The Secret Economy of Charitable Giving

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THE SECRET ECONOMY OF CHARITABLE GIVING

by

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Charitable giving is big business. In 2009, the Internal Revenue Service reported close to 100,000 private foundations, almost double the number from fifteen years earlier. Some of these charitable trusts, like the Gates Foundation, are multi-billion dollar enterprises. Trust instruments and other governing documents set forth the terms that control these gifts. Because charitable trusts can exist in perpetuity, however, changing circumstances sometimes render the terms difficult to fulfill. Courts can apply cy pres, a saving doctrine that allows for the modification of gift restrictions, but in the past courts have tended to apply cy pres narrowly and privilege donor intent above all other considerations. Recent reforms, however, have moved courts toward a more liberal application of the doctrine. In this Article, I analyze how certain high-profile cases have driven these reforms – which include the presumption of general charitable intent, the recognition of “wasteful” as a criterion, and the deployment of deviation – and explain how these reforms represent positive change. Moreover, I provide a theoretical grounding to account for the correctness of these reforms. I argue that charitable giving should be understood as embedded in a nexus of material and social exchanges – part of the “charitable gift economy.” I describe how charitable giving provides a robust range of benefits to donors, including both tangible tax benefits and intangible benefits such as status, social identity, and warm glow. Based on this understanding of the charitable gift economy, courts and charities alike should embrace current reforms and seek to expand them further.
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The subject is clear. In Scandinavian civilization, and in a good number of others, exchanges and contracts take place in the form of presents; in theory these are voluntary, in reality they are given and reciprocated obligatorily.

- Marcel Mauss, The Gift

We should often blush at our noblest deeds if the world were to see all their underlying motives.

- La Rochefoucauld, Maxims

Charitable trusts and charitable giving are big business. Outright gifts to charity by individuals totaled $217.8 billion in 2011 in addition to $24.42 billion in bequests made by individuals. Moreover, it is estimated that by the year 2055 some $41 trillion will change hands as Americans pass on their accumulated assets to the next generation. Much of this wealth will be transferred through the creation of charitable trusts and other private foundations or through major giving by individuals to established charities. 92,624 private foundations, organized either as charitable trusts or non-profit corporations, filed 990 tax returns in 2009, and these foundations held $588.5 billion in assets. Moreover, in the same year, these private foundations distributed $40.9 billion for charitable purposes. These


2 LA ROCHEFOUCAULD, MAXIMS 89 (n. 409) (Leonard Tancock, trans. 1959).


6 Id.
foundations and major gifts to charitable institutions help support colleges and hospitals, art museums and social welfare organizations, to name only some of the organizations sustained by charitable donations.

In all major charitable giving – whether a donor creates a charitable trust, a private (non-trust) foundation, or makes a major gift to an institution – the donor’s charitable purpose is specified in a governing document. The trust instrument, the incorporation documents and organizational charter, or the gift agreement will detail the charitable purpose along with any relevant spending restrictions or conditions. Some large gifts are unrestricted, just as some private foundations have very broad charitable purposes, allowing the institution maximal latitude in spending. Other restrictions range in specificity. Some are lightly restricted, a fund at a museum for the purchase of art, while others are quite limited, such as a gift to fund an annual poetry prize at a particular college. Because charitable trusts and other private foundations can exist in perpetuity, and because a majority of donors indeed intend for their trusts to last in perpetuity, there exists a strong potential for the terms of the restricted funds and gifts to become outdated due to shifts in institutional needs, the state of medical research, and the social landscape.

In such cases – when the controlling terms of the trust outlive the need for or the appropriateness of resource investment – the cy pres doctrine allows courts to modify the trust terms. The doctrine is set forth in section 413 of the Uniform Trust Code, which states that courts may modify the terms of a gift if the charitable purpose “becomes unlawful, impracticable, impossible to achieve, or wasteful.”

8 As comments to this section mention, cy pres is applied not only to modify the terms of charitable trusts but also to modify any donor restrictions placed on charitable gifts. Furthermore, pursuant to both the Uniform Trust Code and the Uniform Prudent Management of Institutional Funds Act

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7 The Foundation Center found in a 2004 survey that 69.3% of foundation respondents expected their foundations to carry on in perpetuity. Nine percent did not, and 22% were undecided. See Family Giving News, _Perpetuity is a Long Time_, May 18, 2008, http://familygivingnews.org/2008/05/18/perpetuity-is-a-long-time-may-2008-fgn/.

8 The Uniform Trust Code § 413 states in relevant part: “[I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor’s successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.” The comment to this section further states that: “The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.”
(UPMIFA), cy pres is equally applicable to restricted funds held by non-profit corporations as well as charitable trusts.⁹

Historically, courts have tended to apply cy pres both narrowly and infrequently, manifesting a deep reluctance to overturn donor intent. More recently, however, a number of high-profile cases with deeply contested results – including cases involving Fisk University, the Buck Trust, and the Barnes Foundation – have not only pushed questions concerning cy pres into the legal limelight but have also propelled doctrinal reform. In this Article, I discuss how these high-profile cases have driven reform measures, including the presumption of general charitable intent, the recognition of “wasteful” as a criterion for cy pres application, and the deployment of equitable deviation. These reforms have been criticized from both sides, with some scholars arguing that the changes are detrimental while others argue that the reform is too cautious.¹⁰ I maintain that the recent cy pres reforms represent positive – and significantly unappreciated – change. Moreover, I put forth a new theory that accounts for the correctness of these and additional reforms. Specifically, I propose a theoretical revision of the legal understanding and treatment of charitable gifts based on the idea of charitable giving as an intricate constellation of multi-partite exchanges – what I call the charitable gift economy.

Anthropologists and sociologists have long believed that gifts are a strong form of currency in an economy driven by non-market transactions. Marcel Mauss, in his seminal study of Polynesian and other cultures, demonstrated the ways in which gifts have been deployed to create an economy of transfers, services, and obligations governed by social norms and customary behavior. Economists have since been drawn to the question of gift giving, trying to understand what motivates individuals to engage in the practice of gifting since it generally contravenes individual economic interest. Eric Posner, concluding that gifts are motivated by altruism, status building, and trust creation, has observed: “Frequently . . .

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⁹ See Uniform Prudent Management of Institutional Funds Act (UPMIFA), prefatory note, at 4 (“UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful.”).

transfers that are called 'gifts' do call for a return transfer, if only implicitly or by convention."\textsuperscript{71} Carol Rose, alluding to the norm of reciprocity, has put the matter more succinctly by asking, "Does anyone ever really give anything away?"\textsuperscript{12} Sociologists have widened the conversation by exporting the debate about gift-as-exchange into the realm of philanthropy. They have examined the various reasons for which donors give, paying particular attention to the complicated cultural networks that charitable gifts create and maintain.\textsuperscript{13} Scholars in philanthropy studies and fundraising experts have equally scrutinized the factors that motivate individual giving, particularly in order to better craft fundraising strategies.\textsuperscript{14}

The concept of the charitable gift as a part of a charitable gift economy has not, however, been discussed in legal scholarship concerning trust principles and the regulation of charitable gifts. This omission is striking because charitable gifts, possibly more than any other type of gift, reveal and exemplify the gift economy at work. Furthermore, the charitable gift economy is significant because it encompasses not just the micro connections of family, friends and colleagues (the conventional parties in non-charitable giving exchanges), but also macro connections between individuals and institutions. My contribution with this Article is, therefore, to develop and apply the concept of the charitable gift economy into charitable giving law, so as to help reimagine the base assumptions inherent in legal regulation and cy pres jurisprudence.

This Article proceeds in three parts. In Part I, I describe the evolution of charitable trust regulation, charity law, and the cy pres doctrine. I pay particular attention to how charitable giving law developed such that donor intent became the lodestar of judicial analysis. The second Part of the Article contains an analysis of recent cy pres cases that have generated commentary and driven reform. I explain how these cases either demonstrate the ways in courts are adopting reforms put forth in the Uniform Trust Code and Restatement (Third) of Trusts or how cases produced those very reforms. In Part III, I offer a new theoretical

\begin{itemize}
\item \textsuperscript{14} See, e.g., Peter Frumkin, \textit{Strategic Giving} (2006). See also Joan Mount, \textit{Why Donors Give}, 7 \textit{NONPROFIT MANAGEMENT AND LEADERSHIP} 3 (1996);\
\end{itemize}
grounding for these reforms and other, future reforms. I develop the idea of the charitable gift economy, drawing on established concepts of the gift economy in other fields, and discuss the complicated nexus of exchanges that constitutes this charitable gift economy. I detail the benefits, both tangible and intangible, that flow to charitable donors, and clarify why donor benefits should be restricted. Ultimately, I conclude that in light of the realities of this charitable gift economy, the evolutions in case law are sound: because donors receive such a wide range of significant benefits within the charitable gift economy, donor intent should be given more narrow berth and be time-limited.

I. THE SUPREMACY OF DONOR INTENT

Although there have been recent reforms to the cy pres doctrine and its judicial application, courts have historically hewed very closely to donor intent. In this Part, I describe the various factors that led to this strict adherence to donor intent. I also describe the historical treatment of the cy pres doctrine, which was intimately related to the development of charitable trusts, and explain the status of the cy pres doctrine prior to recent reforms.

A. Charitable Trusts and the Early Calculus of Giving

In early American courts, legal understandings of the charitable trust suffered from misapprehensions – common among both judges and lawyers – concerning Chancery’s equitable jurisdiction over charitable trusts. At the same time that state courts were grappling with the idea of the unascertainable beneficiary, however, Justice Marshall put forth an early and influential theory of charitable giving in *Dartmouth College v. Woodward*15 that was grounded in the importance of donor intent. Marshall’s theory of great men making charitable gifts to build a legacy was subsequently reinforced by shifts in the economic landscape and the emergence of major philanthropists. In this section, I briefly discuss the history of charitable giving in early America and explain how donor intent became the lodestar of charitable giving regulation.

1. Fear of the Unascertainable Beneficiary

In the wake of the Revolution and eager to clear the statute books of English taint, “state legislatures and the courts began to test every point of English law.”16 The resulting legal confusion landed in a Virginia case

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concerning the validity of a bequest on the U.S. Supreme Court’s docket in 1819. The case, Trustees of Philadelphia Baptist Association v. Hart’s Executors, turned on the question of whether an unincorporated association could be the legal recipient or beneficiary of Hart’s intended charitable trust. At issue was the status of such a bequest before the enactment of the Statute of Charitable Uses, which clearly sustained bequests to unincorporated associations. The question was important because, as Justice Story observed, “the statute of Elizabeth not being in force in Virginia . . ., it becomes a material inquiry, how far the jurisdiction and doctrines of the court of chancery respecting charitable uses depends upon that statute, and whether, independent of it, the present donation can be upheld.”

Unfortunately for the testator, the Court held that there was no precedent outside of the repealed statute for supporting the gift and the bequest failed.

It was not until 1844, armed with the publication of previously unavailable English Chancery reports, that the Court overturned Hart and established support for charitable trusts in Vidal v. Girard’s Executors. Despite the ruling in the Girard case, however, the lack of ascertainable beneficiaries continued to cause bequests to fail in a number of states. For


17 The Statute of Charitable Uses Act (1601), 43 Elizabeth I c. 4. The Statute of Charitable Uses was enacted in 1601, a reform driven by the desire to “efficiently protect the use of charitable assets, and [cultivate] the ethos of . . . such giving” such that “the middle and upper middle classes, particularly the merchant gentry, might increase their support towards ends that the State approved.” James J. Fishman, The Political Use of Private Benevolence: The Statute of Charitable Uses 32 (2008), Pace Law Faculty Publications. Paper 487. The Statute is “is famous for providing a legal definition of charitable purpose and is the starting point for the modern law of charity.” Id., at 34.


19 Vidal v. Girard’s Executors, 43 U.S. 127, 196 (1844) (“But very strong additional light has been thrown upon this subject by the recent publication of the Commissioners on the public Records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns”). For a discussion of the case and its cultural resonance, see Robert Ferguson, The Girard Will Case: Charity and Inheritance in the City of Brotherly Love, in PHILANTHROPY AND AMERICAN SOCIETY: SELECTED PAPERS (Jack Saltman, ed. 1987).

20 Edith Fisch remarks that: “[I]t was a case of locking the barn door after the horse had been stolen . . . the error became so firmly entrenched in . . . law that the Girard decision failed to remedy the situation.” EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 12-13 (Matthew Bender & Co., 1950). A small set of cases, following Girard, upheld charitable trusts on the grounds that English common law supported them. See e.g., Williams v. Williams, 8 N.Y. 525, 542 (1853). For a description of the approximately half-dozen cases in New York that followed this analysis, see Stanley N. Katz, Barry Sullivan and C. Paul Beach, Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893, 3 LAW & HIST. REV. 51, 64-68 (1985). Once equity and law merged in New York, this line of cases
example, in the case of Bascom v. Albertson, the high court in New York ruled that charitable trusts created through bequests with no ascertainable beneficiaries were void under the state law. New York’s settled policy, the court stated, was rather to “encourage donations and endowments for educational, religious and charitable purposes, by providing for the administration of such funds through organized and responsible agencies, sanctioned by legislative authority, and subject to legislative regulation and control.”

One of the most notorious cases was that of Samuel Tilden, a corporate lawyer turned politician who became the governor of New York. Tilden left a bequest directing his executors and trustees to procure an act of incorporation for “an institution to be known as the ‘Tilden Trust,’ with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate.” The court concluded that the trust was void and, because the intention to promote science and education was unacceptably indefinite, the bequest to the library failed as well. The court asked: “Can it be seriously claimed that there is any duty resting on [the trustees] to establish a library in the city of New York?”

