

The estate tax charitable deduction, which dates to the Revenue Act of 1918,[32] offers a list of eligible organizations similar to that in section 501(c)(3).[33] It has never mentioned cemeteries.[34]

Congress' express enumeration of nonprofit cemeteries in discrete sub-

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23. *See infra* notes 41-42 and accompanying text.

24. I.R.C. § 501(c)(3) (1986).

25. *See infra* notes 40-53 and accompanying text.

26. Ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

27. *See* 55 Cong. Rec. 6728 (1917) (statement of Sen. Hollis). Some modern authorities also justify the charitable contribution deduction on the ground that it fosters organizations that accomplish purposes useful to the public. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 587-88 (1983). Other theories have been advanced, however. *See, e.g.*, Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harv. L. Rev. 309 (1972) (proposing tax definition of "income" as private consumption and arguing that gifts to charity divert resources away from private consumption); Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 Tax L. Rev. 37, 59-60 (1972) (charitable deduction justified because it equitably accounts for contributor's loss in personal welfare).

28. *See* I.R.C. § 170(c)(2)(B) (1986). This section does not enumerate the purpose of "testing for public safety," which does appear in section 501(c)(3).

29. *See* I.R.C. §§ 170(c)(1), 170(c)(3)-(c)(5) (1986).

30. *See* I.R.C. § 170(c)(5) (1986). The eligibility of nonprofit cemeteries to receive deductible contributions is set out in section 170 as follows:

> (c) [T]he term "charitable contribution" means a contribution or gift to or for the use of . . . (5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

31. *See* Internal Revenue Code of 1954, ch. 1 § 170(c)(5), 68A Stat. 3, 60 (1954).

32. Ch. 18, § 403(a)(3), 40 Stat. 1057, 1098 (1919).

33. *See* I.R.C. § 2055(a)(2) (1986).

34. *See* Mellon Bank v. United States, 762 F.2d 283, 285 (3d Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986).

sections of the Code's income tax exemption and charitable deduction provisions entitles public and other nonprofit cemeteries to the same tax benefits accorded "charitable" organizations under separate but companion subsections of those provisions.[35] The question arises, however, whether the explicit references to cemeteries imply that public cemeteries are not covered by the separate subsections that refer to "charitable" organizations.[36] Bequests to public cemeteries squarely raise this issue posed by the Code's framework because the estate tax chapter qualifies "charitable" organizations for tax-deductible transfers but is silent as to nonprofit cemeteries.[37]

B. *The Meaning of "Charitable" in the Code*

If public cemeteries are not preemptively barred from charitable status by the Code's framework, their eligibility for the benefits of the estate tax charitable deduction must be viewed in light of what Congress intended the word "charitable" to mean in the tax statutes.[38] Some courts have held that public cemeteries are not charitable organizations under the Code because their principal purpose is not to inter the indigent for free or at reduced cost.[39]

A lack of clear guidance from Congress on the tax meaning of "charitable"[40] has opened the door for two schools of thought. On the one

35. *Compare* I.R.C. § 501(c)(3) (1986) (income tax charitable exemption) *and* I.R.C. § 170(c)(2) (1986) (income tax charitable deduction for contributions to charitable organizations) *with* I.R.C. § 501(c)(13) (1986) (income tax exemption for nonprofit cemeteries) *and* I.R.C. § 170(c)(5) (1986) (income tax charitable deduction for contributions to nonprofit cemeteries).

36. *See Mellon Bank*, 762 F.2d at 285-86; Child v. United States, 540 F.2d 579, 581-82 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Robertson v. United States, 87-1 U.S. Tax Cas. (CCH) ¶ 13,712, at 87,936 (M.D. Tenn. 1987), *aff'd*, 838 F.2d 1215 (6th Cir.), *cert. denied*, 109 S. Ct. 245 (1988).

37. *See* I.R.C. § 2055(a) (1986).

38. The word "charitable" has the same meaning in the income tax charitable exemption section and the various charitable deduction sections. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 590 n.15 (estate tax authority used to construe "charitable" for purposes of I.R.C. § 501(c)(3)); *Mellon Bank*, 762 F.2d at 288 (Aldisert, C.J., dissenting) (Supreme Court's interpretation of "charitable" in income tax chapter "equally applicable" to estate tax section 2055(a)); *Child*, 540 F.2d at 585 n.2 (Anderson, J., dissenting) (Code's income, gift, and estate tax charitable provisions "all subject to the same definition of 'charitable' "); B. Hopkins, *supra* note 10, § 4.3, at 59 & n.18 (Code's charitable sections are "sister provisions" that "should be interpreted together."). The I.R.S. has promulgated a definition for the word "charitable" only under Code section 501(c)(3), *see* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1976), and has not defined the term separately in the regulations governing section 170(c) or 2055(a).

39. *See, e.g.*, *Child*, 540 F.2d at 582-83; Gund's Estate v. Commissioner, 113 F.2d 61, 62-63 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940); Bank of Carthage v. United States, 304 F. Supp. 77, 80 (W.D. Mo. 1969).

40. The word "charitable" is neither defined in the Code, *see* Green v. Connally, 330 F. Supp. 1150, 1157 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971), nor authoritatively explained in the legislative histories of the charitable exemption and deduction sections, *see* B. Hopkins, *supra* note 10, § 4.3, at 58, 62; Bittker & Rahdert, *supra* note 16, at 301-02; Thompson, *supra* note 14, at 8 & n.27, 12.

hand, "charitable" has an ancient and broadly defined legal meaning, drawn from the law of charitable trusts.[41] In this context, the term embraces a wide variety of organizational purposes, including relief of the indigent, advancement of education, religion, and health, lessening the burdens of government, and a range of other endeavors to promote the general welfare of the community.[42] The Supreme Court impliedly recognized such a broad rationale for the federal income tax charitable exemption as early as 1924.[43] On the other hand, the word "charitable" also has a popular meaning, confined chiefly to alleviation of poverty.[44] A strict reading of the relevant statutes, with attention to the disjunctive "or" separating the enumerated purposes in each,[45] supports the view that the term is used in this narrow sense[46] and therefore only organizations that serve the poor are technically charitable.[47]

The Internal Revenue Service itself has spoken on both sides of the issue. In 1923, it declared that "charitable" in the Code was to be taken

41. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983); 4 J. Mertens, The Law of Federal Gift and Estate Taxation § 28.22, at 346 (1959); Restatement (Second) of Trusts § 368 comment a (1959); IVA A. Scott & W. Fratcher, The Law of Trusts §§ 368, 368.1 (4th ed. 1989).

