

March, 2007

From the Dead Hand to the Living Dead: The Conundrum of Charitable Donor Standing (symposium)

Evelyn Brody, *Chicago-Kent College of Law*

FROM THE DEAD HAND TO THE LIVING DEAD: THE CONUNDRUM OF CHARITABLE-DONOR STANDING

*Evelyn Brody**

TABLE OF CONTENTS

I. INTRODUCTION	1186
A. OVERVIEW	1186
B. KEY LEGAL QUESTIONS	1189
1. <i>Does It Matter If Property Law or Contract Law Applies? (See Part II)</i>	1190
2. <i>What Is the Relationship Between Donor Standing Here and Donor Standing (Or Lack Thereof) in a Cy Pres Proceeding? Can We Meaningfully Distinguish Between a Suit to Enforce a Restriction and a Suit over Charity Governance? (See Part III)</i>	1193

* Professor, Chicago-Kent College of Law, Illinois Institute of Technology. This Article was initially prepared for *Grasping the Nettle – Respecting Donor Intent and Avoiding the “Dead Hand,”* Annual Conference of the National Center on Philanthropy and the Law (NCPL), New York University School of Law (New York City, Oct. 27–28, 2005); I appreciate comments from my discussants, Harvey Dale and Harvey Goldschmid, and from the attendees, especially Rob Atkinson, Bonnie Brier, Laura Chisolm, John Eason, Marion Fremont-Smith, Susan Gary, Lorraine Sciarra, John Simon, and Steve Schwarz. I am grateful, too, for comments from attendees at my presentation of prior drafts at the Second Annual University of Illinois—Chicago-Kent College of Law Colloquium (Champaign, Nov. 4, 2005); the Moritz College of Law Faculty Workshop (Ohio State University, Feb. 6, 2006); the 35th Annual Conference of the Association for Research on Nonprofit Organizations and Voluntary Action, as part of a panel on “Charitable Donors and the Legal Construction and Enforcement of Donor Intent” (Chicago, Nov. 17, 2006); and the Association of American Law Schools 2007 Annual Meeting, as part of a panel on “State-Level Legal Reform of the Law of Nonprofit Organizations” (Washington, D.C., Jan. 5, 2007). Special thanks to David A. Brennan, Ira Mark Bloom, John Colombo, Ed Halbach, David Hyman, Garry Jenkins, Bruce Johnson, Creola Johnson, Allan Samansky, Jack Siegel, and Donald Tobin. While this Article draws in part from American Law Institute, *Principles of the Law of Nonprofit Organizations* (Preliminary Draft No. 3, May 12, 2005), drafted by me as Reporter for discussion by the project’s Advisers and Members Consultative Group, this Article and that draft reflect my views only.

3. <i>What Is the Significance of Attorney General Action, or Inaction? (See Part IV)</i>	1195
4. <i>Can Courts Address the Problems in a Satisfactory Way, or Is Legislation Needed? (See Part V)</i>	1195
II. RESTRICTED CHARITABLE GIFTS: PROPERTY, CONTRACT, OR OTHER LAW?	1197
A. STANDING UNDER COMMON LAW CHARITABLE TRUST DOCTRINE	1197
1. <i>Standing of the Settlor, in a Direct Suit or as One with a Special Interest</i>	1198
2. <i>Conditional Gifts Contrasted</i>	1201
3. <i>Visitors and Trust Protectors</i>	1203
B. RESTRICTED GIFTS TO CORPORATE CHARITIES: DRAWING ON TRUST DOCTRINE	1206
1. <i>Effect of Restriction</i>	1206
2. <i>Standing of Donor of Restricted Gift</i>	1209
C. STATUTORY DEVELOPMENTS	1213
1. <i>Uniform Management of Institutional Funds Act (UMIFA) (1972)</i>	1213
2. <i>Uniform Trust Code (2000)</i>	1215
3. <i>Revised UMIFA: The Uniform Prudent Management of Institutional Funds Act (UPMIFA) (2006)</i>	1216
4. <i>Nonprofit Corporation Statutes</i>	1219
D. CONTRACT DOCTRINE	1223
1. <i>Contrasting Private Contracts and Restricted Charitable Gifts</i>	1223
2. <i>Symmetry for Applying Contract Law?: Charitable Pledges</i>	1230
III. DISTINGUISHING IMPLEMENTATION, BREACH, AND CY PRES	1233
A. IMPLEMENTATION VERSUS BREACH	1234
B. "SAVING" DONOR INTENT THROUGH DEVIATION AND CY PRES	1237
C. "SELF-HELP" MODIFICATION: PERMITTED, BREACH, OR RATIFICATION?	1240