This result in the Tilden case garnered remarkable attention, both locally and nationally, and the bulk of the criticism derived from the fact that the court’s hostility to charitable trusts with no ascertainable beneficiary was overriding donor intent. While the case was pending, the New York Times published an article that stated optimistically: “The court will undoubtedly consider the purpose and intent of the testator, and whether by the creation of the Tilden Trust that purpose and intent can be carried out.” After the decision, James Barr Ames observed that “the beneficent purpose of the testator was unmistakably expressed in a will

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21 Bascom v. Albertson, 34 N.Y. 584, 584 (1866). New York, like Virginia, had repealed the Statute of Charitable Uses. Moreover, addressing the Girard argument that early Chancery cases demonstrated valid bequests to unascertainable beneficiaries, the court stated: “The legislature of this State could not fail to see that the earlier English system of charity, which was superseded and displaced by the statute of Elizabeth, was fragmentary and disjointed; that it was obscure in its origin, incongruous in its theory, and disastrous in its tendency; that it had been discarded as an excrescence upon the common law.” Id., at 605.

22 Tilden v. Green, 130 N.Y. 29, 44 (1891).

23 Id., at 60.

24 The Tilden Trust Corporation, N.Y. Times, March 29, 1887.
executed with all due formalities” and that court’s decision was “a deplorable disappointment of the testator’s will.”  

Because of this maelstrom of public dissatisfaction, the New York legislature passed the Tilden Act in 1893, which authorized charitable trusts and, more particularly, bequests made to unascertainable beneficiaries for charitable purposes. This legislation was a turning point for the regulation of charitable trusts, and marked the legal embrace of charitable trusts as a vehicle for philanthropic giving.

2. Dartmouth and the Charitable Bargain

Despite judicial misgivings about the nature of charitable trusts and the power of dead-hand control, judicial support did exist for charitable giving done through the proper channels. In fact, an influential judicial theory in support of charitable giving was beginning to take shape during this same period, and it was set forth in Trustees of Dartmouth College v. Woodward. Decided in the same term as the Hart case, Dartmouth addressed the New Hampshire legislature’s ability to modify the college’s charter through legislation without the express consent of the college trustees. Chief Justice Marshall quickly set aside any concerns about the fact that a contractual bargain had been formed through the charter. The charter was, Marshall remarked, “a contract for the security and disposition of property” and ample consideration existed in the grant of “perpetual application of the fund to its object.”

Marshall proceeded to provide a clear description of the contract entered into between a donor and the State: “Charitable or public-spirited individuals . . . apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them.” The charitable bargain, accordingly,

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26 The Act stated that “No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty or the persons designated as the beneficiaries thereunder in the instrument creating the same.” 2 LAWS OF THE STATE OF NEW YORK PASSED AT THE ONE HUNDRED AND SIXTEENTH SESSION OF THE LEGISLATURE, BEGUN JANUARY THIRD, 1893, AND ENDED APRIL TWENTIETH, 1893, IN THE CITY OF ALBANY (James B. Lyon, Printer, 1893).
28 Id., at 642.
29 Id.
30 Id., at 637-38. Justice Story, concurring in the opinion, also remarked that there was an implied contract between the corporation and the beneficiaries “that [the corporation] would administer his bounty according to the terms, and for the objects stipulated in the charter.” Id., at 689-90 (J. Story, concurring).
consisted of individuals dedicating resources to public benefit in return for the grant of a vehicle capable of actualizing the charitable vision of the individual. Adherence to donor restrictions was both a spur and the reward for charitable giving. Marshall observed:

It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. . . . All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it.  

In this calculus of giving, the donor was motivated by altruism and the desire to further social welfare and the public good. Because the donor received no benefit other than the ability to restrict a gift in perpetuity, the organization owed it to the donor to execute his design as intended. The charitable bargain was an exchange of resources for immortality.

The Dartmouth case, therefore, established certain judicial values and traced an outline for the future of charity law. In cases that followed, the Dartmouth case was cited a number of times concerning the charitable bargain. City of Louisville v. President & Trustee of University of Louisville (1855) turned on similar questions of the city’s rights with respect to University governance after the city had made a major gift to the University. Ruling in favor of the University and citing to Dartmouth, the Chief Justice of the Kentucky court stated: “[T]here is certainly a contract between the donors and the donee. And as the donors parted with their property under the inducements of the charter promising a continuance of the corporation, the faith of the state was pledged to them.” Likewise, relying on Dartmouth, the court in one of the leading New York decisions supporting charitable trusts observed that charitable giving: “was a contract between the government and the donors, one of the terms of which was, that the lands should be held by the corporation in perpetuity to promote the pious and charitable objects of its institution.” An Indiana court said the same,

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31 Dartmouth College v. Woodward, 17 U.S. at 647.
32 Writing about the Dartmouth case, Mark D. McGarvie has remarked: “The beginning of philanthropic organizations occurred not with the funding of the large trusts at the turn of the twentieth century, but in the creation of the legal model for philanthropic pursuits during the early republic.” Mark D. McGarvie, The Dartmouth College Case, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 105 (Mark D. McGarvie & Lawrence J. Friedman, eds., 2003). McGarvie suggests that the Dartmouth case moved philanthropy from a community model present in the colonial period “by demanding formal legal structures for religious and philanthropic organizations.” Id.
33 City of Louisville v. President & Trustees of Univ. of Louisville, 54 Ky. 642, 686 (1855).
34 Williams v. Williams, 8 N.Y. at 534. “Subsequent decisions, however, repeatedly attacked the Williams case, and its scope was narrowed until it was virtually impossible to formulate a charitable trust of personality that would be held valid.” Edith L. Fisch, American Acceptance of
concluding that the state legislature could not pass any law that would impair the contractual obligations between an incorporated charitable organization and its donors.\textsuperscript{35} Accordingly, the legal leitmotif set forth in Dartmouth not only gained traction but also ultimately helped frame support for charitable giving and the primacy of donor intent.

3. The Triumph of Philanthropy

In addition to the incremental judicial progress toward an embrace of charitable trusts and Dartmouth-style support for donor intent, seismic changes in wealth holding and philanthropy at the end of the nineteenth century helped to both rewrite the law of charitable trusts and reaffirm the importance of donor intent. By the end of the nineteenth century, changes in economic conditions and national markets had created an entire class of newly minted millionaires.\textsuperscript{36} In 1892, the New York Tribune counted and published the names of 4,047 millionaires; by 1916, there were 40,000 millionaires, including John D. Rockefeller and Henry Ford who were actually billionaires.\textsuperscript{37} A few months after the list was published in 1916 another article, \textit{American Millionaires and their Public Gifts}, was published and “[t]he author observed that it would be interesting if the millionaires enumerated by the Tribune could be separated into givers and non-givers.”\textsuperscript{38} Shortly after that, George Hagar, a member of the staff of \textit{Appleton’s Annual Cyclopaedia}, “began to collect figures on gifts and bequests . . . for religious, charitable and educational purposes.”\textsuperscript{39} Charitable giving brought public status and created public personae in a new and spectacular way.


\textsuperscript{35} Edwards v. Jagers, 19 Ind. 407, 415 (1862) (“[T]here was an implied contract, between the donor and the corporation, that the property should be used only for the purposes indicated by the charter”).

\textsuperscript{36} According to Robert A. Gross, this development in giving marked a turn from charity (“concrete and individual”) to philanthropy (“abstract and institutional”). See Robert A. Gross, \textit{Giving in America: From Charity to Philanthropy, in Charity, Philanthropy, and Civility in American History, supra note 32, at 30.}

\textsuperscript{37} Olivier Zunz, \textit{Philanthropy in America: A History} 8 (2011). “The list was arranged state by state, city by city. The kind of economic activity thought to be the major factor in the creation of each fortune was indicated. The Tribune’s financial editor claimed to have consulted 1,500 merchants, bankers, commercial agents, lawyers, surrogates of counties, trustees and other citizens all over the country in a position to know the facts.” Merle Curti, Judith Green and Roderick Nash, \textit{Anatomy of Giving Millionaires in the Late 19th Century}, 15 \textit{American Quarterly} 416, 418 (1963).

\textsuperscript{38} Curti, et al., \textit{supra} note 37, at 419.

\textsuperscript{39} \textit{Id.}, at 420. Hagar excluded all gifts under $5,000. "The result of the first year's quest," Hagar later wrote, "was such a grand tribute to the humanity of the American men and women" that he continued to make similar investigations through the year 1903" \textit{Id.} For his results see \textit{id.} at 421 (Table I).
Philanthropy was biography, and wealthy individuals sought to make their mark on the social landscape through charitable giving. In this context of new wealth, “philanthropic projects were acts of generosity and hubris on a scale never before entertained. The new rich felt free to envision and fashion the common good, and they did so.” 40 The philanthropists themselves viewed charity as both a creative, individual vision and the personal responsibility of great men.41 This turn-of-the-century philanthropy confirmed that charitable giving was the work of eminent individuals who sought to leave their mark on the nation and expected their legacies to endure intact. Charitable giving was donor-centric and the bargain set forth by Dartmouth still prevailed – charitable gifts to benefit the community and nation in exchange for immutable legacies.

These rich industrialists, anxious to build legends and legacies, also helped to finally bring about acceptance of the charitable trust form. As Olivier Zunz has remarked: “[A]mbitious new philanthropists placed themselves in opposition to the centuries-old charitable practice of carefully delimiting purpose and beneficiary. . . . They conceived of their largesse as open-ended so that it might achieve the greatest impact on society.”42 The recurrent question was how to effect these philanthropic goals within the existing legal framework. As Andrew Carnegie announced in The Gospel of Wealth: “The problem of our age is the proper administration of wealth.”43 Charity law varied by state and there was no uniform treatment of the body of law, with many states still refusing to recognize trusts with no ascertainable beneficiaries. However, with great “accumulations of private wealth, the need for effective mechanisms to enforce and sustain charitable

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40 ZUNZ, supra note 40, at 8. Merle Curti suggests: “The American emphasis on individual achievement and on sustained activity to that end have also given a distinct stamp to large-scale giving. Having spent untold effort in getting rich, having tasted the sweets and boredom of extravagant spending, some, driven by a never-ceasing lust to achieve, turned to philanthropy, Carnegie and Rockefeller, each relatively frugal in what he spent on himself, set their hearts on giving with the imagination, organization and efficiency that had marked their activities in steel and oil.” Merle Curti, American Philanthropy and the National, 10 AMERICAN QUARTERLY, 420, 429 (Winter, 1958). Exemplary institutions founded during this period include Cornell University, Stanford University, Johns Hopkins University, the University of Chicago, the Sage Foundation, the Rockefeller Foundation, and the New York Public Library, to name a few. See ZUNZ, supra note 40, at 9-10.


42 ZUNZ, supra note 40, at 12.

43 Id. Carnegie condemned the practice of giving through bequests and charitable trusts, stating: “Men who leave vast sums in this way may fairly be thought men who would not have left it at all, had they been able to take it with them. The memories of such cannot be held in grateful remembrance, for there is no grace in their gifts.” Carnegie supported high estate taxes at death and urged all those with philanthropic leanings to give during their lives.
gifts became increasingly manifest.” Similarly, a public policy of encouraging charitable giving coalesced as “courts began to recognize the necessity of encouraging contributions to further the welfare of a pioneer society by private means, thereby reducing the expenses of the government.”

Ultimately, then, courts and legislatures finally admitted the necessity and value of the charitable trust form when faced with a new wave of major donors who envisioned their charitable goals in broad strokes. These major philanthropists helped to render charitable trusts “favorites of the law.” These same philanthropists, inspired by personal visions of the greater good, also reaffirmed the notion that donor intent was a primary value and that great instances of charitable giving were to be rewarded with perpetual application of restrictive terms.

B. Overcoming Opposition to the Cy Pres Doctrine

The cy pres doctrine, a saving doctrine of deep but obscure historical roots, was designed to allow courts to modify the terms of an outdated or excessively narrow trust agreement. Cy pres derives from Norman French and means “as near,” the full phrase being “cy pres comme possible,” or “as near as possible.” As the name implies, the doctrine provides “that equity will, when a charity is originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible.”

The standard modern statement of the doctrine is, however, less exacting and provides that the court will modify the trust terms “in a manner consistent with the settlor’s charitable purposes.” The cy pres doctrine developed in America alongside and in step with the law of charitable trusts. Like the charitable trust, the cy pres doctrine encountered

44 Fisch, supra note 20, at 117.
45 Id.
46 Fisch, supra note 20, at 118. See also In re Porter’s Estate, 164 Kan. 92, 100 (1947) (“charitable trusts are favorites of the law which must be upheld whenever possible”); In re Pruner’s Estate, 400 Pa. 629, 634, 162 A.2d 626, 629 (1960) (“Charities are favorites of the law and a gift, even for a specific charitable purpose, should be liberally construed whenever reasonably possible.”); In re Knouse’s Will, 254 Iowa 1339, 1342 (1963) (“Other general principles of the law as it relates to charitable trusts are that they are favorites of the law.”).
47 “The doctrine of cy pres . . . was known and used in Rome before Constantine . . . A Case applying the cy pres principle appears in the Digest of Justinian.” Fisch, supra note 20, at 3. “So far as can be ascertained, [the term] cy-près first appears in Littleton’s Tenures (c. 1481).” L. A. Sheridan & V.T.H. Delaney, The Cy-Près Doctrine 5 (1959).
49 Id.
50 Uniform Trust Code §413.
significant judicial resistance in early state courts because of its association with English law and royal prerogative. Nonetheless, over time, cy pres gained legal acceptance and courts began to use it in order to modify trust terms. In this section, I describe the gradual acceptance of cy pres and detail the current status of the doctrine.

1. Resistance to Prerogative Cy Pres Power

Because of strong judicial resistance to the charitable trust form as a vehicle for philanthropy, the cy pres doctrine was largely irrelevant and rarely invoked as a tool for modifying trust terms in the years directly following the Revolution until after the Civil War.\(^{51}\) In fact, “[o]f the fifteen states which by 1860 had occasion to consider the cy pres doctrine, the court of some ten states had either condemned it or repudiated the doctrine.”\(^{52}\) Of the five states that approved the doctrine, some of the state courts applied the doctrine without naming it, and Kentucky applied it once in 1839 only to repudiate it later cases.\(^{53}\) Pennsylvania was the only state that enacted a cy pres statute before 1860.\(^{54}\)

For the most part, courts that considered the cy pres doctrine rejected it because of confusion concerning jurisdictional questions with respect to the exercise of cy pres and the consequent association of cy pres with royal prerogative. In England, two types of cy pres – prerogative and judicial – had developed over the years.\(^{55}\) Many American courts, believing that cy pres derived uniquely from the unrestrained prerogative power of the monarch and not from the equitable jurisdiction of Chancery – a belief perpetuated in part by the \textit{Hart} case – therefore reacted to the doctrine with antagonsism.\(^{56}\)

\(^{51}\) “Until the middle of the nineteenth century, because there were few charitable trusts, the need for the application of the cy pres doctrine was rarely felt.” \textit{Fisch, supra note 20}, at 117.