42. *See Bob Jones Univ.*, 461 U.S. at 587-89; Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867); G. Bogert & G. Bogert, The Law of Trusts and Trustees § 369 (2d rev. ed. 1977); Restatement (Second) of Trusts, § 368 (1959); IVA A. Scott & W. Fratcher, *supra* note 41, § 368, at 130-31.

43. *See* Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924) (Code's charitable exemption section recognizes public benefits provided by enumerated organizations); *see also* Helvering v. Bliss, 293 U.S. 144, 147 (1934) (income tax deduction section enacted "to encourage gifts to religious, educational *and other charitable objects*") (emphasis added). Lower courts have also applied the broad definition of "charitable" in federal tax cases. *See, e.g.*, Northern California Central Servs., Inc. v. United States, 591 F.2d 620, 626 (Ct. Cl. 1979); Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1287 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976); St. Louis Union Trust Co. v. United States, 374 F.2d 427, 432 (8th Cir. 1967); Girard Trust Co. v. Commissioner, 122 F.2d 108, 109 (3d Cir. 1941); United States v. Proprietors of Social Law Library, 102 F.2d 481, 483 (1st Cir. 1939).

44. *See* Green v. Connally, 330 F. Supp. 1150, 1157 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971); G. Bogert & G. Bogert, *supra* note 42, § 369, at 62-63; B. Hopkins, *supra* note 10, § 4.3, at 58; 4 J. Mertens, *supra* note 41, § 28.22, at 347-48 & n.97.

45. *See* I.R.C. §§ 170(c)(2)(B), 501(c)(3), 2055(a)(2) (1986).

46. The discrete terms "religious," "educational," "scientific," and the like enumerated in the charitable provisions, *see, e.g.*, I.R.C. § 501(c)(3) (1986), become redundant if "charitable" is interpreted in its capacious legal sense. *See supra* notes 41-42 and accompanying text. In Reiter v. Sonotone Corp., 442 U.S. 330 (1979), the Supreme Court stated that unless the context of a statute demands otherwise, "terms connected by a disjunctive [should] be given separate meanings." *Id.* at 339; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 617 (1983) (Rehnquist, J., dissenting) (frequent congressional refinements of enumerated purposes in I.R.C. section 501(c)(3) indicate common-law meaning of "charitable" not intended). *But see* Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980) (reading enumerated purposes in section 501(c)(3) disjunctively "tears [that section] from its roots"), *aff'd*, 461 U.S. 574 (1983).

47. *See* Child v. United States, 540 F.2d 579, 582-84 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Gund's Estate v. Commissioner, 113 F.2d 61, 63 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940).

in its narrow "popular and ordinary" sense and not its common-law sense.[48] In 1959, however, the Service reversed itself, ratifying by regulation the broad legal definition of the word.[49]

In 1983, the Supreme Court settled the question by adopting the broad common-law meaning of the word "charitable" in a federal tax context. In *Bob Jones University v. United States*,[50] the Court ruled that, regardless of the enumerated purposes in the Code's charitable exemption section, no organization is entitled to tax exemption under section 501(c)(3) unless it is "charitable" within the meaning of the common law of charitable trusts.[51] The Court rested its decision on a finding that Congress had employed the word "charitable" in the Code in its capacious legal sense.[52] In enacting the income tax charitable exemption and deduction sections, the Court stated, Congress intended to bestow tax benefits on a wide range of entities that meet the common-law requirements that a charitable organization serve public purposes and harmonize with public policy.[53] It is thus plain that charitable status under the common law of charitable trusts at least strongly suggests charitable status under the Internal Revenue Code.[54]

48. *See* I.T. 1800, II-2 C.B. 152, 153 (1923). The I.R.S. adhered to this narrow definition for the next 36 years. *See* B. Hopkins, *supra* note 10, § 4.3, at 62-63.

49. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). The regulation states that the term "charitable" is "not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions." *Id.* The Service's change of heart may perhaps be traced to an influential article published by Herman T. Reiling, then I.R.S. Assistant Chief Counsel, the year before the new regulation was promulgated. The article forcefully advocated the view that Congress intended the broad common-law meaning of the word "charitable" in the Code. *See* Reiling, *supra* note 17, at 526-28.

50. 461 U.S. 574 (1983).

51. *See id.* at 586-92. The question before the Court was whether private, nonprofit educational institutions that met all the facial criteria of Code section 501(c)(3) were nonetheless barred from tax exemption because their racially discriminatory practices conflicted with the common-law requirement that "charitable" organizations must operate in harmony with public policy. The Court ruled that the schools were not charitable entities and that the I.R.S. had properly revoked their exemptions. *See id.* at 598, 605.

52. *See id.* at 587-90.

53. *See id.* at 586-92. The *Bob Jones University* court did not address whether other requirements of the common law of charitable trusts are also implicated in the Code's charitable provisions. *See id.* at 588 n.12. It is apparent, however, that at least some of them are. For example, the common-law requirement that a legal charity serve a large enough class of beneficiaries that it can be said to benefit the community as a whole, *see* G. Bogert & G. Bogert, *supra* note 42, § 365, at 26-28; Restatement (Second) of Trusts § 375 (1959), is inherent in the Court's "public purpose" criterion for "charitable" designation under the Code, *see Bob Jones Univ.*, 461 U.S. at 586-88. The common-law requirement that the income of a legal charity not inure to the gain of private individuals, *see* G. Bogert & G. Bogert, *supra* note 42, § 364, at 19; Restatement (Second) of Trusts § 376 (1959), is explicit in the Code, *see* I.R.C. §§ 170(c)(2)(C), 501(c)(3), 2055(a)(2) (1986).

54. *Cf.* Reiling, *supra* note 17, at 595 (organizations generally recognized as charitable by states presumed charitable under federal tax laws).