IV. RELEVANCE OF THE REASON FOR LACK OF ATTORNEY GENERAL ENFORCEMENT	1244
A. CASES NOT INVOLVING ATTORNEY GENERAL CONFLICT OF INTEREST	1245
B. ATTORNEY GENERAL CONFLICT OF INTEREST	1250
V. DESIGNING A POSITIVE LAW OF “GIFTRACTS”	1258
A. INTRODUCTION	1258
B. STANDING OF DONOR (OR ALTERNATIVE BENEFICIARY): DIRECT AND DERIVATIVE SUITS	1261
1. <i>Direct Action by Donor or by Alternative Beneficiary of a Gift Over</i>	1262
2. <i>Derivative Suit by Donors: Open (Legislative?) Issues</i>	1264
a. <i>Allowance of Donor Standing to Enforce Restriction</i>	1264
b. <i>Attorney General Behavior</i>	1266
C. DONOR’S ROLE IN CY PRES PROCEEDING AND EFFECTS OF THE PASSAGE OF TIME	1266
D. PROPOSED APPLICATION OF LEGAL REGIME TO PARADIGMATIC CASES	1273
VI. CONCLUSION	1274

I. INTRODUCTION

A. OVERVIEW

For hundreds of years, scholars and practitioners have debated the central position of donor intent in Anglo-American law—the right of the “dead hand” to govern from the grave the use of a charitable donation into the indefinite future, even into perpetuity.¹ The topic of this Article is not, however, that normative position, but rather the seemingly more mundane question of whether the donor can enforce his or her intent in court. As Professor Rob Atkinson cautions: “Standing questions are ‘who’ rather than ‘what’ questions. . . . Technically speaking, [a denial of standing] is merely a determination that the claim, however meritorious, should be asserted by someone else.”² Consider the following four scenarios:

CASE 1: D gives \$100,000 to C University to establish a fund to support library operations.

CASE 2: D gives \$100,000 to C University to establish a fund to support library operations. C agrees that D may bring suit to specifically enforce the restricted gift.

CASE 3: D gives \$100,000 to C University to establish a fund to support library operations. C agrees that D and D’s descendants may bring suit to specifically enforce the restricted gift.

CASE 4: D gives \$100,000 to C University to establish a fund to support library operations, but that if C University does not carry out the purposes of the gift, the gift shifts to H University.

This Article considers whether these four cases provide D with the same rights to enforce the charity’s performance of the gift, and, if not, whether they should be the same. That is, does—and

¹ See generally Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997) (discussing legal significance of donor intent).

² Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 658 (1998).

should—drafting make a difference? Does—and should—the law care whether the donor has explicitly obtained the consent of the charity to specific rights of private enforcement? Moreover, does it matter that there is another charity named as an alternative beneficiary of the gift? I supply suggested answers to these four cases at the end of Part V of this Article.

Traditionally, private parties—including donors—have no legal authority to sue to enforce charitable duties. “[D]espite the fact that the organization is legally bound by specific terms of the gift, *legally* it is not the donor’s concern. It is *society’s* concern, to be pursued (or not) by society’s representative, the attorney general.”³ The reason for disabling the donor might be to recognize the completeness of the gift for public purposes. The rule, however, applies even when the donor is not seeking a return of the gift—indeed, a donor who has a reversionary interest in the case of failure of the gift *does* have standing to sue for its return. In light of this focus on whether the plaintiff has a direct interest in obtaining the property, in situations where, as is most likely, the donor wants to make an irrevocable gift to charity, a conditional gift in the form of a “gift over” to another charity can be useful. Thus, when a gift is made “to Charity X, but if the terms of the gift are not carried out, then to Charity Y,” then the alternative charity can sue to claim the gift. In theory, this direct oversight by the alternative beneficiary and prospect of losing the property for noncompliance with the gift terms would concentrate the mind of the initial donee—but so would granting standing to the donor (when alive and available). And donor enforcement might be a better mechanism to carry out the donor’s original charitable intent.