\(^{52}\) Id., at, 115-16, n. 1.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) See \textit{The Law of Trusts and Trustees} \$432 (“Two kinds of cy pres power have been developed in England, judicial and prerogative”). “The prerogative power is vested in the crown, as parens patriae, and is exercisable by the sign manual of the king, that is, by a direction of the crown under his signature.” \textit{Id.}. Judicial cy pres was that exercised by the Court of Chancery. \textit{Id. See also} Hamish Gray, \textit{The History and Development in England of the Cy-Pres Principle in Charities}, 33 B.U.L.REV. 30 (1953). The classic example of the abusive use of prerogative cy pres power is found in \textit{Da Costa v. De Pas}, 27 Eng. Rep. 150 (Ch. 1754). In that case the king used his cy pres power to allot money designated for the purpose of teaching Jewish law and religion to instruct foundlings in the Christian religion.

\(^{56}\) See \textit{Fisch}, supra note 20, at 116. Fisch observed: “Deeming the cy pres doctrine contrary to the spirit of our democratic institutions, and in conflict with the separation of powers, the early courts reviled and excoriated the English charity doctrine.” \textit{Id. In Bascom}, the New York court stated that, even if Chancery’s cy pres jurisdiction predated the Statute of Charitable Uses, it was “an excrescence upon the common law, inappropriate even to a government in
In *Fontain v. Ravenel* (1854), a leading case at the time, the Court referenced the *Hart* case as evidence that cy pres was a uniquely prerogative power: “[T]here can be no doubt that the power of the crown to superintend and enforce charities existed in very early times; and . . . that it is a branch of prerogative, and not a part of the ordinary powers of the chancellor, is sufficiently certain.” 57 Accordingly, the Court determined that “[p]owers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as parens patriae, are not possessed by the circuit courts.” 58 State courts followed suit. The New York high court, in determining that a charitable trust was void, remarked: “In England, the cy pres power would be exerted . . . by a master of the Court of Chancery, or the crown would appoint the charity under the sign manual. In either mode of exercising that power, it rests upon prerogative, and . . . does not belong to our judicial system.” 59

The support for an opposing view – that judicial and royal prerogative cy pres were in fact two different things – came from *Girard* and the line of cases that followed. These cases, based on the *Girard* court’s new understanding of Chancery’s powers, all posited that Chancery possessed ordinary jurisdiction over valid charitable trusts before the enactment of the Statute of Charitable Uses. Consequently, American equity courts could assume judicial cy pres powers. The Kentucky high court, as a consequence, was led to conclude as early as 1836 that judicial cy pres was available “where there is an available charity to an identified object, and a particular mode is prescribed which is not available. Then a court of equity may substitute, or sanction, some other mode to effectuate the declared intention of the donor; but cannot declare an object for him.” 60

By the end of the century, the concept of judicial cy pres had become commonplace. Accordingly, in *In re Creighton’s Estate* (1900), 61 the Nebraska high court said: “It needs no argument or elaboration to reach the conclusion that, under our system of equity jurisprudence, the [cy pres] powers exercised are purely judicial, derived solely from the organic law and

which the crown and the mitre were in mutual alliance and dependence.” Bascom v. Albertson, 34 N.Y. 584, 605 (1866).


58 *Id.* (stating that “[a]n arbitrary rule in regard to property, whether by a king or chancellor, or both, leads to uncertainty and injustice”).

59 Bascom v. Albertson, 34 N.Y. at 594. See also Beckman v. Bonsor, 23 N. Y. 298; Miller v. Teachout, 24 Ohio St. 525, 529 (1874) (“The English doctrine of *cy pres* is not the law here-it resting entirely on prerogative, and being foreign to our judicial system and form of government”).

60 Moore’s Heirs v. Moore’s Devises, 34 Ky. 354, 366 (1836). See also Erskine v. Whitehead, 84 Ind. 357, 364 (1882) (“It is . . . well established that there is a *cy pres* power, which is judicial in its origin and character, recognized and exercised by the English and by the American courts generally”).

61 *In re Creighton’s Estate*, 84 N.W. 273, 60 Neb. 796 (1900).
the statutes including the common law.”\textsuperscript{62} Courts had reoriented the judicial understanding of Chancery’s historical powers and countered arguments concerning the arbitrary nature of prerogative power.\textsuperscript{63}

2. Modern Judicial Application of Cy Pres

In between 1900 and 1949, twenty-one jurisdictions applied the cy pres doctrine for the first time.\textsuperscript{64} By 1950 twenty-nine states had judicially adopted the doctrine.\textsuperscript{65} By 2004, the doctrine was either statutorily or judicially accepted by all states except for Alaska and North Dakota.\textsuperscript{66} The doctrine has been adopted in the Restatement of Trusts and the Uniform Trust Code. The basic modern formulation of the cy pres doctrine states that:

If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor’s successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} “[T]he problem of enforcing and upholding the ever increasing number of charitable trusts, the public policy underlying . . . induc[ed] the courts to dispel the mists of confusion that had ensnared the cy pres doctrine for many years, and to adopt an attitude of liberal application.” \textit{Fisch, supra} note 20, at 120.

\textsuperscript{64} \textit{Id.}, at 120 n. 16.

\textsuperscript{65} \textit{Id.}, at 92.

a manner consistent with the settlor’s charitable purposes.67 Similarly, the Uniform Prudent Management of Institutional Funds Act (UPMIFA) – which 49 states as well as the District of Columbia and the U.S. Virgin Islands had adopted as of 2014 – allows for the use of cy pres as a tool for modifying restrictions placed on institutional funds.68 Like the Uniform Trust Code, UPMIFA clarifies that “the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts.”69

The cy pres process begins with the trustees or directors. Once the trustees determine that the trust terms have become “unlawful, impracticable, impossible to achieve, or wasteful,” they file a cy pres petition seeking to modify the conditions. The trustees are the proper party and the only party with standing to seek such modifications.70 According to UMPIFA, at this point the trustees or directors also “shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard.”71 Once the petition has been filed, courts apply a three-part test in order to evaluate whether cy pres is appropriate. In the absence of contravening language in the trust itself, courts must determine that: (1) a valid charitable trust exists; (2) the trust’s purpose is illegal, impractical, or impossible, and (3) the donor possessed a general charitable intent.72 If these conditions are met, the court will modify the terms of the trust such that they are as near as possible to those of the original gift.73

67 Uniform Trust Code §413. “[I]n a manner consistent with the settlor’s charitable purposes” is the standard phraseology that is meant to replace “as near as possible.” This change may in and of itself be considered a liberalization.
68 UPMIFA sec. 6 (c) states that: “(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument.”
69 Uniform Prudent Management of Institutional Funds Act see http://uniformlaws.org/Act.aspx?title=Prudent+Management+of+Institutional+Funds+Act at 4. The comment to Uniform Trust Code §413 states that: “The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations.”
70 In the case of restricted gifts not in the form of a trust, the beneficiary institution may file a cy pres petition.
71 UPMIFA sec. 6 (c).
72 See Uniform Trust Code sec. 413; Restatement of Trusts (Third) sec. 67. This formulation has been widely adopted by courts as well. See, e.g., Kolb v. City of Storm Lake, 736 N.W.2d 546, 555 (Iowa 2007).
73 “Finally, in applying cy pres, courts must generally seek a purpose that conforms to the donor’s objective “as nearly as possible.” In re Elizabeth J.K.L. Lucas Charitable Gift, 125 Haw. 351, 360 (Ct. App. 2011), citing Am. Jur.2d § 157. A comment to section 67 of the
The first of these requirements – the valid charitable trust – has “crumbled” somewhat as the doctrine has been applied more regularly and courts have “impl[ed] a valid charitable trust where only a simple gift had been made to charity.” 74 Some scholars suggest that courts have also progressively relaxed the second requirement – that a trust’s purpose be illegal, impractical, or impossible. 75 Historically, courts used cy pres to modify trust terms and the conditions on other restricted gifts when the purpose was no longer relevant. For example, once the days of frontier building were clearly over, a court modified the conditions placed on a gift meant to “furnish relief” to immigrants and travelers coming to Saint Louis on their way “to settle the West.” 76 Restricted trusts and gifts with idiosyncratic conditions – such as a bequest to “maintain a hospital for ailing Siamese cats” 77 – have also been the object of judicial modification in order for money to be spent.

More recently, courts have almost universally removed racially restrictive trust terms as violative of equal protection law and modified the trusts accordingly through the application of cy pres. 78 Courts have treated restrictive religious and gender terms similarly. In these cases, courts generally assume that the donor would have preferred the charitable trust to continue even without the restrictive terms. 79 For example, in Howard Savings Institution of Newark, N. J. v. Peep, the New Jersey high court used cy pres to strike conditions from a bequest intended to provide scholarship monies to Amherst College. The testator left money to Amherst “to be held in trust to be used as a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts.” 80 Amherst refused to accept the gift with conditions attached to the scholarship, and the court concluded that, “[w]ithout Amherst’s cooperation the administration of this trust would be

Restatement (Third) of Trusts states that the modified purpose “need not be the nearest possible but one reasonably similar or close to the settlor’s designated purpose.”

74 Chester, supra note 10, at 416.

75 Id., at 416; see also Fisch, supra note 20, at 139.


77 Id., at 118.

78 See David Luria, Prying Loose the Dead Hand of the Past: How Courts Apply Cy Pres to Race, Gender, and Religiously Restricted Trusts, 21 U.S.F.L. REV. 41 (1986). David Luria found that out of 40 cases challenging restrictive and discriminatory trusts terms, the courts attempted to reform the terms through the application of cy pres in 29 of the cases. See, e.g., Evans v. Newton, 382 U.S. 296, 301, 302 (1966), and Com. of Pa. v. Brown, 392 F.2d 120, 123 (3d Cir. 1968).

79 See, however, Evans v. Newton, 382 U.S. 296 (1996) (concluding that the trust could not be modified and that the trust therefore failed).

so impracticable as to defeat the general purpose of the testator.” 81 In a similar case in New Hampshire, in which scholarship money was to be given to Protestant boys, the state high court remarked: “Our cy pres statute . . . directs our courts to reform the illegal purpose, not to preserve it as far as possible by modifying those provisions requiring public administration of the trust.” 82

Some commentators have remarked that “policy considerations and concern for furthering the public welfare [have become] of increasing importance in delimiting and defining the degree and type of impracticality necessary to call the cy pres doctrine into operation.” 83 Other critics have asserted that, even in instances of liberal interpretation, courts set too high a standard for determining whether a trust’s terms are impossible or impractical. 84 Furthermore, critics claim that courts apply the standard inconsistently. As the Iowa high court observed in Kolb v. City of Storm Lake: “A review of the case law on impossibility and impracticability has led many to believe ‘no precise definition of the standard exists,’ and whether something has become impossible or impracticable is up to the ‘particular facts of each case.’ We agree.” 85

The third prong of the test is the requirement of a general charitable intent. Some scholars have proposed the total elimination of this requirement, 86 suggesting that all charitable gifts inherently possess general charitable intent. Courts consider “both the express language of the instrument, as well as extrinsic evidence” 87 and general procedure requires the application of the following test: “If the testator had known that it would be impossible to follow the express terms of the charitable bequest,

81 Id., at 508. The testator was held to have a general charitable intent to benefit Amherst, his alma mater.
83 Fisch, supra note 20, at 143.
84 Fremont-Smith, supra note 20, at 178.
85 Kolb v. City of Storm Lake, 736 N.W.2d at 556 (citation omitted). The court concluded that cy pres was applicable when a charitable trust created to build and maintain a fountain and garden at a certain location could no longer fulfill its terms after the city razed the garden in order to make room for a major economic development project. “Such a massive project should be planned in a way that maximizes its potential, and when the location of the garden and fountain jeopardize that potential it becomes impractical not to relocate them.” Id., at 557.
86 See, e.g., Ronald Chester, Cy Pres or Gift over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts, 23 Suffolk U. L. Rev. 41, 44 (1989) (“A court need not attempt to find a general charitable intent in order to apply cy pres”). An alternate rule: “alternative rule which stipulates that the settlor’s assets always revert back to his heirs whenever any significant aspect of the settlor’s intentions are thwarted, unless the settlor provides for a contrary result, would serve the interests of efficiency at least as well. Such a rule would provide a better guide to courts on the value to the settlor of his second choice asset allocation.” See also Jonathan R. Macey, The Private Creation of Private Trusts, 37 Emory L.J. 295, 306 (1988).
would he or she prefer to bequeath the funds to a similar charitable purpose or have his or her largess be treated like all other ineffective bequests.”

The focus, critics contend, remains on donor intent and the undertaking is an exercise in reconstructing donor intent from all relevant sources, with emphasis on the agreement itself.

II. A ROADMAP FOR CY PRES REFORM

Because of the particular way in which charitable giving regulation has developed, donor intent has traditionally been the lodestar of judicial cy pres analysis. This focus on donor intent has been the subject of academic critique. One commentator has remarked that, “[n]otwithstanding the potential for a meaningful public benefit, donor intent – not public interest – remains paramount in the administration and modification of charitable trusts.” 89 Critics have consequently lamented the lack of meaningful reform90; or, relatedly, stated that reform has been made the doctrine too confused and confusing.91

While scholars have consistently highlighted the shortcomings in cy pres doctrine and the cautious nature of reform, however, reform has nevertheless come to the cy pres doctrine. In the past decade, reform efforts have produced significant changes in the way the Uniform Trust Code, the Restatement of Trusts and some state courts all approach the cy pres doctrine. Three reforms in particular have wrought significant changes for cy pres analysis within legal doctrine. First is the shift in presumption concerning general charitable intent; second is the addition of “wasteful” as a criterion for cy pres application; and third is the correlated deployment of the doctrine of deviation.