C. *The "Exclusively Charitable" Requirement*

The estate tax charitable deduction section, like its sister provisions in the income tax chapter, requires that a qualified entity be organized and operated "exclusively" for charitable purposes.[55] As this requirement is interpreted by the federal courts and the Internal Revenue Service, an organization may maintain charitable status under the Code as long as it does not pursue any substantial noncharitable purpose.[56]

The language of the Code itself, the governing Treasury regulation, and the weight of case authority support the position that an organization's purposes, and not its activities viewed in isolation from its purposes, are the proper focus of inquiry under the exclusivity requirement.[57] Nonetheless, confusion persists in the case law about whether the requirement may be applied to find a given activity of an organization inherently noncharitable.[58] One court, for example, applied the exclusivity requirement to deny charitable status to two public cemeteries solely on the ground that the cemeteries engaged in activities—selling of gravesites and maintenance of cemetery property—that the court characterized as noncharitable in nature.[59]

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55. *See* I.R.C. § 2055(a); *see also* I.R.C. §§ 170(c) (income tax charitable deduction), 501(c)(3) (income tax charitable exemption).

56. *See* Better Business Bureau v. United States, 326 U.S. 279, 283 (1945); St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431-32 (8th Cir. 1967); Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1976); 6 J. Mertens, The Law of Federal Income Taxation § 34.07, at 35 (1983 rev. vol. & Supp. 1984).

57. *See, e.g.*, Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924) (purposes of charitable organization not altered by its commercial activity); Aid to Artisans, Inc. v. Commissioner, 71 T.C. 202, 214 (1978) (sale of handicrafts of disadvantaged artisans not a "purpose" but "merely an activity" that furthers entity's exempt purposes); I.R.C. §§ 170(c)(2)(B) (qualified organizations must be "organized and operated exclusively for" enumerated *purposes*), 501(c)(3) (same), 2055(a) (same) (1986); Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 1976) (exclusivity requirement applies to organization's purposes); Rev. Rul. 74-587, 1974-2 C.B. 162 (organization's purposes, not its activities, are focus of inquiry under exclusivity requirement); Rev. Rul. 69-572, 1969-2 C.B. 119 (same).

58. See, for example, Northern California Central Services, Inc. v. United States, 591 F.2d 620, 626 (Ct. Cl. 1979), in which the court stated that a substantial noncharitable purpose *or* activity precludes exempt status, citing Better Business Bureau v. United States, 326 U.S. 279, 283 (1945); St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431 (8th Cir. 1967); Treas. Reg. § 1.501(c)(3)-1(c)(1). In fact, none of the cited authorities states or implies that the exclusivity test applies to an entity's activities in isolation from its purposes. For example, while the court in *St. Louis Union Trust* did aver that "the existence of extensive good works . . . is not enough if there is a substantial nonqualifying activity," the context makes plain that the court regarded a "nonqualifying activity" as one in furtherance of a nonexempt *purpose*. *See St. Louis Union Trust*, 374 F.2d at 431; *see also Better Business Bureau*, 326 U.S. at 283 (does not state or imply that an activity may be inherently noncharitable); Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959) (same).

59. *See* Smith v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 13,595, at 86,206-07 (W.D. Mo. 1984).

II. THE CODE'S FRAMEWORK AND CASE LAW PERMIT CHARITABLE STATUS FOR PUBLIC CEMETERIES

A. *The Framework Analysis Does Not Bar Charitable Treatment of Public Cemeteries*

Some courts have relied on a framework analysis of the Code's charitable provisions to deny estate tax deductions for bequests to public cemeteries.[60] Under this analysis, the explicit references to nonprofit cemeteries in discrete subsections of the income tax exemption and charitable deduction sections point ineluctably to a congressional intent that no nonprofit cemetery is a charitable organization for income tax purposes.[61] Therefore, the courts reason, a public cemetery cannot be construed as charitable under the estate tax charitable deduction section.[62]

Although superficially appealing, this reading of the Code's framework does not survive close examination.[63] First, the framework analysis disregards a distinction between public and private nonprofit cemeteries that is recognized in both the common law[64] and federal tax law.[65] Private nonprofit cemeteries—those not open for the use of the public—have been held eligible for income tax exemption under section 501(c)(13), even though they are clearly not charitable organizations under section 501(c)(3).[66] Other authority suggests that contributions to such organizations are similarly eligible for the income tax charitable de-

60. *See, e.g.*, Mellon Bank v. United States, 762 F.2d 283, 285-86 (3d Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986); Child v. United States, 540 F.2d 579, 581-82 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Gund's Estate v. Commissioner, 113 F.2d 61, 63-64 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940); Robertson v. United States, 87-1 U.S. Tax Cas. (CCH) ¶ 13,712, at 87,936 (M.D. Tenn. 1987), *aff'd*, 838 F.2d 1215 (6th Cir.), *cert. denied*, 109 S. Ct. 245 (1988); Bank of Carthage v. United States, 304 F. Supp. 77, 80-81 (W.D. Mo. 1969).

61. *See supra* note 60.

62. *See id.*

63. *See* Mellon Bank v. United States, 475 U.S. 1032, 1034 (1986) (O'Connor, J., dissenting to denial of certiorari).

64. *See* Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 87, 58 A. 467, 469-70 (1904); Stewart v. Coshow, 238 Mo. 662, 673, 142 S.W. 283, 286 (1911); Davie v. Rochester Cemetery Ass'n, 91 N.H. 494, 495, 23 A.2d 377, 378 (1941); Parker v. Fidelity Union Trust Co., 2 N.J. Super. 362, 390, 63 A.2d 902, 916-17 (1944); 14 Am. Jur. 2d *Cemeteries* § 2 and citations therein (1964 & Supp. March 1989); 14 C.J.S. *Cemeteries* § 1 and citations therein (1939 & Supp. 1989).

65. *See, e.g.*, John D. Rockefeller Family Cemetery Corp. v. Commissioner, 63 T.C. 355, 359, 363-64 (1974); Du Pont de Nemours Cemetery Co. v. Commissioner, 33 T.C.M. (CCH) 1438, 1442 (1974).