The traditional legal bar to donor standing forces the charitable donor to make the case to the person traditionally granted standing to sue: the state attorney general. Such a framework, though, depends on “the inclination and budget of a public official” to enforce charitable duties.⁴ If the donor cannot persuade the attorney general to act, the donor must employ extra-legal avenues, such as

³ Laura B. Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6 NONPROFIT MGMT. & LEADERSHIP 141, 147 (1995).

⁴ *Oberly v. Kirby*, 592 A.2d 445, 468 (Del. 1991) (addressing “vindicat[ion]” of charitable beneficiaries’ rights).

bringing public pressure on the charity to change its behavior. To proponents of this system, this result is a good thing—it keeps the law out of disputes best addressed by private parties, particularly including the “market” for future donations. After all, most charities are in a repeat game, although often with different counter-parties, and need to develop a reputation for honoring their promises.

Like other procedural “technicalities” that bar reaching the merits, however, the traditional rule that a donor lacks standing to complain in court about a charitable donee’s use of a restricted gift can baffle and even infuriate. This legal state of affairs leads donors to adopt a range of self-help measures (one of which is the gift over mentioned above).⁵ Anecdotally, donors’ increasing attempts to influence charities’ use of donations have been taking the form of “contracts” specifying charities’ performance obligations and donors’ enforcement rights. While these detailed instruments have not yet been tested in court, unhappiness with the relatively primitive structure of current charity law is not limited to laymen.⁶ In a small but growing recent trend, courts increasingly have been willing to grant donors the right to bring suit for reversion when not explicitly

⁵ For example, see Jack Siegel’s suggestions to a donor in the situation of the plaintiff who was denied standing in *Prentis Family Foundation v. Karmanos Cancer Institute*, 698 N.W.2d 900 (Mich. Ct. App. 2005), discussed in Part II.D.1. See JACK B. SIEGEL, A DESKTOP GUIDE FOR NONPROFIT DIRECTORS, OFFICERS AND ADVISORS: AVOIDING TROUBLE WHILE DOING GOOD 444 (2006) (suggesting, “[i]n the case of building naming rights, filing an appropriate deed that requires any building associated with the land to carry the specified name”).

⁶ For supporters of expanded standing, see George Gleason Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 633–36 (1954); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 443–44 (1960); see also Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 609–10 (1981) (“[I]t makes sense to deny standing to [donors] only if the consequence would be large numbers of spite suits, strike suits, or suits filed through sheer idiocy . . . or of suits that, though based on a real grievance, are feebly litigated and thus do more harm than good. . . . [T]he real problem appears to lie in creating sufficient incentives to lead individuals to bring suit rather than in creating roadblocks to hold them back.”). But see generally MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS (2004) [hereinafter FREMONT-SMITH, GOVERNING] (opposing expanded standing); Atkinson, *supra* note 2 (offering discussion by opponents of expanded standing); Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37 (1993) (offering summary of cases and set of recommendations); Marion R. Fremont-Smith, *Enforceability and Sanctions*, 1997 NAT’L CTR. ON PHILANTHROPY & L. PROC.: GOVERNANCE OF NONPROFIT ORGS.: STANDARDS & ENFORCEMENT, http://www.law.nyu.edu/ncpl/library/publications/Conf1997_FremontSmith_Final.pdf [hereinafter Fremont-Smith, *Enforceability and Sanctions*] (opposing expanded standing).

specified in the gift instrument, as well as for specific performance—with one claim for punitive damages scheduled to be decided in 2007.⁷

If the trust law of settlor standing is unsatisfactory, the law applicable to restricted gifts (not expressly made in trust) to corporate charities does not even explicitly exist—and most American charities take the corporate form. Courts that sympathize with donors in these situations have not been consistent in the legal theory they apply, and they sometimes do not apply their chosen legal theory accurately, mixing up the doctrines of charitable trusts, conditional gifts, and contracts. These decisions have repercussions beyond the issue of standing, and spill over into the area of permitted remedies. One gets the sense that courts are groping towards a result that allows the donor to enforce the terms of her gift, but not too much (that is, not beyond the purposes of the gift), and that limits the range of available contract remedies (that is, by giving charities the “choice” of returning the gift or performing the restriction). These cases create additional mischief because courts institutionally cannot address policy and design issues beyond those raised by the case before them. As Reporter of the American Law Institute’s project on Principles of the Law of Nonprofit Organizations, discussed in Part V of this Article, I hope to rationalize the legal treatment of restricted charitable gifts. Rather than contort existing legal doctrines that were never designed to answer these questions, courts would benefit from a positive law of what I call in this Article “giftracts.” However, legislatures, not courts, could most thoroughly and fairly design a regime that balances the competing policy concerns.