88 Id.
90 Rob Atkinson, The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets, 58 CASE W. RES. L. REV. 97, 97 (2007) (stating that despite this barrage of reformist activity and scholarship, “[t]hese calls, for all their merit, have gone virtually unheeded”); see also Alex M. Johnson Jr., and Ross D. Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation, 74 IOWA L. REV. 546, 567 (1989)(“Although commentators often have attacked the conservative approach to cy pres-pointing out its suboptimal use of trust assets-and have called for its expansion, courts have resisted relaxing the doctrine”).
91 John K. Eason, Motive, Duty, and the Management of Restricted Charitable Gifts, 45 WAKE FOREST L. R. 123, 125-26 (2010) (stating that “the malleability of cy pres doctrine too often leads to outcomes that fail to predictably serve either donor intentions or society’s interest in the accomplishment of purposes beneficial to the public”).
In this Part, I tell the story of how reform came to cy pres by describing and analyzing some recent high-profile cy pres cases that have provoked both controversy and furthered reform efforts. In some cases, the cy pres litigation demonstrates how judicial cy pres analysis is in conversation with changing non-profit law and the Uniform Trust Code as well as the Restatement. In other cases, with the Buck Trust case in particular, the litigation is important because it directly resulted in doctrinal reform. What emerges from this tapestry of judicial contestation and high-stakes litigation is a roadmap for reform – a chart of successful reform efforts and a blueprint for continued doctrinal development.

A. *Fisk* and the Presumption of General Charitable Intent

The third prong of the cy pres test – the requirement of a general charitable intent – has spilled the most ink among scholars and legal commentators. For many years, critics were disappointed that so little “progress has been made in modifying the rule requiring a general charitable intent be the settlor.”92 Moreover, there were no more than “a few cases in the latter half of the twentieth century in which the courts did broaden the application of the doctrine by assuming general charitable intent.”93 The problem with finding general charitable intent was clearly stated by Scott, who observed in his treatise:

>[T]he trust does not fail if the testator has a more general intention to devote the property to charitable purposes. . . . This principle is easy to state but is not always easy to apply. . . . Indeed it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter.94

This meant that courts were engaging in speculative inquiries about what a donor might have done had she still been alive, and puzzling through ways to preserve as much as possible of donor intent in the face of changed circumstances. Restating the difficulty with effectuating this principle, another scholar has suggested that traditional cy pres analysis is constructed such that “whatever the court does, it does with the consent of the phantom testator.”95

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92 Chester, *supra* note 10, at 417. Chester attributes this lack of progress to “the persistence of the requirement of general charitable intent, a remnant of the stress on individual property rights so prevalent in Anglo-American common law.” *Id.*, at 424.
93 Fremont-Smith, *supra* note 20, at 176.
Reform measures, however, have attempted to shift judicial norms and courts are progressively relaxing the requirements for proving general charitable intent. In 2003, the Uniform Trust Code, following on the heels of similar modifications to the Restatement (Third) of Trusts in 2001, modified the cy pres doctrine to include a presumption of general charitable intent.96 In the comment to this section, the drafters remarked: “Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent.”97 The drafters added, confirming that courts were right to take great latitude to find general charitable intent: “Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.”98 As of 2014, the Uniform Trust Code had been adopted by thirty states and had been introduced in New Jersey.99

Even in states that have not adopted the Uniform Trust Code, however, courts are relaxing the level of proof required to show general charitable intent. This relaxation is not happening, however, without back and forth in the state courts. A good example of the growing pains associated with reform around general charitable intent – and the heavy litigation that it can produce – is the Fisk case. Fisk University, a historically black university founded in 1866, was the recipient of 101 paintings that were donated by Georgia O’Keeffe to the school in the late 1940s and early 1950s. Four of the paintings were the property of Georgia O’Keeffe, and the rest O’Keeffe gave to the school from the Alfred Steiglitz collection, in her capacity as executrix of the estate.100 “All 101 pieces were charitable, conditional gifts that were subject to several restrictions, two of which are at issue here; the pieces could not be sold and the various pieces of art were to be displayed at Fisk University as one collection.”101

The controversy over the paintings began in 2005, when the University filed an ex parte Complaint for Declaratory Judgment, and sought permission to sell two valuable paintings from the Alfred Steiglitz Collection, Radiator Building—Night, New York by Georgia O’Keeffe and Painting No. 3 by Marsden Hartley. As stated in the complaint, the “purpose of the proposed sale was to generate funds for the University’s business

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96 Uniform Trust Code sec. 413 (a), see also Restatement (Third) of Trusts, sec. 67.
97 Uniform Trust Code sec. 413 (a), comments.
98 Id.
101 Id., at 4.
plan’ to restore its endowment, improve its mathematics, biology, and business administration departments, and build a new science building.”

While the case was pending, the University’s request for relief “morphed” into a request for approval of a settlement agreement with the Crystal Bridges Museum of American Art, Inc., “whereby the University would sell a 50% undivided interest in the entire Collection for $30 million. . . . [and] the University and Crystal Bridges would each have the right to display the Collection at their respective facilities six months of each year.”

In its amended complaint, the University sought relief from the conditions placed on the gifted painting, pursuant to the cy pres doctrine. The University contended that its “bleak financial circumstance” rendered it “impractical to comply with the literal terms’ of the gifts,” as did “other material changes in circumstances that have occurred in the more than fifty years since the conditional gifts were made.” The chancery court denied the University’s amended request, applying New York law and concluding that O’Keeffe had specific and not general charitable intent in giving the artwork to Fisk.

The chancery court began its analysis of this question with a discussion about the importance of donor intent and what exact sources the court was using in order to determine donor intent. Relying on probate documents, correspondence, and personal statements, the court acknowledged that: “Indicative of a general charitable intent is that the Stieglitz Will and the O’Keeffe gifts consisted of donations not just to Fisk but other charities.” The court also noted that there was no gift over provision in the donation. However, the court also observed that: “Indicative of a specific intent are the intentions of a social statement and control and the proof supporting them.”

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102 Id.
103 Id., at 5.
104 Id., at 15
105 Georgia O’Keeffe Found. v. Fisk Univ., 312 S.W.3d at 15.
106 Id.
107 Id., at 5.
108 In re Fisk University, 2008 WL 5347750 (Tenn.Ch.) (Trial Order) (“It is, then, critical in the first instance for a court to isolate and identify exactly what the donor’s intent was in making a gift”).
109 In re Fisk University, 2008 WL 5347750 (Tenn.Ch.) (Trial Order) (“This Court has devoted a large part of its work in this case to identifying with precision the intent which motivated the donation of the Alfred Stieglitz Collection to Fisk. The sources the Court has used are the Alfred Stieglitz Will and probate documents; letters from Georgia O’Keeffe and Fisk documents, prepared at the time the Collection was donated to Fisk; and, subsequent to the donation, correspondence between Fisk and Ms. O’Keeffe, and statements by Fisk and Ms. O’Keeffe about the Collection.”).
110 Id.
111 Id.
Proceeding to determine whether O’Keeffe’s intent was general or specific, the court remarked that making any such determination was “elusive” and that “it is difficult to extract a concrete definition or principle to guide the Court in discerning in this case whether the intent is general or specific.” The court also remarked that “the question whether a settlor had general charitable intent beyond the specific purpose mentioned is ‘just another way of asking what the settlor would have done under the circumstances.’” Confronted with the question, however, the court decided that the facts of the record supported a finding of specific charitable intent.

The Court of Appeals disagreed. The appellate court stated that a donor’s general charitable intent could be demonstrated by “other charitable gifts and the provisions of the gift,” by “similar charitable gifts to several different charities,” and “the absence of a divesting clause.” Gift provisions stated that the purpose of the gift was to promote the study of art in the South, and there were no gift over provisions. In addition, O’Keeffe had made other similar charitable gifts to other charities. The court also noted that, in favor of finding a general charitable intent, there was also the “legal principle that the courts favor finding a general charitable intent.” Consequently, the court stated: “[T]he fact that Ms. O’Keeffe had a specific purpose and imposed specific conditions does not alter the fact that the motivation for the gifts to the University was to promote the study of art in Nashville and the South.” The appellate court therefore reversed the trial court’s finding and remanded the case to determine whether or not the University’s financial straits rendered compliance with the gift terms impractical or impossible.

On remand, the trial court concluded that financial necessity did indeed render compliance impossible, based on the uncontradicted testimony of Fisk’s President, Hazel O’Leary. Subsequently, the court evaluated three proposals for revision to the terms of the gift – two put forth by the Attorney General and the one put forth by the University in

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112 Id.
113 Id.
114 In re Fisk University, 2008 WL 5347750 (Tenn.Ch.) (Trial Order).
115 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 In re Fisk Univ., 392 S.W.3d 582, 588 (Tenn. Ct. App. 2011). O’Leary discussed Fisk’s budget cuts and financial statements, while also demonstrating that that the annual cost to maintain and display the Collection was $131,000.
the amended complaint. The trial accepted Fisk’s proposal because “(1) the superior resources of the Crystal Bridges Museum to provide this important Collection excellent support and access to the public, and (2) Fisk and Crystal Bridges have modified their agreements to assure that the Collection retains a presence in Nashville.”

When the litigation ended, a writer at the New York Times announced, “The long battle over the fate of Fisk University’s art collection is finally over.” One scholar asked: “Why did resolution of this conflict require six years of litigation and the expenditure of enormous amounts of charitable and public dollars?” Her answer to the question clearly implicated the cy pres doctrine: “The blame lies with the law itself: the centuries-old doctrine of cy pres . . . practically guarantees that years of litigation will ensue when a charity finds itself unable to comply with a gift restriction.” The litigation did stem from confusion around the cy pres doctrine and application of the general charitable intent principle. However, any confusion surrounding the principle can be answered by a shift to the presumption of general charitable intent and the gradually increasing willingness of courts, like the Tennessee appellate court, to construe intent broadly. Within the Fisk litigation and the appellate court’s decision lay the path to reform and the seeds of a clearer standard.

B. The Buck Trust and Wasteful Economic Conditions

Fiercely debated questions concerning cy pres have also emerged in connection with charitable trusts that have significant surplus income and run the risk of wasteful management. In this case, doctrinal reform was the direct result of the prolonged and controversial litigation concerning the Buck Trust. Beryl Buck established the Beryl Buck Foundation Trust by bequest in 1975. Buck’s will directed that the trust “shall always be held and used for exclusively non-profit charitable, religious or educational purposes in providing care for the needy in Marin County, California, and for other non-profit charitable, religious or educational purposes in that county.” At the time of Buck’s death, the assets – in the form of Belridge Oil stock –

122 Id., at 591.
123 Id.
125 Melanie B. Leslie, Time to Save the Dead Hand: Fisk University and the Cast of the Cy Pres Doctrine, 31 CARDOZO ARTS & ENT. L.J. 1, 3-4 (2012).
126 “In the Fisk case, the law’s fuzziness allowed the [O’Keeffe] Museum—an unrelated third party—to make a grab for the Collection under the guise of effectuating donor’s intent. The fact-specific cy pres standard also enabled the Tennessee Attorney General to make it extraordinarily difficult for Fisk to craft a solution involving entities located outside the state of Tennessee.” Id.
were worth approximately eight million dollars. Four years later, however, when Shell Oil bought Belridge, the stock prices soared and the trust assets became worth almost 300 million dollars.\footnote{128}

Faced with this unexpected and dramatic increase in trust assets, the Distribution Committee deliberated about how to approach spending in light of trust terms requiring that the spendable income be used in Marin county, a county with “one of the highest per capita incomes in the country and relatively few charitable needs.”\footnote{129} Ultimately, the committee, in 1984, “resolved that it was ‘impracticable and inexpedient to continue to expend all of the income from the Buck Trust solely within Marin County’ and authorized the filing of a petition to modify the geographic restriction of Beryl Buck's Trust.”\footnote{130} The Foundation, in its cy pres petition, requested authorization to “spend an unspecified portion of Buck Trust income outside of Marin County in the four other Bay Area counties preferentially served by the Foundation.”\footnote{131} Once the Foundation filed its petition, a frenzied debate began. John Simon recounted that: “The petition was characterized as a threat to the sanctity of wills and the health of philanthropy, and as an offense against capitalism, the American way of life, and God.”\footnote{132} A number of motions to intervene were filed — “46 Objector Beneficiaries sought to intervene in support of the Foundation's petition, and seeking to intervene in opposition was the Marin County Bar Association.\footnote{133} The University of California, Solano County, Mendocino County, and Sonoma County all sought to intervene solely on the question of whether the court should apply cy pres.\footnote{134} In the briefs prepared for trial, the Foundation argued that modification of the gift conditions was appropriate “on the basis of unanticipated changed circumstances, or ‘surprise,’ and ‘inefficiency.’”\footnote{135} The opposing side argued that there were no legal grounds on which to grant cy pres, that there was no “surprise,” that Buck’s intention was to limit expenditures to Marin County regardless of the value of the trust, and that “any perceived ‘inefficiency’ or ‘ineffectiveness’ was attributable to the Foundation’s conflicts of interest and improper administration of the Buck

\footnote{128 Kathleen Teltsch, Wealthy California County Fights for Legacy, N.Y. TIMES, Feb. 2, 1986. Mrs. Buck's trust was worth ten million dollars at the time of her death but $260 million by the close of probate and over $400 million at the time of trial. See Ronald Hayes Malone, Mary K. McEachron, and Jay M. Cutler, The Buck Trust Trial-A Litigator's Perspective, 21 U.S.F. L. REV. 585, 590 (1987).}
\footnote{129 Malone et al., supra note 128, at 590.}
\footnote{130 Id., at 591.}
\footnote{131 Id.}
\footnote{133 Malone et al., supra note 128, at 594}
\footnote{134 Id.}
\footnote{135 Id., at 609.}
Trust, not the Trust's terms, its value or the nature of Marin County.” In July 1986, in the midst of the litigation, the Attorney General of the State of California, the County of Marin, and the Marin Council of Agencies entered into a partial settlement agreement, which was adopted by the court six days later, “providing that 20 to 25% of income from the newly reconstituted Buck Trust would be set aside for one to three ‘major projects’ of ‘national and international importance.’”