66. *See Rockefeller*, 63 T.C. at 363; *accord Du Pont*, 33 T.C.M. (CCH) at 1442-43. In both cases, the court rejected the I.R.S.'s contention that family-only cemetery companies are ineligible for exemption under Code section 501(c)(13) because they do not serve public purposes. *See Rockefeller*, 63 T.C. at 359, 363; *Du Pont*, 33 T.C.M. (CCH) at 1442. The *Rockefeller* court stated that in section 501(c)(13) Congress had plainly exempted cemeteries "which would be unable to meet the stricter 501(c)(3) tests which require service to public interests rather than to private ones." *Rockefeller*, 63 T.C. at 363.

duction under section 170(c)(5).[67] It can therefore be argued that Congress' intent in enacting the cemetery-specific sections 501(c)(13) and 170(c)(5) was not to send a message that public cemeteries are noncharitable, but rather to extend tax benefits to certain private cemetery organizations that would otherwise be ineligible for them.[68]

Second, the framework analysis erroneously assumes that there is no overlap among the subsections in the Code's income tax exemption and deduction sections.[69] Its tacit premise is that no nonprofit cemetery can be charitable under income tax section 501(c)(3)—and hence under estate tax section 2055(a)—because all nonprofit cemeteries must fall exclusively within the purview of section 501(c)(13).[70] Followed logically, this construction would bar charitable status for purposes of the estate tax charitable deduction section to *any* entity, regardless of its charitable attributes, that falls into a class identified anywhere in section 501(c) other than 501(c)(3). For example, because section 501(c)(4) exempts all nonprofit organizations "operated exclusively for the social welfare," and because section 2055(a) contains no parallel provision, the framework analysis dictates that no social welfare organization may qualify as a charitable entity under the estate tax charitable deduction section. All legally charitable organizations can be said exclusively to promote the social welfare.[71] By its own terms, then, the framework analysis effectively renders estate tax section 2055(a) a nullity. Congress could not have intended such a perverse result. The framework analysis therefore fails to demonstrate that courts are compelled by the structure of the

67. *See* Mellon Bank v. United States, 475 U.S. 1032, 1034 (1986) (O'Connor, J., dissenting to denial of certiorari) (similarity in language of sections 501(c)(13) and 170(c)(5) suggests congressional intent that contributions to private nonprofit cemeteries be tax deductible). There are no reported cases on the application of I.R.C. section 170(c)(5) to donations for the general maintenance or operations of private nonprofit cemeteries. In a ruling predating the Tax Court's decisions in *Rockefeller*, 63 T.C. 355, and *Du Pont*, 33 T.C.M. (CCH) 1438, the Service declared that a family cemetery was ineligible for the section 501(c)(13) exemption, adding that contributions to such cemeteries are therefore also nondeductible. *See* Rev. Rul. 65-6, 1965-1 C.B. 229, 231. Despite its defeats in *Rockefeller* and *Du Pont*, the Service has not declared the ruling obsolete.

68. *See* Mellon Bank v. United States, 475 U.S. 1032, 1034 (1986) (O'Connor, J., dissenting to denial of certiorari). In justifying the framework analysis, one court noted that the Senate Report on the 1954 Code stated that new section 170(c)(5) " 'extend[ed] the [income tax charitable] deduction . . . beyond those allowed under present law to contributions made to nonprofit cemeter[ies] . . . .' " Child v. United States, 540 F.2d 579, 582 (2d Cir. 1976) (quoting Senate Report on Internal Revenue Code of 1954, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 4660), *cert. denied*, 429 U.S. 1092 (1977). This language of the Report is not, however, inconsistent with the position that *some* nonprofit cemeteries are charitable and that the "extension" of the deduction was to noncharitable (because private) nonprofit cemeteries.

69. This criticism of the framework analysis derives from arguments made to the United States Supreme Court by the petitioner in *Mellon Bank*. *See* Petition for a Writ of Certiorari at 10-11, Mellon Bank v. United States, 762 F.2d 283 (3d Cir. 1985) (No. 85-459), *cert. denied*, 475 U.S. 1032 (1986).

70. *See supra* note 22 and accompanying text.

71. *See supra* notes 41-42 and accompanying text.

Code to deny charitable status to public cemeteries under section 2055(a).

Third, the framework analysis that courts have applied in estate tax cases on public cemeteries employs a strict construction of the Code's charitable provisions.[72] It thus contravenes the general rule that such statutes are to be liberally construed.[73] A liberal interpretation of the structure of the statutes would take into account evidence of a congressional intent to expand, not narrow, the tax benefits conferred on nonprofit cemeteries generally.[74] A liberal construction would also avoid the pitfall of imputing to the Code's charitable provisions a precision they are not generally considered to possess.[75] The sections describing the

72. The framework analysis was first used by a federal court to deny charitable status to a public cemetery in an income tax charitable deduction case, Schuster v. Nichols, 20 F.2d 179 (D. Mass. 1927). The *Schuster* court offered in support of its holding the axiom that " 'exemption from taxation is an extraordinary grace of the sovereign power, and is to be strictly construed.' " *Id.* at 181 (quoting Milford v. County Comm'rs, 213 Mass. 162, 165, 100 N.E.2d 60, 62 (1912)). Most of the courts that employed this framework analysis in the estate tax context relied on *Schuster*. *See, e.g.*, Mellon Bank v. United States, 762 F.2d 283, 285 (3d Cir. 1985), *cert. denied.*, 475 U.S. 1032 (1986); Child v. United States, 540 F.2d 579, 583 n.7 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Gund's Estate v. Commissioner, 113 F.2d 61, 62-63 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940).

73. *See* Helvering v. Bliss, 293 U.S. 144, 150-51 (1934) (Code's charitable exemption was "begotten from motives of public policy, and [is] not to be narrowly construed."). With respect to the estate tax charitable deduction, Professor Mertens states the principle this way:

> Charities . . . are favorites of the law. Their exemption . . . is not a matter of grace or favor but is rather an act of public justice. . . . Since the law is the expression of an intent of Congress to promote gifts for altruistic objects by encouraging testators to make them, it follows that the law is to be liberally construed . . . .

4 J. Mertens, *supra* note 41, § 28.04, at 285-86 (footnotes omitted); *see also* 6 J. Mertens, *supra* note 56, § 34.02 (charities are exception to the rule that exemptions from taxation are strictly cônstrued); *cf.* G. Bogert & G. Bogert, *supra* note 42, § 361, at 2-3 (in trust law, "courts apply liberal rules of construction in an effort to find a charitable purpose").