B. KEY LEGAL QUESTIONS

It is striking how many of the relevant judicial decisions (reported as well as unreported) on standing have appeared in the last few years. Consider *L.B. Research & Education Foundation v. UCLA Foundation*,⁸ a June 2005 California appellate court decision in a

⁷ See *infra* notes 162–70 and accompanying text.

⁸ 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005).

run-of-the-mill suit that ordinarily would have been dismissed (as, indeed, it was by the trial court).⁹ The appellate opinion begins:

A donor contributed \$1 million to establish an endowed chair at the UCLA School of Medicine, which UCLA accepted along with the conditions imposed by the donor. The primary question on this appeal is whether the agreement created (1) a contract subject to a condition subsequent or (2) a charitable trust, the answer to which supposedly determines whether the donor has standing to sue UCLA and the Regents of the University of California to enforce the terms of the gift. We find there is a contract subject to a condition subsequent, not a charitable trust, and also find that, in either event, the donor has standing to pursue this action. Because the trial court reached a contrary result, we reverse.¹⁰

Several features make this decision a classic case for study. The remaining discussion in this Part uses those features as a guide to this Article.

1. *Does It Matter If Property Law or Contract Law Applies?* (See Part II). The court in *L.B. Research & Education Foundation* suggests that the only analytical choice is between charitable trust law and contract law.¹¹ In so doing, the court makes two fundamental mistakes. First, the court views conditional gifts as falling under contract law, when it is actually a specie of property law. Second, the court does not appreciate that restricted gifts to corporate charities might fall outside the full panoply of trust law without necessarily being classified as a conditional contract. That is, there are actually four ways to analyze a restricted gift—three under property law (charitable trust, conditional gift, restricted gift to corporate charity), and then contract law. The choice of legal

⁹ *Id.* at 712.

¹⁰ *Id.*

¹¹ *Id.*

theory can determine not only the standing issue, but also the choice of remedy.

Under the majority view of traditional trust doctrine, settlors have no standing to specifically enforce a restriction. Direct suits to recover property are, by contrast, available because they protect rights that are adverse to the interests of the trust. Thus, a settlor can sue to get the property back if the settlor has a reversionary interest; if the initial gift fails and the settlor had provided for a “gift over” to an alternative beneficiary, that beneficiary has a direct right to sue to get the property.¹² Ordinarily, trusts may be specifically enforced only by co-trustees and beneficiaries. For charitable trusts, the attorney general, acting as *parens patriae* on behalf of indefinite charitable beneficiaries, can sue to enforce the gift. In addition, however, those with a “special interest” have standing to bring an enforcement action. When they want to deny standing to donors, courts traditionally apply analogous standing principles to restricted gifts made (not in trust) to a corporate charity—and when they want to grant standing, sometimes courts will apply these trust rules to find that the donor has a special interest. The recently promulgated Uniform Trust Code explicitly grants standing to a settlor to enforce the charitable trust.

In defining trusts, the *Restatement (Third) of Trusts* distinguishes conditional gifts. But conditional gifts, while excluded from trust law, are still governed by property law, not contract law. Importantly, a donor who has made a conditional gift (without more) can sue to get the property back in the event the conditions are not satisfied, but cannot sue for specific performance to compel the donee to carry out the terms of the gift. The *L.B. Research & Education Foundation* case cited this narrow remedy as a reason that courts prefer to construe restricted gifts as trusts rather than conditional gifts.¹³ More worrisome is that the court declared that while a charitable trust is enforceable at the instance of the attorney

¹² Traditionally, upon the failure of a charitable gift, the settlor or heirs could sue for the gift even in the absence of an express reverter if the settlor lacked a “general charitable intent.” As described in Part III.B of this Article, modern trust doctrine has tried to minimize this possibility. As a result, it is more likely that the gift will be modified to a new charitable purpose. See *infra* notes 175–76 and accompanying text; see also *infra* notes 267–68 and accompanying text (discussing interaction between cy pres and gift over).