On August 15, 1986, the court entered a judgment denying the cy pres petition. The court concluded that the Foundation had not proved that it was impossible, illegal or impracticable, to spend the trust income as directed in the trust terms. Moreover, the court concluded that “[n]either inefficiency nor ineffectiveness of philanthropy constitutes impracticability, nor does either concept constitute an appropriate standard for the application of cy pres.” Pursuant to the partial settlement agreement, which stated that the court would hold a hearing in July 1987 in order to select one or more of the “major projects” to be funded, in August 1987 the court directed trust funds be distributed to three ‘major projects’: The Buck Center on Aging, Institute on Alcohol and Other Drug Problems, and Marin Educational Institute. The court also appointed a special master to oversee the progress of these projects and ordered a “review [of] the progress and operations of each major project annually.”

Thus ended a prolonged process that included a six-month trial that produced nearly 15,000 pages of trial transcript and over 2,000 trial exhibits. Because of the hype surrounding the case as well as the major investment of resources in its judicial resolution, some called the case the “Superbowl of Probate.” Also because of the hype – and severe dissatisfaction with the outcome – reformers started a campaign to include the term “wasteful” as an acceptable criterion demanding the application of cy pres. Invoking the example of the Buck Trust, reformer advocates argued that “the legal right to dictate through a trust how wealth is to be used after death may lead to economic inefficiency because conditions inevitably will change in ways unforeseen to the settlor.”

The direct and successful result of this activity was modification to the Restatement (Third) of Trusts in 2003 and to the Uniform Trust Code in 2000, such that the term wasteful is now included in the standard rubric.

The Restatement (Third) of Trusts states that cy pres may be appropriate

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136 Id.
137 Simon, supra note 132, at 660
139 Simon, supra note 132, at 661.
140 Malone et al., supra note 128, at 610.
141 Id., at 637.
142 Macey, supra note 86, at 297.
when it “becomes wasteful to apply all of the property to the designated purpose.” In a comment to this section, the Reporter further describes “wasteful” as meaning that the funds far exceed what is necessary, rendering it imprudent not to expand the purposes for which the funds can be applied. On the flip side, but also an efficiency concern, the Uniform Trust Code sets forth expedited procedures for reforming small charitable trusts. A trustee may modify or terminate a trust with assets less than $50,000 “if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.” Fourteen states have enacted statutes providing for the availability of similar procedures.

While these reforms were unable to help in the Buck Trust case, the reforms may help with other trusts that are generating more income than they can spend. For example, a cy pres challenge has yet to come for the Kamehameha Schools Bishop Estate Trust (KSBET). Nonetheless, scholars have remarked that the “KSBET presents a classic example of a trust in need of modification via the cy pres doctrine to conform to conditions that have changed since it was established by the will of Princess Bernice Pauahi Bishop over 114 years ago. Aside from significant concerns about trustee abuse of power, a major concern is the efficient utilization of the trust’s income.

The trust is valued at approximately ten million dollars and the “revenue from 337,000 acres of Hawaii land, and worldwide investments that include 10% of the Wall Street firm Goldman Sachs & Co., is used

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144 Restatement (Third) of Trusts 67 (2003).
145 See id. § 67 cmt. c(1) (“The term ‘wasteful’ is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely ‘better use’ will suffice”). Uniform Trust Code was amended in 2001. Arizona, Nebraska, New Mexico and Wyoming have adopted the Uniform Trust Code. Delaware also includes the language about wasteful purpose in its cy pres statute. Fremont-Smith, supra note 20, at 178. These changes may have come in response to criticism in the wake of legal disputes involving the Buck Trust and the Hershey trust.
146 Fremont-Smith, supra note 20, at 179-80.
147 Uniform Trust Code, see 414(a).
148 Fremont-Smith, supra note 20, at 179-80.
149 The Trust has faced other legal challenges, including equal protection challenges to the discriminatory admission policies. See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006).
151 In 1999, the trust was “embroiled in a public tangle of boardroom intrigue, questionable investments, IRS audits and allegations of criminal acts.” Hawaii Trustees Plagued by Scandal, L.A. Times, March 29, 1999. All five trustees were, at that time, removed from office “after the Internal Revenue Service threatened to strip the estate of its status as a tax-free charitable organization.” Samuel P. King and Randall W. Roth, Erasure of Trust. Hawaii’s Bishop Estate: a cautionary tale of mismanagement at a charitable organization. ABA Journal, August 2007. The Bishop Estate “has been referred to as ‘the Enron of charities.’” Id. To date, trustees still receive upward of a million dollars a year in compensation.
solely to finance Kamehameha Schools, a 600-acre campus for 3,100 Hawaiian students that sits on a wooded hillside overlooking Honolulu.\textsuperscript{151} As Alex Johnson has observed, even assuming the lowest valuation of the trust corpus and a conservative rate of return, the trust would provide each student with a pro-rata share of $100,000 per annum.\textsuperscript{152} “If all the money generated by the KSBET was spent to support the Kamehameha Schools, in other words, the trustees would have to come up with creative ways to spend hundreds of millions of dollars annually to benefit a high school when such expenditures may be unnecessary, wasteful, and downright stupid.”\textsuperscript{153}

Similar questions have been asked about the Hershey Trust Company and Milton Hershey School. The trust, which is worth over five billion dollars, “has yielded an embarrassment of riches, which now includes almost $800 million in accumulated income, far more than the school needs for its 1,163 students, who receive free room, board, clothes, books, bikes and backpacks.”\textsuperscript{154} The school’s alumni, with help from the Attorney General, have blocked attempts to modify trust spending by means of cy pres.\textsuperscript{155} Moreover, in 2002 when the school announced a plan to diversify the trust’s investment portfolio by selling its controlling interest in the Hershey Company, public outrage was immediate. Although the Company’s stock jumped almost fifteen dollars based on news of the sale, the Attorney General obtained a preliminary injunction, and the trustees abandoned the sale, causing the stock price to drop back down.\textsuperscript{156} Robert Sitkoff and Jonathan Klick have argued that “the attorney general’s intervention preserved charitable trust agency costs on the order of roughly $850 million and prevented the Trust from achieving salutary portfolio diversification.”\textsuperscript{157} They further estimate that the blocked sale “destroyed roughly $2.7 billion in shareholder wealth, reducing aggregate social welfare by preserving a suboptimal ownership structure of the Hershey Company.”\textsuperscript{158}

The Hershey Trust, like the Bishop estate, may be a prime target for cy pres modification, with petitioners leveraging the reform concept of “wasteful” to facilitate amendment of trust terms. Introducing the concept of economic waste into cy pres analysis has, accordingly, been a major

\textsuperscript{151} Hawaii Trustees Plagued by Scandal, supra note 150.
\textsuperscript{152} Johnson, supra note 149, at 362.
\textsuperscript{153} Id.
\textsuperscript{154} Tamar Lewin, Alumni Fight for Soul of Richest Orphanage, N.Y. TIMES, November 30, 2000
\textsuperscript{155} Lewin, supra note 154. In 1999, “when the school sought permission to use $25 million to build a teacher training institute, and another $25 million a year to run it, the alumni association attacked the plan.” Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
reform with great relevancy. Furthermore, looking forward, wasteful cy pres analyses could help bring about the efficient use of significant sums of money that are now being tied up by outdated trust terms.

C. The Barnes Trust and the Doctrine of Deviation

Another highly publicized and hotly contested case, the Barnes Trust, has highlighted the utility of a related savings doctrine, the doctrine of deviation. The doctrine of deviation, applicable to both charitable and private trusts, allows a court to “modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.” The distinction from cy pres is that deviation applies to administrative terms, while cy pres relates to substantive terms.

As one scholar has observed, however, “distinguishing between administrative and substantive provisions is extremely difficult, if not impossible.” The Uniform Trust Code renders distinguishing between the two doctrines even more difficult, stating: “The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.” The main difference between the two doctrines, then, is that deviation is considered to be a more liberal tool in reforming charitable trust terms. Accordingly, “[c]ourts appear to apply the deviation doctrine in situations short of impossibility, particularly when ‘effective philanthropy’ or the public interest is paramount.”

In the case of the Barnes Trust, the deviation doctrine was used to make significant changes to the trust terms, changes that highlight the extent to which deviation can reform a trust under cover of administrative change. The Barnes Trust was formed by Albert Barnes, a physician and art collector, on his property in Lower Merion, just outside of Philadelphia. He collected primarily French Impressionist and Post-Impressionist pieces, but owned “about two thousand works in all, by artists ranging from El Greco

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161 Uniform Trust Code sec. 412 (a) (adding that “[t]o the extent practicable, the modification must be made in accordance with the settlor’s probable intention”).
In the comment to this section, the drafters added: “The purpose of the ‘equitable deviation’ authorized by subsection (a) is not to disregard the settlor’s intent but to modify inopportune details to effectuate better the settlor’s broader purposes.”
162 Alex M. Johnson, Jr., supra note 160, at 354.
163 Id.
and Rubens to Miró and Modigliani. As Barry Munitz, the president of the J. Paul Getty Trust, puts it: “There are some of the most spectacular paintings that the world has ever seen.” The value of the collection “ranges reputedly from twenty-five to one hundred million dollars.” Aside from the quality of the collection, the Barnes collection may be most well known for the restrictions placed on the artwork.

The 1946 bylaws to the trust indenture drafted by Barnes, an adamant populist, stated that “plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access to the art gallery and the arboretum upon those days when the gallery and the arboretum are to be open to the public.” Barnes insisted that the “purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden.” Accordingly, Barnes prohibited any “society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs.” Perhaps more importantly, Barnes prohibited the sale or loan of any of the artworks and specified that “[a]ll paintings shall remain in exactly the places they are at the time of the death of Donor and his said wife.”

When Barnes died in 1951, legal challenges to the trust terms began almost immediately. In 1953, private individuals sought to compel the alteration of the Barnes’ administrative rules allegedly limiting access of public to institution’s art gallery. The appellant did not file a cy pres petition, but rather a bill in equity for administrative change: “Appellant's bill does not seek application of the cy pres doctrine because of alleged failure of the trust, but complains of the manner in which the Foundation is being administered as being violative of its corporate purposes.” The court dismissed the complaint for lack of standing, but a dissenting Justice, in a preview of rulings to come, stated:

> Building a well of haughtiness around the gallery . . . is certainly not conducive to helping the ‘plain people.’ Every one has the right to dispose of his money, property and other possessions as he chooses, but once he stamps them with a public interest to the extent that they are exempt from public taxation he divests himself of the arbitrary control which was once his.

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167 Id.
168 Id.
169 Id.
Seven years later, the Attorney General filed “a petition for citation calling upon the Barnes Foundation and its trustees to show cause why they should not unsheathe the canvases to the public in accordance with the terms of the indenture.”\textsuperscript{172} This time, the court allowed the claim, because the Attorney General had standing, and ruled that the collection was obligated to provide public access to the artwork:

A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well as exist. The respondents argue that the paintings may be seen, but only privately. However, that is not what Dr. Barnes contemplated and it certainly is not what the tax authorities intended.\textsuperscript{173}

Despite the lack of a cy pres request, the court concluded that expanded public access was required in order to satisfy not only the terms of the trust indenture but also the obligations created by preferential tax treatment.

Litigation did not end there. Over the years an “extensive litigation history and the significant expense of maintaining an increasingly valuable collection”\textsuperscript{174} caused the Barnes Foundation to sink deep into troubled financial waters. Foundation trustees bemoaned “their inability to fundraise because of the limitations on public access, the small size of the board, the inability to deaccession works from the collection, and the constant costs of litigation.”\textsuperscript{175} Moreover, pursuant to the trust terms, the Foundation still did not charge entrance fees to collection visitors. In 2003, in response to financial circumstances, the trustees filed a petition to restructure the Foundation Board and relocate the collection from Lower Merion to Philadelphia in conjunction with the acceptance of a proposal from the Pew Charitable Trusts and the Lenfest Foundation. Pew and Lenfest offered $150 million to “ensure the Foundation’s long-term financial health,” conditioned on the collection’s move into Philadelphia.\textsuperscript{176}

Specifically, the Foundation trustees requested that the court “remove restrictions in the current [indenture, charter, and bylaws] that prevent relocation of the Foundation’s main gallery from the Merion facility to Philadelphia.”\textsuperscript{177} They further requested that the court “remove some of the conditions and stipulations set forth in the present Indenture that restrict the Foundation. The Foundation will therefore have the flexibility in the future to manage its affairs in accordance with its best professional and

\textsuperscript{173} Com. v. Barnes Found., 398 Pa. at 462-63.
\textsuperscript{174} Eisenstein, supra note 89, at 1751.
\textsuperscript{175} \textit{Id.}, at 1752.
\textsuperscript{176} Second Amended Petition of the Barnes Foundation to Amend its Charter and Bylaws at 5; http://www.barnesfriends.org/download/2nd_amended_petition_barnes.pdf.
\textsuperscript{177} Second Amended Petition of the Barnes Foundation at 9.
business judgment.”178 In making these requests, the trustees also reiterated that “[n]one of the proposed changes would alter the Foundation’s existence as an educational institution.”179 There was no request for cy pres relief.

Using the doctrine of deviation, the court granted the Foundation’s requests based on the Foundation’s financial circumstances.180 Addressing the question of relocation and citing to the Restatement (Second) of Trusts, the court stated “that the provision in Dr. Barnes’ indenture mandating that the gallery be maintained in Merion was not sacrosanct, and could yield under the ‘doctrine of deviation,’”181 provided that the proposed solution “represented the least drastic modification of the indenture that would accomplish the donor’s desired ends.”182 The court never discussed the applicability of cy pres, and allowed significant changes by deploying the doctrine of deviation.