74. The Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913), exempted from income tax only "cemetery companies, organized and operated exclusively for the mutual benefit of their members." *See id.*, § IIG(a), at 172 (codified at I.R.C. § 501(c)(13) (1986)). In the Revenue Act of 1921, ch. 136, 42 Stat. 227 (1921), this was enlarged by Congress to include, in addition, all nonprofit cemetery companies and certain nonprofit cemetery corporations. *See id.* § 231(5), at 253 (codified at I.R.C. § 501(c)(13) (1986)). In the Internal Revenue Code of 1954, ch. 1, 68A Stat. 3 (1954), Congress added nonprofit cemeteries to the list of eligible donees for the income tax charitable contribution deduction. *See id.*, § 170(c)(5), at 60 (codified at I.R.C. § 170(c)(5) (1986)). In 1970, Congress added operation of crematoria to the permissbile purposes of cemetery corporations exempt from income taxation. *See* Pub. L. No. 91-618, 84 Stat. 1855 (1970) (codified at I.R.C. § 501(c)(13) (1986)).

75. Many entities that now receive the benefits of charitable status under the income tax chapter could not do so if courts and the I.R.S. chose always to read the statutes literally. Under Code section 2055(a)(2), for example, "encouragement of art" is specified as a purpose qualifying a transfer by bequest for a charitable deduction. No mention is made of this purpose in income tax section 501(c)(3) or 170(c)(2)(B). A strict construction parallel to the framework analysis would hold that because Congress mentioned encouragement of art in the estate tax deduction section and omitted it from the income tax

groups that qualify for charitable treatment have taken shape over the course of many years,[76] and the inconsistencies among them give evidence that Congress did not act with one mind in formulating them.[77] Finally, a liberal reading would avert the ultimately irrational and unfair result that the framework analysis mandates, under which *inter vivos* contributions to public cemeteries are deductible while contributions by will are not.[78]

B. *Public Cemeteries Have Charitable Purposes Recognized by the Code*

In ruling that the word "charitable" in the Internal Revenue Code must be given its broad legal meaning,[79] the Supreme Court in *Bob Jones University v. United States* recognized as charitable under the Code the wide variety of public purposes ratified by the common law of charitable trusts.[80] The Court thus swept away the precedential value of lower court holdings that denied charitable status to public cemeteries when the purpose of such cemeteries is not narrowly confined to relief of the burdens of the poor.[81] In determining whether public cemeteries serve charitable purposes recognized by the Code, therefore, the proper inquiry is whether the common law deems such entities to be charitable.[82]

Strong authority that public cemeteries are charitable institutions exists in the American common law of charitable trusts[83] and in other case

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exemption and deduction sections, it must have intended that no arts group receive the benefits of the latter. Yet the opposite result is clearly established in case and regulatory authority, *see* B. Hopkins, *supra* note 10, § 6.9, at 123-26 and citations therein, indicating that such a precise reading of the Code is not generally employed.

76. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 614-17 (1983) (Rehnquist, J., dissenting) (reviewing development of income tax charitable exemption provision between 1894 and 1976); Liles & Blum, *Development of the Federal Tax Treatment of Charities*, 39 Law & Contemp. Probs. 6, 24-40 (No. 4, 1975) (reviewing development of income, estate, and gift tax charitable deduction sections between 1917 and 1969).

77. *See, e.g.*, C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes § 16.1 (3d ed. 1974) (describing "perplexing" variations in lists of qualified organizations and purposes in Code's income, estate, and gift tax charitable deduction sections); McGovern, *supra* note 17, at 524 (Code's exemption provisions reflect no "planned legislative scheme" or "unified concept" but were enacted over eight decades "by a variety of legislators for a variety of reasons."); *cf.* Mellon Bank v. United States, 762 F.2d 283, 288 (3d Cir. 1985) (Aldisert, C.J., dissenting) (omission of public cemeteries from enumerated charitable purposes of section 2055(a) was "technical drafting oversight" by Congress), *cert. denied*, 475 U.S. 1032 (1986).

78. *See Mellon Bank*, 762 F.2d at 287-88 (Aldisert, C.J., dissenting).

79. *See supra* notes 50-53 and accompanying text.

80. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586-92 (1983).

81. *See* Child v. United States, 540 F.2d 579, 582-83 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Gund's Estate v. Commissioner, 113 F.2d 61, 63-64 (6th Cir.), *cert. denied*, 311 U.S. 696 (1940); Bank of Carthage v. United States, 304 F. Supp. 77, 80 (W.D. Mo. 1969); Wilber Nat'l Bank v. Commissioner, 17 B.T.A. 654, 661 (1929).

82. *See Mellon Bank*, 762 F.2d at 288 (Aldisert, C.J., dissenting).

83. *See, e.g.*, Hopkins v. Grimshaw, 165 U.S. 342, 352-53 (1897) (dictum); Stubblefield v. Peoples Bank, 406 Ill. 374, 386-88, 94 N.E.2d 127, 133-34 (1950); Chapman v. Newell, 146 Iowa 415, 419-21, 125 N.W. 324, 326-27 (1910); Carlisle County v. Norris,

law.[84] The charitable purposes ascribed to such cemeteries in judicial opinions and commentaries on the law of trusts include lessening the burdens of government,[85] supplying a place to bury the community's dead decently,[86] promoting public health,[87] public aesthetics,[88] and historical preservation,[89] and fostering respect for the dead and other moral values of a civilized society.[90] These purposes are public in that they benefit the entire community, not just those members of it who avail themselves of the public cemetery directly.[91] Hence the purposes of pub-

200 Ky. 338, 339-41, 254 S.W. 1044, 1045 (1923); McElwain v. Attorney General, 241 Mass. 112, 118, 134 N.E. 620, 621 (1922); Stewart v. Coshow, 238 Mo. 662, 673-75, 142 S.W. 283, 286-87 (1911); Parker v. Fidelity Union Trust Co., 2 N.J. Super. 362, 388-92, 63 A.2d 902, 913-17 (1944); *In re* Estate of Anderson, 571 P.2d 880, 883 (Okla. Ct. App. 1977); Pope v. Alexander, 194 Tenn. 146, 152-53, 250 S.W.2d 51, 54-55 (1951); City of Tacoma v. Tacoma Cemetery, 28 Wash. 238, 244, 68 P. 723, 725 (1902); *see also* Restatement (Second) of Trusts § 374 comment h (1959) ("trust for maintenance of a public cemetery . . . is a charitable institution"); II A. Scott & W. Fratcher, The Law of Trusts § 124.2, at 257 (4th ed. 1987) (bequest for upkeep of public cemetery is charitable trust); IVA A. Scott & W. Fratcher, *supra* note 41, § 374.9, at 243 (nonprofit public cemetery is charitable institution); Annotation, *Gift for Maintenance or Care of Private Cemetery or Burial Lot, or of Tomb or of Monument, Including the Erection Thereof, as Valid Trust*, 47 A.L.R.2d 596, § 1, at 600 (1956) (trust for maintenance of public cemetery is valid charity); 14 C.J.S. *Charities* § 14 (1939 & Supp. 1989) (same).