¹³ *L.B. Research & Educ. Found.*, 29 Cal. Rptr. 3d at 714.

general, a conditional gift to charity is not—that in the event of breach, only the donor (or successors-in-interest) can sue, and only for the return of the property.¹⁴

If contract law instead of property law were to apply to a restricted or conditional gift, then the California appellate court expresses a rather limited view of the range of possible remedies. Contract law generally allows competent parties to agree to any terms they negotiate. But is such a laissez-faire view of private ordering appropriate for charities? What if the parties contract to grant standing to the donor to enforce the restriction and not just to sue for forfeiture? Are there public policy limits that should be invoked to protect charities from agreeing to waive the donor's traditional lack of standing? Can (should) the law take the view that the parties representing the charity have little incentive to act in the charity's best long-term interests, and thus lack the capacity to enter into such a provision? Moreover, "rewarding" parties who insert specific terms in what are essentially gift instruments puts a premium on drafting, and ratchets up the level of lawyering and negotiating for too many major restricted gifts.

The most difficult obstacle for those who view restricted gifts as contracts is the fact that many, if not most, restricted gifts are created by testamentary disposition. The recipient charity is not a party to the will, although in some cases the charity was involved in the planning of the restricted gift. While the bare acceptance of the gift could be viewed as acceptance of an offer to contract, ordinarily there would have been no bargaining by the charity. So would this restricted gift be interpreted as a contract of adhesion?

Interestingly for proponents of a contract-law approach, courts have not yet remarked on a striking asymmetry—courts typically *do* apply contract analysis when it is the donor that has breached, by failing to fulfill a charitable pledge. So, is sauce for the goose sauce for the gander? Of course, a contract analysis does not necessarily imply that the donor is a proper party to enforce the contract; further difficulties would arise should such a case reach the merits.

¹⁴ See *id.* at 714–15 (citing *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859 (Cal. Ct. App. 1999)); see also *infra* notes 22–54 and accompanying text (discussing standing under common law charitable trust doctrine).

As discussed in Part V of this Article, the ALI project is considering whether to declare that a restricted charitable gift has contract-like features—it is binding and enforceable—but enforceable only by the attorney general (and not the donor), whereas a pledge also has contract-like features—it is also binding and enforceable—but enforceable not only by the attorney general but also by the charity. Such an approach still leaves open the issue of remedy when the charity breaches a restriction: that is, return of property versus specific enforcement (and even possibly damages).¹⁵

2. *What Is the Relationship Between Donor Standing Here and Donor Standing (Or Lack Thereof) in a Cy Pres Proceeding? Can We Meaningfully Distinguish Between a Suit to Enforce a Restriction and a Suit over Charity Governance? (See Part III).* The complaint in *L.B. Research & Education Foundation* alleged:

[T]he UCLA Foundation and the Regents had failed to employ personnel meeting the criteria of the Chair; failed to account to L.B. Research; offered the Chair to nonqualified individuals and, over the objection of L.B. Research and the Attorney General of the State of California, elected an unqualified person to the Chair; withdrew unearned fees from the Chair's fund; and refused to deliver the Chair's fund to the Department of Surgery at the University of California, San Francisco, School of Medicine.¹⁶

These allegations clearly reveal a dispute over the UCLA Foundation's performance of a gift restriction that requires the exercise of judgment. Those who support donor standing to enforce a gift restriction usually do not support donor standing to interfere with charity governance. But where is the line?

¹⁵ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS., pt. II, ch. 4, topic 3, introductory note (Preliminary Draft No. 3, 2005). The Gifts chapter will be revised for Preliminary Draft No. 4, published sometime in May 2007. Separately, the issues of standing and enforcement (Chapter 7 of Preliminary Draft No. 3) will appear (as renumbered Chapter 6) in subsequently published drafts; see also *infra* notes 253–60 and accompanying text.