The public outcry over the petition and the resulting decision was immediate and intense. The Board of Commissioners of Lower Merion Township passed a resolution stating that the Barnes Foundation was “part of the fabric, character and culture of Lower Merion Township” and any change in location was “in direct contravention of the intent and purpose of Albert Barnes.”183 Moreover, commentators railed against the proposal, calling it “death by disembowelment” 184 and an “act of cultural vandalism.”185 Despite all the turmoil,186 over a decade after the Foundation

178 Second Amended Petition of the Barnes Foundation at 9.
179 Second Amended Petition of the Barnes Foundation at 10.
185 Id. (citing Michael J. Lewis, COMMENTARY).
186 The legal battles did not stop after the 2004 ruling. A group “Friends of the Barnes” filed a petition to reopen the proceedings in 2007. See Orphan’s Court Division, No. 58,788, Memorandum Opinion Sur Appeal (J. Ott), May 15, 2008, available at http://www.barnesfriends.org/download/Memo%20Opinion%2005-15-08.pdf. Despite the fact that the court dismissed their petition for lack of standing, Friends of the Barnes filed another petition to reopen the case in 2011. In their second petition, the Friends once again argued that new information about funding had been revealed, this time in the movie “The Art of the Steal.” Orphan’s Court Division, No. 58,788, Petition to Reopen the Matter Based on Newly Discovered Evidence of Improper Conduct Not Know During the Time of Trial by the Attorney General of Pennsylvania and the Governor of Pennsylvania, Feb. 11, 2011, available at http://www.barnesfriends.org/download/Barnes%20(Petition).pdf. The court sustained preliminary objections to the petition. Furthermore, the court imposed sanctions on the petitioners. Orphan’s Court Division, No. 58,788,
filed the petition to amend the terms of Barnes’ trust indenture, the collection moved to Philadelphia and opened to the public in its new location. The galleries were “recreated with amazing fidelity in terms of proportions, window placement and finishings, albeit in a slightly more modern style. The structure is oriented to the south, exactly as in Merion; the same mustard-colored burlap covers the walls; the same plain wood molding outlines doors and baseboards.” All the paintings were placed in the same arrangements as in their previous home, and the New York Times art critic raved, in surprise, that “Barnes’s exuberant vision of art as a relatively egalitarian aggregate of the fine, the decorative and the functional comes across more clearly, justifying its perpetuation with a new force.”

While the doctrine of deviation clearly does not strictly speaking constitute a cy pres reform measure, the deployment of this related doctrine has provided a way for charitable organizations to circumvent more stringent standard cy pres requirements. Furthermore, the boundaries between the two doctrines has also blurred to such a degree that the lower threshold required to satisfy the deviation standard may be creating change within cy pres application as the two doctrines evolve to more closely resemble one another. Alex Johnson has, from this perspective, proposed that deviation and cy pres doctrines be merged and “treated, for all intents and purposes, as the same. In other words, courts should employ the same test to determine whether to change terms and conditions of so-called administrative or substantive provisions of a charitable trust.” Likewise, Ronald Chester has remarked that cy pres may become obsolete because events that trigger deviation are the same that trigger cy pres. The use of deviation, consequently, can be considered as part of the reform package, a step toward the liberalization of cy pres.

III. GIVING GIFTS IN THE CHARITABLE ECONOMY

Cy pres reform – grounded in modifications to the Uniform Trust Code and the Restatement (Third) of Trusts and making its way into judicial analysis – has begun to modernize the doctrine. Reforms have decreased

Memorandum Opinion and Order Sur Preliminary Objections to Petitions to Reopen (J. Ott).


188 Smith, supra note 187.

189 Id.

190 Ronald Chester, Modification and Termination of Trusts in The 21st Century: The Uniform Trust Code Leads A Quiet Revolution, 35 REAL PROP. PROP. & TR. J. 697, 709 (2001) (“Events that make continuation of the trust as is ‘impracticable,’ ‘impossible,’ ‘illegal’ or ‘wasteful’ seem to be just the types of ‘unanticipated circumstances’ necessary to trigger section 411”).
the guesswork for courts with respect to donor intent, created room for concepts of economic waste and efficiency, and focused on facilitating the optimal administration of charitable gifts organizations. What is still missing, however, is a theory to account for the correctness of these reforms. Legal scholars have begun to address this question by focusing on the tax benefits that donors receive. These scholars posit that a charitable bargain exists between the donor and the public, mediated through institutions and by the government. While this understanding of donor benefits and charitable giving is apt, it is nonetheless incomplete.

In this Part, I set forth the idea that charitable giving takes place within what I call the charitable gift economy – an economy driven by non-market exchanges and social norms. In the charitable gift economy, a concept derived from both anthropological and economic scholarship, gift giving is a form of exchange that is not merely a bilateral but rather embedded in a constellation of culturally relevant relationships. Understanding charitable giving within this gift economy allows us to see clearly why cy pres reforms are a positive step in the right direction. Since donors receive multiple social goods in this gift economy during their lifetimes, cy pres liberalization is justified. The donor, in short, has been given her due. Once we fully understand what the donor receives in the charitable gift economy, then, we also understand that making deviations beyond a donor’s lifetime is as understandable as it is often necessary.

I begin this Part by explaining the tax intervention and the current reasoning deployed by scholars to justify cy pres liberalization. Subsequently, I discuss charitable giving as part of a complex gift economy and detail the myriad tangible and intangible benefits that donors receive from their giving. Finally, I propose further reforms based on the understanding that the charitable gift economy provisions donors with a range of plentiful benefits during their lifetime.

A. The Modern Charitable Bargain

While the Dartmouth case and its progeny established the charitable gift as an implied contract – an exchange of resources for a perpetual legacy – the modern charitable bargain is better defined and more concrete. The major concrete benefit that donors now receive through their charitable giving is preferential tax treatment. Since the introduction of the charitable deduction in 1917, an individual has been allowed to deduct charitable contributions, subject to certain limitations. Donors receive a tax

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191 There is a longstanding debate among tax policy scholars about whether the charitable contribution should be classified as a tax “preference” or whether a deduction for charitable contributions instead is necessary to define the income tax base. See William Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309 (1972).
deduction on personal income taxes for making charitable gifts, in the form of established trusts, as lifetime gifts, and as bequests. Donors can deduct up to fifty percent of their annual adjusted gross income in charitable gifts, and also take carry over gift deductions for five years. This includes gifts made as charitable trusts, for which donors can take a tax deduction at the time of the trust creation.

Donors plan their charitable giving strategically through the use of planned giving vehicles – primarily various forms of trusts – in order to minimize the impact and consequences of the estate tax. In an exemplary statement, one fundraising strategist has remarked: “Tax and financial considerations are very important to [charitable trust donors]” and “[m]arketing materials for the very wealthy should contain tax and financial information.” Following this advice, many institutions emphasize the tax benefits of a donor’s charitable gift, especially in the context of charitable trusts and planned giving.

This preferential tax treatment provides a very significant, tangible benefit to donors. Unsurprisingly, numerous studies have shown that “awareness of tax advantage” is a prominent reason that donors make charitable gifts. In fact, studies about donor motivation in making charitable contributions reveal that tax benefit is almost always one of the

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192 The deduction is codified at I.R.C. §170 (1982 & Supp. IV 1986). I.R.C. § 170(c)(2) defines entities to which deductible contributions may be made. Congress first adopted a contributions deduction in 1917. War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). “Until the mid-1950’s, most people were limited to a deduction equal to 15% of their income; this limit was raised to 30% in 1954, where it stood until 1969. Also prior to 1969, individuals whose charitable gifts and income taxes together surpassed 90% of their taxable income in eight of the ten preceding years were allowed an unlimited deduction. Also in 1969, the general AGI limit was raised to its current level of 50%.” Miranda Fleischer, Generous to a Fault: Fair Shares and Charitable Giving 93 MINN. L. REV. 165, 171 (2008). See also MICHAEL J. GRAETZ AND DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 411 (7th ed., 2013) (“Although Congress provides incentives for individuals to donate significant portions of their income to charities, it does not believe individuals should be permitted to eliminate their tax liability entirely”).

193 The estate tax was enacted in 1916. For an overview of the estate tax and the current contestation, see MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2006). See OSTROWSKI, supra note 13, at 103-04.


top three reasons donors give major gifts.197 Relatedly, studies reveal that “[o]ne thing donors clearly do not want is to see their wealth pass to the government through taxes.”198

In light of this major benefit accorded to charitable donors, some scholars have highlighted the existence of a charitable bargain or contract between the donor and the public. For example, discussing donor tax treatment, Alex Johnson has observed: “[B]y establishing a charitable trust, the settlor has entered into a contract . . . . [that] provides tangible and intangible benefits to the settlor and tangible benefits to society.” 199 Similarly advertizing to an implied bargain, if an imperfect one, between donor and public, another scholar has remarked: “Charitable trusts receive enormous benefits from the public, justified by the public nature of the trust itself. The law does not require any proportionality between the benefits-tax exemption, existence in perpetuity, and public enforcement-and actual service to the public.”200 Scholars have therefore adverted to the substantial benefits that donors receive in the form of both preferential tax treatment and exemption from the rule against perpetuities. Furthermore, they have marshaled these facts to support the liberalization of cy pres analysis. The picture, however, remains incomplete.

B. Completing the Picture of Charitable Giving

To complete the picture, we need to understand charitable giving as situated in a complex gift economy. This requires more than understanding the concept of the charitable bargain to include tax benefits. Understanding the fullness of charitable exchange requires reimagining our conception of gift-giving. Gift-giving is not solely a bilateral exchange with easily definable, material benefits accruing to each party. Rather, gift-giving is a complicated form of exchange that provides a donor with numerous intangible benefits and operates within an intricate system of social networks and cultural norms. John Simon has described this more complete

197 See Vesterlund, supra note 196, at 569 (“Data from a survey of 200 big donors are suggestive of the impact that taxes have on giving . . . . This study revealed that ‘awareness of tax advantages’ was ranked the third most important motivator for making a charitable donation.”). The survey in question can be found in RUSS ALAN PRINCE AND KAREN MARU FILE, THE SEVEN FACES OF PHILANTHROPY: A NEW APPROACH TO CULTIVATING MAJOR DONORS (Jossey-Bass Nonprofit & Public Management Series, 1994).
198 OSTERW, supra note 13, at 101.
199 Johnson, supra note 149, at 387. Other scholars discuss the existence of a charitable bargain but maintain the focus on perpetuity in exchange for gifts. See, e.g., Eason, supra note 91, at 124 (“Society has thus struck a more conciliatory bargain with donors who contribute their property in furtherance of such public purposes. Societal concessions to charitable donors, in other words, permit these donors to exercise a degree of perpetual control over the use of contributed property in ways otherwise foreclosed by law.”).
200 Eisenstein, supra note 89, at 1786.
notion of the gift economy, stating that “the donation calculus”\textsuperscript{201} includes factors such as “tax incentives, absolute levels of wealth, ‘old money’ cultural norms, individual morality and altruism, and the desire for social power and prestige.”\textsuperscript{202} A full theory of this gift economy, however, has yet to be imported into trust law.

Anthropologists and sociologists pioneered the concept of the gift as a form of exchange. Marcel Mauss, in his seminal anthropological study, elucidated how gifts are in fact deployed to create informal contracts, cement social exchanges, and clarify intra-group relationships. According to Mauss and his followers, gifts are a clear form of currency and they allow members of certain communities and societies to signal not only appreciation or gratitude, but also kinship, obligation, and even superiority. Contrasting participants in the gift economies with those in commodity economies, Mauss observed: “[W]hat they exchange is not exclusively goods and wealth, real and personal property, and things of economic value. They exchange rather courtesies, entertainments, ritual, military assistance, women, children, dances, and feasts; and fairs in which the market is but one element and the circulation of wealth but one part of a wide and enduring contact.”\textsuperscript{203}

Economists as well as law and economics scholars have also debated what motivates gift giving and how gift giving constitutes a subtle form of exchange. Eric Posner has observed: “[A] gift to a friend often calls for a return gift on a future occasion, or at least expressions of gratitude; a gift to a business associate frequently creates the expectation of future dealings; and a gift to a politician generally requires the politician to show some favoritism to the donor in return.”\textsuperscript{204} Economists have also studied charitable giving, in particular, in an attempt to explain why individuals make charitable gifts when the economic return is absent and any other return is non-obvious.

Sociologists have likewise studied the reasons why donors choose to make charitable gifts. They focus on the nexus of non-economic exchanges in which charitable gifts are embedded and the social norms that govern these exchanges. Francie Ostrower has stated: “Gift exchange has been interpreted as a symbolic representation of the relationships among the individuals who exchange gifts. Philanthropic gifts are also expressive of relationships, but they express the individual’s relationship to, and identification with, particular social groups.”\textsuperscript{205} Motivated by the more practical concern of raising money, fundraising experts and leaders have also delved into analyzing which benefits, from a range of benefits, are most

:\textsuperscript{201} Id., at 1758.
\textsuperscript{202} Id., at 1758-59.
\textsuperscript{203} MAUSS, supra note 1, at 5.
\textsuperscript{204} Posner, supra note 11, at 569.
\textsuperscript{205} OSTROWER, supra note 13, at 98.
attractive to donors with an eye to better design in fundraising programs.\footnote{See generally FRUMKIN, supra note 14, Mount, supra note 14, and Barman, supra note 13.}
The sections that follow explain exactly how charitable gifts act as a multifaceted form of exchange in a gift economy in which “exchanges and contracts take place in the form of presents.”\footnote{MAUSS, supra note 1, at 3. For a discussion of how gifts – and bribes – have been treated in the representation of judicial administration, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 38-48 (2011).}

1. Signaling Status and Social Benefit

In the gift economy that controls charitable trusts and gifts, it is clear that innumerable benefits flow between the donor, the charitable organization, and the public. Furthermore, the bestowing of these benefits is often mediated by social groups, the institutional community, and the public at large. These benefits are both tangible and intangible. Outside of preferential tax treatment and beneficial estate planning, donors receive other tangible benefits as well in the form of donor recognition gifts and opportunities.\footnote{Charitable organizations cannot provide tangible benefits that exceed a certain amount in return for their contributions; otherwise, the benefit will impact the tax deductible status of the gift. The IRS has provided administrative guidelines. See Rev. Proc. 90-12, 1990-1 C.B. 471, available at http://www.irs.gov/pub/irs-tege/tp_1990-12.pdf.}

Some charities offer donors actual gifts in return for the donation – for example, recognition, welcoming or thank-you gifts, membership benefits like free tickets to events, updates on shows and exhibits, and so on. Similarly, large contributors may have buildings named after them, receive exclusive dinner invites, be invited to lunch with powerful politicians and so on.\footnote{Vesterlund, supra note 196, at 573. See also TERESA O'DENDAH, CHARITY BEGINS AT HOME 34 (1990) ("[m]ost members of the culture of philanthropy sit on several boards where they have the opportunity to meet, influence, and be praised by fellow philanthropists").}

Fundraising leaders have learned how to craft a range of giving opportunities that bring tangible benefits such as the naming of buildings or lecture halls, inclusion on donor walls, and invitations to black-tie events.\footnote{Vesterlund, supra note 196, at 583. Charitable trust donors, who are more likely to be high-end donors, receive a disproportionate amount of benefits such as naming opportunities.}

At least one scholar has argued that naming rights should not be valued at zero for tax purposes because the benefit is so significant. See William A. Drennan, Where Generosity and Pride Abide: Charitable Naming Rights, 80 U. CIN. L. REV. 45 (2011) ("This special rule
Donor relations and stewardship professionals in fundraising offices across the country are charged with making sure that donors are recognized in timely and gift-appropriate ways – whether it be inviting the donor of an endowed chair at a university to lunch with the faculty member who holds the chair or sending letters from students to the donors who fund their scholarships. That donors take these benefits seriously is demonstrated, as one economist noted, in that “the form of recognition the charity will provide in exchange for the gift is often spelled out in legal contracts, and there are even cases where donors have demanded the return of donations after their gifts have not been recognized to their satisfaction.”