84. *See, e.g., In re* Estate of Edwards, 88 Cal. App. 3d 383, 391, 151 Cal. Rptr. 770, 776 (1979) (public cemetery charitable for purposes of state death taxes); Davie v. Rochester Cemetery Ass'n, 91 N.H. 494, 498, 23 A.2d 377, 380 (1941) (public cemetery charitable for purposes of state unemployment compensation act); *see also* Mellon Bank v. United States, 475 U.S. 1032, 1034 (1986) (O'Connor, J., dissenting to denial of certiorari) (noting "virtually uniform consensus" in state common and statutory law that public cemeteries are charitable and bequests to them exempt from inheritance taxes); Mellon Bank v. United States, 762 F.2d 283, 288 (3d Cir. 1985) (Aldisert, C.J., dissenting) (public cemetery is charitable organization), *cert. denied*, 475 U.S. 1032 (1986); Child v. United States, 540 F.2d 579, 585-90 (2d Cir. 1976) (Anderson, J., dissenting) (same), *cert. denied*, 429 U.S. 1092 (1977).

85. *See Child*, 540 F.2d at 585-86 (Anderson, J., dissenting); Smith v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 13,595, at 86,206 (W.D. Mo. 1984); *Estate of Edwards*, 88 Cal. App. 3d at 391, 151 Cal. Rptr. at 775-76; Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 195 (1873); Bushong v. Taylor, 161 Tenn. 522, 529, 33 S.W.2d 80, 82 (1930); IVA A. Scott & W. Fratcher, *supra* note 41, § 374.9, at 243; 14 Am. Jur. 2d *Cemeteries* § 3, at 700 (1964).

86. *See Child*, 540 F.2d at 588 (Anderson, J., dissenting); *Stubblefield*, 406 Ill. at 386, 94 N.E.2d at 133; *Lake View*, 70 Ill. at 195; *Chapman*, 146 Iowa at 420, 125 N.W. at 327.

87. *See Child*, 540 F.2d at 587 (Anderson, J., dissenting); Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 87, 58 A. 467, 469 (1904); *Stubblefield*, 406 Ill. at 386, 94 N.E.2d at 133; *Parker*, 2 N.J. Super. at 391, 63 A.2d at 917; *Bushong*, 161 Tenn. at 529, 33 S.W.2d at 82; G. Bogert & G. Bogert, *supra* note 42, § 377, at 170.

88. *See Child*, 540 F.2d at 587 (Anderson, J., dissenting); *Lake View*, 70 Ill. at 195-96.

89. *See* Stubblefield v. Peoples Bank, 406 Ill. 374, 386, 94 N.E.2d 127, 133 (1950); G. Bogert & G. Bogert, *supra* note 42, § 377, at 170.

90. *See* Metairie Cemetery Ass'n v. United States, 282 F.2d 225, 228 n.8 (5th Cir. 1960); *Stubblefield*, 406 Ill. at 386, 94 N.E.2d at 133; Chapman v. Newell, 146 Iowa 415, 420-21, 125 N.W. 324, 327 (1910); G. Bogert & G. Bogert, *supra* note 42, § 377, at 169.

91. One court has suggested that public cemeteries may not have the requisite public purposes because they benefit only the limited number of persons who purchase gravesites. *See* Estate of Amick v. Commissioner, 67 T.C. 924, 930 (1977). This view

lic cemeteries are charitable within the intendment of the Code.

C. *Public Cemeteries Have Exclusively Charitable Purposes*

To qualify under the Code's charitable exemption and deduction sections, an organization must comply with the statutory requirement that its purposes be "exclusively" charitable.[92] The exclusivity test is generally satisfied upon a showing that an organization's purposes are primarily charitable in nature[93] as evidenced by the fact that its funds and activities are primarily devoted to achieving charitable ends.[94]

Some courts considering the deductibility of bequests to public cemeteries under Code section 2055(a) have applied the exclusivity requirement to hold that certain activities of public cemeteries preclude charitable status.[95] To the extent that these opinions relied on the premise that the only permissible substantial activities of a charitable entity are those that further the purpose of benefitting the indigent,[96] they are overruled by *Bob Jones University v. United States*.[97]

One court, however, looked not at the organizational purposes served by the activities of public cemeteries but at the activities in isolation.[98] While holding that the cemeteries in question had legitimately charitable purposes, the court stated that selling of gravesites and maintenance of cemetery property were inherently noncharitable activities.[99] On the basis of these activities alone, the court concluded that the cemeteries were not exclusively charitable organizations.[100] This reasoning misapplies

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mistakenly fails to take account of the broad and diffuse public puposes ascribed to such cemeteries by the common law of charities. *See supra* notes 85-90 and accompanying text; *see also* G. Bogert & G. Bogert, *supra* note 42, § 362, at 4-6 (beneficiary of every charitable trust is the public; persons served directly are "merely instrumentalities through which the community benefits flow"); *cf.* McNulty, *supra* note 14, at 235-36 (tax-deductible gifts to charities offering "public goods and services" produce diffuse benefits). Moreover, the view that public cemeteries do not have public purposes erroneously implies that a valid charity must bestow an equal benefit on every member of the public. Neither the Code nor the common law so requires. *See, e.g.*, Sound Health Ass'n v. Commissioner, 71 T.C. 158, 185 (1978) (Code's charitable provisions do not require direct benefit to every member of community); B. Hopkins, *supra* note 10, § 4.4, at 75 (same); IVA A. Scott & W. Fratcher, *supra* note 41, § 375.1, at 262 (if class of potential beneficiaries is sufficiently large, small number of actual beneficiaries is irrelevant to charitable status); *id.* § 375.2, at 266 (not every community member need be actual or potential beneficiary of valid charitable trust).

92. *See* I.R.C. §§ 170(c)(2)(B), 501(c)(3), 2055(a)(2) (1986).

93. *See supra* notes 55-56 and accompanying text.

94. *See* B. Hopkins, *supra* note 10, § 11.1, at 225-26; 6 J. Mertens, *supra* note 56, § 34.07, at 34-35.