¹⁶ *L.B. Research & Educ. Found.*, 29 Cal. Rptr. 3d at 713.

What can look like a breach to the donor can, to the charity, be the exercise of necessary discretion in implementing the restriction. Moreover, whether it is the attorney general or a private party with enforcement rights, everyone assumes that the proceeding must be limited to addressing breach of the gift restriction. Of course, in a simple charitable trust—e.g., to fund scholarships—there is an identity between the “gift” and the “charitable purpose.” But in a more complex charity, when does enforcing the gift unduly meddle in the board’s duty of care?

In other situations, what can look like a breach to the donor can, to the charity, be a situation requiring modification of the restriction. The settlor (or successor-in-interest) can sue to enforce any reversionary interest, but the settlor as such traditionally does not have a say in choosing the new purpose in a cy pres proceeding—after all, if the trust purpose cannot now be carried out, the settlor is in no better position to decide the fate of property given away than any other member of the public. The Uniform Trust Code, however, grants the settlor standing to commence a cy pres proceeding.

Finally, what is the relevance of a gift over to an alternative beneficiary? As indicated above, the gift instrument in *L.B. Research & Education Foundation* provided that if UCLA does not or cannot satisfy the agreement, the funds would be transferred, on the same terms and conditions, to support an endowed chair in the University of California at San Francisco’s School of Medicine.¹⁷ The court does not address whether this gift over is actually made in favor of the same legal donee as the initial gift (i.e., the University of California system). Let us assume that the San Francisco campus is a separate legal entity. What if UCLA does not perform because it no longer teaches the medical speciality that is the subject of the endowed chair? Should the University of California at San Francisco be able to sue for the gift over despite any ability of UCLA to seek cy pres reform of the restriction? What if instead UCLA can, but does not, perform the restriction: Does the existence of an alternative beneficiary with rights to sue for the gift trump any rights of the donor to complain about the donee’s breach?

¹⁷ *Id.* at 712.

Separately, which parties may (or must) ratify a charity's breach of a gift restriction?

3. *What Is the Significance of Attorney General Action, or Inaction?* (See Part IV). The few courts that do grant enforcement rights to private parties usually cite the state attorney general's failure to act. Indeed, the appellate court in *L.B. Research & Education Foundation* quoted extensively from a California Supreme Court opinion that had granted standing to co-trustees to enforce fiduciary duties, in part in recognition of the institutional limits of attorney general enforcement activities.¹⁸ In *L.B. Research & Education Foundation*, however, the attorney general *had* taken action:

In its first amended complaint, L.B. Research alleges that it (through its own personnel and through the Attorney General's office) brought these alleged violations to the attention of the appropriate people at UCLA and demanded performance in accordance with the terms of the gift, but that no response was forthcoming.¹⁹

By contrast, the courts usually require more, and take pains to identify the existence of improper attorney general behavior or of disabling conflicts of interest. On the other hand, courts that deny standing to the plaintiff often emphasize that attorney general inaction is not alone enough to empower a private party.

4. *Can Courts Address the Problems in a Satisfactory Way, or Is Legislation Needed?* (See Part V). Finally, many proponents of donor standing have in mind an individual donor, and are reluctant to extend standing to the donor's successors in interest (notably children, or even further-removed descendants) or designees. Note, however, that the donor in *L.B. Research & Education*

¹⁸ See *id.* at 717 ("The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment." (quoting *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 935 (Cal. 1964))).

¹⁹ *Id.* at 713.

Foundation—like many major donors these days—is itself a charitable institution having perpetual life.²⁰ How should we address the complication of a donor who never dies?

This difficulty is only one of several important line-drawing and policy issues that cry out for a legislative rather than a judicial solution, and one that is more nuanced than the Uniform Trust Code's simple grant of standing. We are only asking for trouble if we expect courts to choose among existing legal doctrines that were not designed to address concerns unique to charitable corporations. Yet the extremes of either continuing the common law bar to donor standing or adopting the Uniform Trust Code's absolute grant is guaranteed to produce the "wrong" result in at least some situations. Those who favor expanding standing to donors must acknowledge the weaknesses of legislative solutions so far adopted; those who oppose expanding standing must acknowledge the apparent growing number of sympathetic judges.