Apart from these concrete benefits, donors of charitable gifts and trusts also receive intangible benefits from their gifts. Most particularly, charitable gifts perform a signaling function and mark the donors as members of a particular, usually high-status, social class or group. Ostrower argues that “philanthropy and nonprofits have a special place within the elite that goes beyond the particular services of the organization.” That is to say, philanthropic giving is a behavioral norm in the “culture of the elite” and charitable gifts do more than support a given organization, they announce group membership. “Through their philanthropy, wealthy donors come together with one another and sustain a series of organizations that contribute to the social and cultural coherence of upper-class life.”

The material benefits related to giving are, therefore, only the beginning. “Through charity benefits, board memberships, private events open only to large donors, and related mechanisms, elites carve out a separate world for themselves through philanthropy.” Charitable giving buys social status and “public prestige.” Through charitable giving, donors indicate to their peers as well as outsiders that they belong to a specific reference group and, subsequently, modulate their giving such that it aligns with the norms of their reference group.

The importance of reference groups might explain why fund-raisers often emphasize such social activities as parties, dinners, and reunions: these strengthen such groups. The importance of relative donations within these groups may explain the common practice of having large

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212 See, e.g., Penelope Burke, Donor-Centered Fundraising (2003).
214 Ostrower, supra note 13, at 48.
215 Id., at 36.
216 Id., at 48.
donors solicit contributions from others in their circle. People should presumably increase their donations after being told that a member of their group has given a large amount, especially after they have just had dinner with him.\textsuperscript{218}

Similarly, the listing of donor names – arranged according to giving levels – in annual reports, performance programs or other fundraising publications helps to both establish and police group norms of giving. Supporting the signaling value of public donor recognition, one study concludes: “[A] consumer is more willing to donate to an organization the more likely is the intended audience to hear about that donation. . . . this is understandable to the extent that such fund-raising activities publicize the amounts donated by others. Dinners, benefit concerts, and promotional literature can fall into this category.”\textsuperscript{219} Scholars have termed especially public forms of this behavior \textit{blatant benevolence}, and remarked that, for all donors, this kind of benevolence is “useful for publicizing one’s prosocial nature.”\textsuperscript{220}

Confirming the importance of norm creation, Eric Posner has stated that, “if people care sufficiently about their reputations (for being generous or for being wealthy), almost everyone will conform to a norm of gift-giving behavior.”\textsuperscript{221} Donor behavior may in fact be intimately calibrated to the perceived norms. As economists found in another study: “If the norms about social behavior within the group are violated by some group members not contributing what is considered their appropriate share of contributions to the common interest, this may induce other members of the group to reconsider.”\textsuperscript{222} Charitable gifts exchange wealth for status, resources for recognition, and support for belonging. The complex of relationships established through charitable gifting encompasses individuals, institutions, social groups and the public at large.

\textsuperscript{218} Harbaugh, supra note 213, at 281 (“Donors themselves freely discussed how they ‘use’ the desire for prestige as a tool in fundraising from their peers”). See also FRUMKIN, supra note 14, at 258 (“In such cases, it is not the needs or demands of beneficiaries that motivate philanthropy, but rather the web of social ties that shape individual charitable behavior and the desire of individuals to be seen as contributing their fair share.”); and OSTERWER, supra note 13, at 37.


\textsuperscript{220} Vladas Griskevicius, Joshua M. Tybur, Jill M. Sundie, Robert B. Cialdini, Geoffrey F. Miller, Douglas T. Kenrick, \textit{Blatant Benevolence and Conspicuous Consumption: When Romantic Motives Elicit Strategic Costly Signals}, 93 J. OF PERSONALITY AND SOCIAL PSYCH. 85, 87 (2007). The authors also suggest that blatant benevolence may serve romantic matching purposes.

\textsuperscript{221} Posner, supra note 11, at 576. See also FRUMKIN, supra note 14, at 258 (“the decision of how much to give can also be shaped by the norms for the social groups within which donors find themselves”).

Within the target social group, giving reinforces relationships. Charitable gifts are one of the tools that individuals employ in order to not only maintain networks of contacts but also to create added advantage and opportunities for themselves and family members. Donors will make a gift or join a board because a friend or colleague is involved with a particular organization; likewise, a donor may buy a table at an event because a friend is receiving an award.223 Donors exploit the charitable gift economy in order to build networking opportunities. Speaking about big-ticket charity events, one donor in Ostrower’s study said: “It’s an opportunity to meet people and do some things, which in my mind is networking more than anything else.”224 Another donor admitted to making a leadership gift and heading an alumni fund drive in order to improve his visibility “among . . . classmates, because everybody knows that someone who takes on the chairmanship of a class reunion is prepared to give.”225 For similar reasons, donors make leadership gifts in order to sit on boards, because board membership offers “valuable social and business connections.”226

For those individuals seeking entry into an elite social class, charitable giving is also a valuable tool. “Prestigious nonprofits and charity benefits become the target of ‘social climbing’ and networking.” Making significant gifts to the appropriate nonprofits “serves as a symbol of ‘having arrived’ socially.”227 A donor, speaking about avenues to social success, remarked that “If you move to [X] and you want to be accepted by the OK people, you break your back to get on the board of the museum . . . . The entrées leading off that board are not to be believed.”228 Exploring the phenomenon of charitable giving as a means to social climbing, economists have studied the utility of a common fundraising practice – kicking off a fundraising campaign with the announcement of one or more major gifts from high-profile donors. What the researchers found was “evidence to suggest that a contribution maximizing fundraiser will benefit from first soliciting donors who have a high social ranking, and then announcing their contributions to those of lower ranking.”229 Fundraising professionals themselves agreed that the “strategy may work because it enables subsequent donors to associate with the initial donors, [and] . . . enables

223 Ostrower, supra note 13, at 31-34.
224 Id., at 37. See also Frumkin, supra note 14, at 258 (“Helping may also provide an opportunity to expand one’s social network and access new social opportunities. By giving, donors can buy entrée into social groups and communities that have social prestige, political power, or business ties.”).
225 Ostrower, supra note 13, at 36.
226 Id., at 38.
227 Id., at 37. See also Odendahl, supra note 209, at 40-41 (“once a newly rich family turns to philanthropy, its members have a better chance of being accepted into upper-class society”).
228 Id., at 38.
new money to associate with old money.”230 The charitable gift economy, therefore, operates along various axes of ambition and exchanges are made for compound purposes.

2. Choosing Causes and Individual Self-Definition

Charitable giving provides further benefit to the donor by affording the donor an opportunity to participate in a project that is personally meaningful and that contributes to her individual sense of self-definition. Charitable giving allows donors to affiliate with specific groups, institutions, and causes, thereby signaling their tastes, preferences and ideals to a broad audience. In other words, “when it comes to explaining how and why people give, differences are rarely a function of differences in financial capital or even moral capital, but rather the intensity of associational capital, which takes the form of social networks and close identification with causes.”231

Charitable giving is by no means a monolithic endeavor and within the high-prestige world of philanthropy there are numerous opportunities for donors to give and partner with worthy organizations. As Ostrower found in her study, “[d]onors were often quick to note that there are many worthy causes, more than they could possibly support.”232 Given the wide range of possible objects of charity, and that the “sheer range of possibilities is daunting to many donors,”233 it comes as no surprise that “[t]he choice of what to support lies at the heart of defining a strategy for giving.”234 Indeed, “[a]ll philanthropic activity involves a choice about how to join public needs with private commitments in a way that is both beneficial for others and satisfying for the giver.”235 Usha Rodrigues, drawing on social identity theory, has also posited that non-profit organizations “sell” identity in a way that for-profit corporations cannot, thereby allowing for particularly strong individual identity formation through philanthropy.236

It therefore goes without saying that the “identification that develops between individuals and institutions may have various

230 Id.
231 FRUMKIN, supra note 14, at 259-60.
232 OSTROWER, supra note 13, at 33.
233 FRUMKIN, supra note 14, at 147.
234 Id. See also Paul G Schervish, Inclination, Obligation and Association: What We Know and What We Need to Learn About Donor Motivation, in CRITICAL ISSUES IN FUND RAISING 137 (D. F. Burlingame, ed. 1997) (“generosity is not a function of income but of the personal and social aspects of associational density, inclination, obligation, and invitation”).
235 OSTROWER, supra note 13, at 148.
236 Usha Rodrigues, Entity and Identity, 60 EMORY L.J. 1257, 1283 (2011) (“Nonprofits create and ‘sell’ a particular kind of identity, one in which an individual may participate as employee, donor, or volunteer”).
Meanings.” The key is that, in most cases, there exists a strong identification between the individual and the institution that she chooses to support. “[Donors] believe that they have a right to choose the causes they wish to support. Their choices reflect their personal interests and concerns.” Choices to affiliate with one organization or cause over another are moments of self-definition. The phenomenon of self-definition through charitable giving is reinforced by the fact that high-level philanthropic relationships are “ongoing and longlasting.” These giving relationships are continuing exchanges that build over the years, cultivated by recipient institutions and cemented by the donor’s sense of investment.

Gifts to educational institutions are a common way for individuals to signal a specific affiliative identity as well as family and social history. Individuals donate to specific schools and universities in their capacity as alumni or because a family member attended the institution. Donors also give to schools because they met their future spouses, friends and colleagues during their student days. In fact, “close associations between families and particular schools may lead individual donors to contribute even where their own sense of involvement is weak.” For these reasons, among others, giving to educational institutions is a strong norm among high-wealth donors, sometimes even capturing “the number-one priority in their charitable giving.”

Educational giving, however, is not the only outlet for self-definition through organizational affiliation. “Whether consciously or not, we can see that donors define the boundaries of philanthropy . . . in a way that legitimates them in following their own personal preferences.” Consequently, donors give to cultural institutions in order to signal their appreciation for and understanding of the arts, or in order to be regarded as “an expert” in a certain field. Religious organizations are similarly channels for donors to express certain parts of their identities, as are organizations dedicated to causes related to environmentalism, gender, and other specific social issues. Science funding, for example, has become a newly attractive province for major donors who, “from Silicon Valley to

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237 O淀粉row, supra note 13, at 35.
238 Id., at 130.
239 Id., at 34.
240 Id., at 87.
241 Id., at 88-89. See also Rodrigues, supra note 236, at 1306 (“when universities market to potential donors – chiefly alumni – social identity becomes highly important. Few organizations in an individual’s life shape one’s identity as profoundly as one’s undergraduate institution.”).
242 Id., at 32.
244 O淀粉row, supra note 13, at 131.
245 Id., at 37.
Wall Street . . . seek to reinvent themselves as patrons of social progress through science research.”

In addition, health issues are often very personal ones, and donors often contribute significant amounts to particular medical research when a family member suffers from the disease in question.

By creating private foundations, donors seek to clarify their personal identity and vision through what one scholar has called “strategic giving.” This means individuals leveraging charitable giving “to enact their private visions of the public good.” Usha Rodrigues has suggested that “[f]oundations are in a sense the epitome of nonprofits serving an identity function,” and that there is a specific kind of prestige “associated with creating a nonprofit that fulfills the founders” goals.

Even working with pre-existing institutions, as sophisticated consumers “donors have increasingly defined giving styles and engagement strategies that call for close collaboration between themselves and nonprofit organizations.”

Accordingly, donors approach their charitable giving through the lens of a pre-set “philanthropic agenda” that is based on personal considerations. Susan Ostrander, describing trends toward increased donor control in gifting has observed: “The term social entrepreneur is now often used as a substitute for the term philanthropist, and it typifies the authoritative and directive stance of high donor control where donors develop and carry out their own personal social visions through their philanthropy.”

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247 Devera Pine and Sally McLain, Research Funding: No Longer Just Government Dollars, 2 P&S JOURNAL (1997) (“In other cases, donors are motivated when they, family members, or close friends are touched in a dramatic way by a disease or condition that needs to be researched and eradicated. ‘In general, people give money for research because it hits an emotional spot,’ says Anke Nolting, associate dean and executive director of development and alumni relations.”), http://www.cumc.columbia.edu/psjournal/archive/archives/jour_v17n2_0020.html. See also Broad, supra note 246 (describing major gifts to medical research by donors who have experienced personal or family trauma and are seeking medical advancement).
248 Rodrigues, supra note 236, at 1303.
249 Id.
250 Id.
251 Id.
252 FRUMKIN, supra note 14, at 265.
253 Susan A. Ostrander, The Growth of Donor Control: Revisiting the Social Relations of Philanthropy, 36 NONPROFIT AND VOLUNTARY SECTOR QUARTERLY 356, 361 (2007). John Eason has speculated that this type of “entrepreneurial” giving may in fact increase the number of donors who place restrictions on their gifts. See John Eason, The Restricted Gift Life Cycle, or What Comes Around Goes Around, 76 FORDHAM L. REV. 693, 704 (2007) (“This trend [impose specific terms and conditions upon their gifts] is in part attributable to the growing number of entrepreneurial donors who are confident in both their views and their ability to effectively guide an organization towards its mission.”).
254 Ostrander, supra note 253, at 362.
Whether or not donors see themselves as strongly agentic social entrepreneurs, they nonetheless view charitable giving – and the restrictions that they place on gifts – as an opportunity to create a unique imprint on the world around them. Gifts are, in this light, markers not just of status but also of personality. Gifts help donors to craft a public persona, just as they can facilitate individual self-actualization. And in either – or both – cases, these multiple modes of interaction and association between donors and their charitable projects underscore the idea that the donor derives great benefit, in terms of personal satisfaction as well as self-definition, through giving.