95. *See* Child v. United States, 540 F.2d 579, 582-84 (2d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); Smith v. United States, 84-2 U.S. Tax Cas. (CCH) ¶ 13,595, at 86,206 (W.D. Mo. 1984); Estate of Amick v. Commissioner, 67 T.C. 924, 927-28 (1977).

96. *See Child*, 540 F.2d at 582-84; *Estate of Amick*, 67 T.C. at 927-28.

97. 461 U.S. 574 (1983); *see supra* notes 79-81 and accompanying text.

98. *See Smith*, 84-2 U.S. Tax Cas. (CCH) at 86,206-07.

99. *See id.*

100. *See id.*

the exclusivity doctrine by focusing on the cemeteries' activities outside the context of their overall purposes.[101]

Neither the courts nor the Internal Revenue Service have developed a consistent standard for determining how much income-generating activity an organization may carry on before its purposes can no longer be considered exclusively charitable.[102] That an organization may charge user fees to support its charitable functions without losing charitable status under the Code is, however, well established in federal tax law and practice.[103] Moreover, the Service explicitly permits a charitable entity to engage in "substantial" business activity in furtherance of its charitable purposes, even when the business itself is unrelated to those purposes.[104] A finding that otherwise qualified cemeteries cannot be charitable simply because they sell gravesites in order to accomplish their charitable purpose of burying the community's dead therefore has little support.[105]

Similarly, there is scant justification for the position that maintenance of cemetery property by an otherwise charitable cemetery is a disqualifying activity under the exclusivity doctrine. Physical care of burial grounds furthers the acknowledged charitable purposes of public ceme-

101. *See supra* note 57 and accompanying text.

102. *See* B. Hopkins, *supra* note 10, § 6.9, at 119-23, & ch. 11; 6 J. Mertens, *supra* note 56, § 34.07; P. Treusch, *supra* note 18, chs. 3-D.02 to .03; Thompson, *supra* note 14, at 15-32. Some courts have stated that the standard should be whether the commercial activity is so dominant that it becomes the organization's primary purpose, transcending its charitable purposes. *See, e.g.*, Elisian Guild, Inc. v. United States, 412 F.2d 121, 124 (1st Cir. 1969); Aid to Artisans, Inc. v. Commissioner, 71 T.C. 202, 211-12 (1978). This test accords with the rule that an entity's purposes, not its activities, are the proper focus of the exclusivity doctrine. *See supra* note 57 and accompanying text.

103. A multitude of nonprofit schools and universities, hospitals and nursing homes, theaters, symphonies, museums, and other entities remain eligible for charitable treatment under the Code even though they are paid for some or all of the services they provide. *See* B. Hopkins, *supra* note 10, § 6.9, at 119-23 and citations therein; Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 Yale L.J. 54, 57 n.16 and citations therein (1981); Thompson, *supra* note 14, at 27-32 and citations therein. This general rule tracks that of the common law of charities, which also recognizes entities that charge fees for their services, as long as the proceeds are devoted to charitable purposes and no private individual profits from them. *See* G. Bogert & G. Bogert, *supra* note 42, § 364, at 24-26; Restatement (Second) of Trusts § 376 comments c & d (1959); IVA A. Scott & W. Fratcher, *supra* note 41, § 375.2, at 277, § 376, at 299-303.

104. *See* Treas. Reg. § 1.501(c)(3)-1(e)(1) (as amended in 1976); *see also* P. Treusch, *supra* note 18, ch. 3-D.10 (greater latitude given when business activity is functionally related to organization's exempt purposes than when it is not). A charitable organization operating an unrelated business may, however, be subject to tax on the income thus derived. *See* I.R.C. §§ 501(b), 511-513 (1986).

105. Courts' and the Service's occasional denials of charitable status to otherwise qualified organizations on the ground that they do not provide goods or services at below cost or for free have been criticized as arbitrary and a misapplication of the exclusivity doctrine. *See, e.g.*, Consumer Credit Counseling Serv. of Alabama, Inc. v. United States, 78-2 U.S. Tax Cas. ¶ 9660, at 85,191 (D.D.C. 1978); Federation Pharmacy Servs., Inc. v. Commissioner, 72 T.C. 687, 696-701 (1979) (Tietjens, J., dissenting), *aff'd*, 625 F.2d 804 (8th Cir. 1980); B. Hopkins, *supra* note 10, § 6.9, at 119-23.

teries by evincing respect for the dead and preserving their memories for the community.[106] The common law of charitable trusts recognizes trusts for the maintenance of public cemeteries as charitable.[107] In addition, perpetual care trusts and other arrangements for preservation of cemetery grounds are the subject of many state law privileges[108] and requirements,[109] demonstrating that public policy recognizes a close relation between burial of the dead and care for the places in which they are buried.

Both the charging of fees for gravesites and the maintenance of grounds further the charitable purposes of public cemeteries. Therefore, neither activity runs afoul of the Code's exclusivity requirement.

III. PUBLIC POLICY CONSIDERATIONS WARRANT CHARITABLE STATUS FOR PUBLIC CEMETERIES

A widely accepted rationale for the Code's charitable exemption and deduction provisions is that they are the broad expression of the federal government's interest in encouraging the work of nonprofit, nongovernmental organizations that serve public policy goals.[110] When an organization is found to meet the statutory requirements, charitable status under the Code should be denied only if the organization undermines or conflicts with a fundamental public policy.[111]

No such bar is raised to public cemeteries. For example, the income tax exemption and charitable deduction benefits Congress has given to

106. *See supra* notes 89-90 and accompanying text.

107. *See* Restatement (Second) of Trusts § 374 comment h (1959); II A. Scott & W. Fratcher, *supra* note 83, § 124.2, at 257.

108. *See infra* notes 113-114 and accompanying text.