The ALI draft project, discussed herein, explores six issues with respect to private enforcement of restrictions on charitable gifts:²¹

- (1) How do we identify the permitted plaintiff: the donor only, and not descendants? What about persons designated in the gift instrument (assuming agreed to by the charity)?
- (2) What is the significance of the passage of time? Imposing "term limits" on private enforcement (but not attorney general enforcement) is particularly significant for institutional donors and successor enforcers designated in the gift instrument.
- (3) How do we define a restricted gift? For example, what about an unrestricted gift made to a narrow-purposed charity that now wants to expand or alter its purpose (e.g., go coed)?
- (4) Should the law require a minimum amount at issue to prevent nuisance suits?

²⁰ *Id.* at 712.

²¹ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. (Preliminary Draft No. 3, 2005).

- (5) What remedies should we permit? Can the donor sue for damages? Does the charity have the option to “put” the gift back to the donor (with interest or other adjustment?) and end the matter?
- (6) More broadly, what is the significance of the plaintiff’s identity as a donor? Under trust law, anyone with a “special interest” can sue to enforce the gift; separately, under nonprofit corporate law, when failure to follow the restrictions on a gift constitutes breach of fiduciary duties, state law would presumably permit any private party with standing to bring a derivative suit to sue to enforce a gift.

II. RESTRICTED CHARITABLE GIFTS: PROPERTY, CONTRACT, OR OTHER LAW?

A. STANDING UNDER COMMON LAW CHARITABLE TRUST DOCTRINE

The common law developed out of charitable trust law, where the transferor is termed the settlor rather than the donor. Potentially, standing is permitted to three types of private parties: (1) charitable trust settlors and, more broadly, those with a “special interest”; (2) donors of conditional gifts; and (3) co-trustees and “trust protectors” (compare “visitors” under corporate law). Separately, this examination of trust law discusses statutory standing for settlors—notably, in the Uniform Trust Code.

In brief, the attorney general, co-trustees, and persons with a “special interest” have common law standing to bring suit to enforce the terms of a charitable trust. Traditionally, the settlor may sue only if he or she had a reversionary interest, and thus has a claim adverse to the interests of the charity. This doctrine derives from a view of the transaction as a property interest—and donated property is simply no longer the settlor’s. Rather, for enforcement trust law looks forward: beneficiaries (who have equitable title) have the power to bring suit for breach of fiduciary duty on the part of the trustee (who has legal title). In the context of a charitable trust, which ordinarily has no ascertainable beneficiaries, the state attorney general represents the interests of those indefinite

members of the public, and so can bring an enforcement action. Rarely, courts will grant the charity's beneficiaries standing as persons with a special interest, generally only if those beneficiaries are limited and ascertainable—for example, a trust for the benefit of specified universities.²²

1. *Standing of the Settlor, in a Direct Suit or as One with a Special Interest.* Section 391 (Who Can Enforce a Charitable Trust?) of the *Restatement (Second) of Trusts* provides:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlors or his heirs, personal representatives or next of kin.²³

Emphasizing this last point, the comments distinguish between a suit to specifically enforce the terms of the trust and a suit to recover the property: neither the settlor nor his heirs or personal representatives as such can maintain a suit for the enforcement of a charitable trust.²⁴ They can maintain a suit, however, on a claim adverse to the trust.²⁵ The standing rules in the *Restatement (Third) of Trusts*, when drafted, will appear in section 94.²⁶

²² See Fremont-Smith, *Enforceability and Sanctions*, *supra* note 6, at 3 (adopting useful term “sub-trustees” to refer to beneficiary organization entitled to income from donee fund).

²³ RESTATEMENT (SECOND) OF TRUSTS § 391 (1957).

²⁴ *Id.* cmts. b–c; see also 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 391 (4th ed. 1989) [hereinafter SCOTT ON TRUSTS] (“The question remains whether the settlor or his heirs or personal representatives can maintain a suit for the enforcement of charitable trust. As we have seen, the settlor cannot revoke or modify a charitable trust created by him unless he has reserved a power to do so. After the trust is once created, he has no beneficial interest in the property. Accordingly, it has been held in a number of cases that the settlor has no standing to maintain a suit for the enforcement of a charitable trust. There are, however, cases in which the opposite result has been reached. But where the settlor has a special interest in the performance of the trust he can maintain a suit to enforce it.”); *infra* notes 171–80 and accompanying text (discussing when restriction is instead modified); *infra* notes 253–60 and accompanying text (discussing effects of passage of time).