3. Feeling the Warm Glow

Behavioralists, in economics and other social sciences, have also done research on “warm glow” – their term for the personal pleasure that donors experience as a result of their own charitable giving. From this perspective, donors give not because of concern for their public personas but rather because giving makes them feel good about themselves. Susan Rose Ackerman has observed that: “One explanation for giving is that donors benefit from the act of giving itself… Donors may value not only the benefits supplied by the organization, but also their own acts of charity.”

Likewise, economists recognize: “To better explain charitable giving it has been argued that . . . there are many benefits that only the contributor experiences.”

Pursuing this question of why people give, especially to charitable causes, economists have consequently concluded that one strong factor for charitable giving is “warm glow.” Economists define warm glow as “the sense of agency associated with the act of voluntary giving” and classify it as one motive, among others, for charitable giving. Economists generally believe that donors fall somewhere on a spectrum between pure altruism and pure egoism, and that their giving is motivated by a complicated combination of factors: “Clearly social pressure, guilt, sympathy, or simply a desire for a ‘warm glow’ may play important roles in the decisions of agents.”

The middle area of the spectrum is home to what economists
call “impure altruism.” That is, “[c]onsiderable evidence exists indicating that givers are neither pure altruists nor pure egoists. Rather, the evidence suggests that givers are impure altruists, motivated by both altruism and warm glow.”

Studies of impure altruism predict that, “[g]iven the choice, people are assumed to prefer to give directly, that is, they prefer the bundle with the most warm glow.” Certain subsequent game experiments have demonstrated that warm glow is a determinative factor in charitable giving: “Our results suggest that warm glow giving exists and is significant. Furthermore, when we compare our findings to those of other studies that examined charitable giving without separating warm glow from altruistic giving, the results suggest that warm glow motivates a substantial proportion of all giving.” Studies of neural responses have similarly indicated that the “[s]ubjective satisfaction [of the study participant] increased as transfers increased and costs decreased and was higher in the voluntary . . . than in the mandatory conditions.” Approaching the question of warm glow from an organizational perspective, another scholar has suggested that the particularities of the nonprofit form is “bound up with warm glow” in a way that other corporate forms cannot recreate.

None of this is to suggest that altruism pays no part in charitable giving. What is nevertheless evident from this analysis of the myriad motives for charitable giving is that altruism is impure at best. Moreover, it is clear that considerations about status, social identity, and personal satisfaction weigh heavily in a donor’s decision to make a charitable gift and, in particular, where and how to direct a gift.

C. Aligning Cy Pres Reform with the Charitable Gift Economy

Donors receive a robust set of benefits that encourages us to reconceive the transaction between donor and institution based on a more complete understanding of the extended gift economy in which charitable giving takes place. The charitable gift economy is an elaborate economy organized around personal favors, social norms, institutional access, public

260 Id.
261 See also Thomas R. Palfrey & Jeffrey E. Prisbrey, Anomalous Behavior in Public Goods Experiments: How Much and Why?, 87 AMERICAN ECON. REV. 829, 842 (1997) (“We found that altruism played little or no role at all in the individual’s decision and on the other hand warm glow effects and random error played both important and significant roles”).
262 Harbaugh, et al., supra note 258, at 1623.
263 Rodrigues, supra note 236, at 1288.
prestige, and elite status. Accordingly, we must recalibrate how we think of the charitable giving.

Cy pres reform and the liberalization of cy pres doctrine harmonizes with this recalibrated understanding of charitable giving as squarely situated in a complex gift economy. From this perspective, cy pres reform is based on the idea that donors receive sufficient benefits during their lifetimes such that perpetual adherence to donor intent is neither necessary nor appropriate. That is to say, perpetual adherence to donor intent is no longer the only or even the primary benefit that flows to donors. Historically, this privileging of donor intent may have been more appropriate than it is today. However, with the recognition of not only tax advantage but also the wealth of social and psychological benefits donors receive, there is ample reason to discount the controlling value of donor intent. The doctrinal changes and reforms discussed in the cases in Part II are therefore not only normatively good but also theoretically sound.

In fact, based on this understanding of the charitable gift economy, further reform may be appropriate. In this vein, I propose an additional reform – that donor control be time-limited in order to reflect and properly weight the presence of major donor benefits. The real question, in this new economy, is how much benefit the donor receives for her charitable giving. As the value of the lifetime benefits increase, the sway of donor intent after a donor’s death should decrease. A theoretically accurate way to go about answering this question—one which I do not propose here—would be for courts analyze exactly what benefits a donor received in order to better understand how much weight donor intention should receive. Courts could examine whether the donor received naming rights, participated on a board as a result of a gift, established new institutional relationships, or otherwise benefitted from the gift. This approach, however, would be difficult to realize. These kinds of fact-sensitive inquiries into the benefits received by the donor would be exceedingly burdensome for courts. Furthermore, these inquiries would require the almost impossible quantification of numerous intangibles. How, for example, would a court calculate the value of any reputation enhancement, prestige value, or personal satisfaction received from making a charitable gift?

An alternate approach, one that would be easier to implement, would be to set time limits on donor control of a restricted gift. Time limits help courts avoid difficult questions about the valuation of benefits while still acknowledging the force of the charitable gift economy. Time limits, especially those indexed to the death of the donor, operate on the understanding that numerous donor benefits accrue to the donor during her lifetime, when the donor has the opportunity to enjoy these benefits. Consequently, because the donor has enjoyed the rewards of charitable giving while alive, after her death the benefit of the gift should shift to the institution and larger community the gift is meant to support. A time-based approach recognizes that, “[a]s the warm glow that originally accompanied a
donor’s charitable gift begins to fade with time, however, the circumstances and opportunities for public benefit that framed that gift also inevitably evolve.”\textsuperscript{266} Moreover, Rob Atkinson has stated: “The moral force of commitments may also diminish over time. . . . Beyond a point, the value to a donor (charitable or otherwise) of controlling the future probably diminishes to the verge of vanishing.”\textsuperscript{267}

Previous proposals for reform have explicitly called for time limits of various kinds. Lewis Simes, in his seminal 1955 lectures about “Public Policy and the Dead Hand” proposed that “[a]fter the expiration of a fixed time, say thirty years, or earlier with the approval of the trustees and of the donor, if living, a broadened cy pres should be applicable.”\textsuperscript{268} At the end of the thirty years, courts would presume general charitable intent and interpret restrictions broadly. Alex Johnson has proposed a revivification of the Rule Against Perpetuities in order to limit the duration of donor restrictions on gifts. While the charitable trust could exist in perpetuity, the restrictions would be subject to the time limitations embodied by the Rule Against Perpetuities.\textsuperscript{269} After the expiration of the time period, the assets in the trust would be “delivered to an entity for disposition, and that entity will have power to dispose of the assets without any compliance or adherence to the settlor’s wishes.”\textsuperscript{270}

Iris Goodwin, in her discussion of the Princeton case, has also noted the importance of time periods. She has suggested that “[t]he administration of a restricted gift should be governed by a succession of ‘Program Periods’ . . . . [of] a length sufficient to allow the charity to steward the grant with a degree of autonomy and also to gather evidence demonstrating the feasibility of the stipulated mission given present circumstances.”\textsuperscript{271} Goodwin recommends that fifteen years might be an appropriate “program period,” and that during the first period “the charity would be required to adhere to the strict terms of the grant.”\textsuperscript{272} After that period, the charity would be allowed to proceed with greater latitude in interpreting gift restrictions.\textsuperscript{273} These administrative procedures would help “address the burdens of time.”\textsuperscript{274} Similarly, John Eason has written about

\begin{footnotes}
\footnotetext{266}{Eason, supra note 91, at 124.}\footnotetext{267}{Atkinson, supra note 10, at 1132.}\footnotetext{268}{Simes, supra note 76, at 139.}\footnotetext{269}{Johnson, supra note 149, at 383-84.}\footnotetext{270}{Id.}\footnotetext{271}{Iris J. Goodwin, \textit{Ask Not What Your Charity Can Do For You: Robertson v. Princeton Provides Liberal Democratic Insights}, 51 ARIZONA L. REV. 75, 123 (2009).}\footnotetext{272}{Id.}\footnotetext{273}{Id.}\footnotetext{274}{Id.}\end{footnotes}
the “restricted gift life cycle,” adverting to the idea that the obligations that accompany the management of restricted gifts changes over time.275

Building on these proposals, I suggest a similar kind of timeline. To begin, donor restrictions should be supported during the donor’s lifetime. Donors should be able to enjoy the benefits that accrue to them while they are alive and still able to appreciate the full extent of any social and psychological aftereffects of giving. Moreover, requests to change gift restrictions due to changed circumstances could be addressed in consultation with the donor. In these cases, cy pres would not even be necessary. In cases where communication with the donor was not possible, courts could evaluate cy pres petitions according to reformed standards discussed previously. That is to say, a court engaging in cy pres analysis would – as discussed previously – broadly interpret the requirement that the terms be “illegal, impractical, impossible or wasteful” and presume a general charitable intent.

The death of the donor would be a touchstone event and mark a bright line with respect to donor conditions. I would, in fact, suggest that this event should all but extinguish the need for judicial adherence to donor restrictions. The donor, up until that point, will have received the full benefit of her gift; after that point, the benefit should flow, accordingly, to the institution and the public. Thanks to her gift, the donor has benefitted tax-wise, through the acquisition of social status, and by generating feelings of self-satisfaction. At death, the balance should shift and courts should consider the public benefit rather than donor benefit.

In concrete terms, this would mean an even more liberalized cy pres procedure. Doctrinal modification could entail creating a presumption that gift restrictions, in this context, met the criteria of “illegal, impractical, impossible or wasteful.” Alternately reform might entail dropping that requirement altogether, akin to deviation. Further amendments to doctrine might also entail dropping the requirement of general charitable intent out of judicial analysis so that courts would not be required to address this question and parties would not be required to expend resources trying to prove or disprove general charitable intent. The most radical reform would be to eliminate the need for either cy pres or deviation petitions and allow trustees and directors to spend the gift money according to institutional need without any judicial intervention. This last type of reform would be most appropriate after the passage of a certain time period, such as fifty years, when the donor’s spouse and immediate family would likely no longer be alive either.

275 Eason, supra note 253, at 697 (“considerations bearing upon the donor-recipient relationship at any given time will acquire added significance as the seemingly isolated actions inspired by those considerations reverberate throughout the period spanning from inception of the gift to its potential restructuring over time”).
There are drawbacks to such a timeline and such reform, to be sure. The most salient critique is that such a decrease in adherence to donor intent will lead to a related decrease in charitable giving. Commentators fear that “disregarding donor intent will have an adverse effect on charitable giving; once donors know their intentions can be disregarded without legal penalty, they will be less inclined to give.” Moreover, commentators have speculated that by failing to uphold donor terms and intent, courts may remove incentives not only to philanthropy but also to productivity. It is more likely, however, the myriad benefits that donors receive during their lifetime – including a range of financial, social, and psychological benefits – make giving an attractive proposition even in the absence of perpetual adherence to donor conditions. Charitable giving is an estate planning strategy, a social norm, a tool for shaping personal identity, and a moment of pleasure. The force of these tokens of the charitable gift economy overrides any danger associated with the removal of one particular motivation to give.

CONCLUSION

When Marshall wrote, almost two centuries ago, “that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable,” the philanthropic landscape differed significantly from the modern one. Donors did not make charitable gifts as part of a larger strategy to minimize tax burdens or engage in estate planning. Donors were not wooed by sophisticated fundraising professionals and with a full menu of donor benefits and donor recognition mechanisms. Moreover, donors were not rewarded to the same degree that they are now with board memberships, leadership volunteer opportunities, or strategic institutional partnerships. Donor intent, consequently, reigned supreme as both inducement and reward for charitable giving.

More recently, cy pres reform has slowly but steadily chipped away at the supremacy of donor intent and made it easier for institutions to reform restricted gifts through judicial intervention. Changes adopted by the Uniform Trust Code, the Restatement, and the Uniform Prudent Management of Institutional Funds Act have liberalized cy pres procedure

276 Atkinson, supra note 10, at 1121. Responding to this point, John Simon remarked in relation to the Buck Trust challenge: “[P]ast experience points away from a chilling effect on gifts.” In fact, Simon noted, “giving in England actually increased following cy pres developments that were much more unsettling to donors than any message the Buck Trust case could send.” Simon, supra note 132, at 662-63.

277 Macey, supra note 86, at 297 (stating that “regulating how a settlor can dispose of his wealth may lead to inefficiencies because such interference would decrease the incentives to accumulate wealth”).

278 Dartmouth College v. Woodward, 17 U.S. at 647.
by shifting the presumption in favor of general charitable intent, adding “wasteful” as a criterion, and blurring the line between cy pres and deviation. These reforms represent positive change. What has been missing, however, is a theory to support these and future reforms.

Scholars have made inroads on this question by emphasizing the preferential tax treatment that donors receive. Nevertheless, until we understand charitable giving as embedded and operational within a gift economy, fueled by social exchanges and regulated by cultural norms, we will not be able to get at the true extent of benefits flowing to donors. More specifically, we will not recognize the significant intangible benefits donors receive in exchange for their charitable gifts, including increased social prestige, opportunities for social identity creation, and a strong sense of self-satisfaction. Adopting the charitable gift economy concept into our understanding of trust principles will promote a more modern and nuanced legal view of philanthropy. Working on this new understanding of charitable giving, courts will be equipped to both support cy pres reform and recalibrate the balance between donor and public benefit.