109. *See, e.g., In re* Memorial Properties, Inc., 690 F.2d 158, 159 (8th Cir. 1982) (discussing Arkansas statute requiring all cemeteries to establish permanent maintenance funds); Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1136 (8th Cir. 1981) (discussing Missouri statute to same effect), *cert. denied*, 457 U.S. 1111 (1982); Reed v. Knollwood Park Cemetery, Inc., 441 F. Supp. 1144, 1146 & n.4 (E.D.N.Y. 1977) (discussing New York statute to same effect); Provident Nat'l Bank v. United States, 325 F. Supp. 1187, 1189 & n.1 (E.D. Pa. 1971) (discussing Pennsylvania statute to same effect); Schmidt v. Pine Lawn Memorial Park, Inc., 88 S.D. 665, 667-68, 227 N.W.2d 438, 439-40 (1975) (discussing South Dakota statute requiring that, after certain deductions, cemeteries must apply all proceeds from sale of gravesites to maintenance of cemetery grounds); Frederick & Porcano, *Taxation of Cemetery Organizations*, 57 Taxes 186, 190 (1979) (cemeteries "usually required by state law" to establish perpetual care trust funds for maintenance of grounds).

110. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586-90 (1983); Helvering v. Bliss, 293 U.S. 144, 150-51 (1934); B. Hopkins, *supra* note 10, § 1.2; P. Treusch, *supra* note 18, ch. 1-B.02.

111. *See Bob Jones Univ.*, 461 U.S. at 591-92. The common law also requires that a valid charity be consistent with law and public policy. *See* G. Bogert & G. Bogert, *supra* note 42, § 368, at 58, § 378, at 191; Restatement (Second) of Trusts § 377 comment c (1959); IVA A. Scott & W. Fratcher, *supra* note 41, § 377. Underlying this mandate is the recognition that the public suffers some disadvantage from the tax and other privileges accorded charities, which must be offset by an unequivocal public benefit. *See Bob Jones Univ.*, 461 U.S. at 591-92; G. Bogert & G. Bogert, *supra* note 42, § 361, at 3.

nonprofit *private* cemeteries[112] may be plausibly interpreted as expressing a view that nonprofit cemeteries generally—even those not held open to the public—promote the good of the community at large. This interpretation is strongly supported by the long tradition in state statutory law of encouraging private cemetery upkeep trusts.[113] Such statutes demonstrate the judgment of state legislatures that care for the resting places of the dead furthers the ends of public policy.[114]

State court decisions affirming the charitable nature of public cemeteries also articulate strong public policy rationales.[115] Among them is that public cemeteries relieve government of burdens it would otherwise have to bear at public expense.[116] This justification has been identified as lying at the core of Congress' grant of special status to charitable organizations under the federal tax laws.[117] In this light, public cemeteries as a

112. *See supra* notes 66-68 and accompanying text.

113. *See* G. Bogert & G. Bogert, *supra* note 42, § 377, at 166; IVA A. Scott & W. Fratcher, *supra* note 41, § 374.9, at 236-37; Annotation, *supra* note 83, § 10, at 611-12. Legislative intervention is necessary because the common law has generally struck down private cemetery upkeep trusts on the grounds that they are invalid as charitable trusts for lack of a sufficient public purpose, *see* G. Bogert & G. Bogert, *supra* note 42, § 377, at 162-63; Annotation, *supra* note 83, § 10, at 611-12, and invalid as private trusts for lack of living beneficiaries, *see* G. Bogert & G. Bogert, *supra* note 42, § 377, at 159-60; II A. Scott & W. Fratcher, *supra* note 83, § 112.3.

114. *See* Metairie Cemetery Ass'n v. United States, 282 F.2d 225, 228 n.8 (5th Cir. 1960); G. Bogert & G. Bogert, *supra* note 42, § 377, at 169-70; Annotation, *supra* note 83, § 10, at 611-12. In addition, the Internal Revenue Code itself permits even for-profit cemeteries to deduct from their gross income a portion of the amounts paid from upkeep trusts they create for maintenance of cemetery grounds. *See* I.R.C. § 642(i) (1986). An ancient public policy justification for validating trusts for the maintenance of tombs may be found in E. Coke, Third Part of the Institutes of the Laws of England (London 1628 & facsim. reprint 1979):

> [T]hese monuments do serve for four good uses and ends. First, for evidence, and proof of descents, and pedegrees. Secondly, what time he that is there buried deceased. Thirdly, for example, to follow the good, or to eschew the evill. Fourthly, to put the living in mind of their end, for all the sons of Adam must die.

Id. at 203.

115. *See supra* notes 85-90 and accompanying text.

116. *See In re* Estate of Edwards, 88 Cal. App. 3d 383, 391, 151 Cal. Rptr. 770, 775-76 (1979); Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 195 (1873); Bushong v. Taylor, 161 Tenn. 522, 529, 33 S.W.2d 80, 82 (1930); *see also* Child v. United States, 540 F.2d 579, 586 & n.3 (2d Cir. 1976) (Anderson, J., dissenting) (citing New York statutes providing for local governments to take over maintenance of abandoned or neglected cemeteries within their borders), *cert. denied*, 429 U.S. 1092 (1977); Mellon Bank v. United States, 590 F. Supp. 160, 164 & n.3 (W.D. Pa. 1984) (citing Pennsylvania statute to same effect), *rev'd on other grounds*, 762 F.2d 283 (3d Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986); Wunderlin v. Lutheran Cemetery, 49 Misc. 2d 836, 837, 268 N.Y.S.2d 514, 516 (1966) (upholding state tax levies on cemetery lot owners for maintenance of burial grounds when needed "to prevent cemeteries from falling into disrepair and . . . becoming a burden on the entire community"), *modified on other grounds*, 27 A.D.2d 861, 278 N.Y.S.2d 544 (1967).

117. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 587-88, 590-91 (1983); *Child*, 540 F.2d at 585 (Anderson, J., dissenting); B. Hopkins, *supra* note 10, § 1.2, at 5-6; Bittker & Rahdert, *supra* note 16, at 332. "[L]essening of the burdens of Government" is

class not only do not conflict with public policy but actively advance its goals. Hence they fulfill the Code's requirement that charitable organizations must harmonize with public policy.

CONCLUSION

Public cemeteries fall well within the class of organizations eligible for "charitable" treatment under the Internal Revenue Code. Serving purposes widely accepted in the common law of charitable trusts, they meet the Supreme Court's standard for charitable status in the federal tax laws. The purposes of public cemeteries are also "exclusively" charitable, as the relevant statutes demand. The framework of the Code's charitable provisions, moreover, poses no obstacle to the grant of the estate tax charitable deduction for bequests for the general maintenance and operations of public cemeteries. Considerations of public policy add further support to this position. The issue therefore deserves a reexamination by the federal courts, and a different resolution.

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also enumerated as a distinct ground for charitable status under the Code by the I.R.S. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 1976).