²⁵ RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. e (1957) (citing to cmt. f).

²⁶ The *Restatement (Third) of Trusts* is being published in stages. The material published in 2003 contains, among other sections, definitions. Comment i of section 5 (Trusts and Other

Courts are being asked to consider, under the rubric of those with a special interest, the standing of a range of private parties, not just donors; regardless of the relationship between the plaintiff and the charity, however, standing is rarely granted.²⁷ The claims of potential beneficiaries are uniquely hard to classify as direct or indirect: enforcing the terms of the trust can often be the same as suing for the charity's resources.²⁸ Ordinarily, as noted in a recent appellate court decision in Arizona, "mere potential beneficiaries . . . lack standing as persons with a 'special interest' to enforce a charitable trust."²⁹ The court declared:

Relationships) observes: "Although the promisee as well as the beneficiary may, in many instances, sue upon a contract for the benefit of a third party . . . , a trust ordinarily cannot be enforced by a settlor who is not also a beneficiary (see § 94)." RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. i (2003). The Reporter's Notes add:

On the observation in this Comment about the usual inability of a settlor who is not a beneficiary to enforce a trust, see the typical dictum in *Dauer v. Butera*, . . . 642 N.E.2d 848, 850 (Ill. App.] 1994): "In the law of future interests, it has been established that only those having a beneficial interest in the subject matter and relief sought are proper parties to sue a trustee." See also Note, "Right of a Settlor to Enforce a Private Trust," 62 Harvard L. Rev. 1370 (1949). For a careful and slightly broader description of the settlor's position, see Gaubatz, "Grantor Enforcement of Trusts: Standing in One Private Law Setting," 62 N. Carolina L. Rev. 906 (1984), discussed in *Sanders v. Citizens National Bank*, 585 So.2d 1064, 1066 (1991) (holding that the settlor in the case lacked standing to sue); and see also § 94 of this Restatement.

Id. § 5 reporter's note on cmt. i.

²⁷ See *Steenek v. Univ. of Bridgeport*, 668 A.2d 688, 693 (Conn. 1995) (standing denied to "life trustee" to challenge University of Bridgeport's decision to affiliate with school founded by Reverend Sun Myung Moon); see also *Weaver v. Wood*, 680 N.E.2d 918, 923 (Mass. 1997) (holding that mere membership in Christian Science church or other public charity was not enough to allow standing to contest mismanagement).

²⁸ See, e.g., *Romero v. Nw. Area Found.*, 129 Fed. App'x. 337, 339 (9th Cir. 2005) (unpublished) (involving claim by prospective grantees of funds from grantor foundation). The court ruled:

Romero's breach of contract claim fails because no contract was formed. The facts as pled by Romero do not support the proposition that the Foundation made a conditional offer, as required for contract formation. At best, they support the proposition that the Foundation made a donative promise with the incidental condition that community members participate in the planning process. It is axiomatic that incidental conditions attached to donative promises do not transform promises of gifts into contracts.

Id. at 339. The court, however, allowed a claim for promissory estoppel, suggesting that it would allow "the plaintiffs to recover in a limited manner for incidental costs such as travel, child-care, and time off work." *Id.* at 340.

²⁹ *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1030 (Ariz. Ct. App. 2004); accord *In re Pub. Benevolent Trust*, 829 N.E.2d 1039, 1045 (Ind. Ct. App. 2005), *adhered*

Relying on treatises and decisions from other jurisdictions, we hold that to have such common-law standing, a party must show that they have a special interest in the trust, such as being a current beneficiary, and not merely being a potential or prior beneficiary of a large class of potential beneficiaries.³⁰

In ascertaining whether a claimed beneficiary has such a special interest, that Arizona appellate court gave “special emphasis” to “the nature of the benefitted class and its relationship to the trust, the nature of the remedy requested, and the effectiveness of attorney general enforcement of the trust.”³¹ The court also observed: “More important than numbers of class members is the manageability of the size of the class, whether it can be easily entered, and whether the plaintiff established that it has a direct interest in the operation of the trust.”³² In addition, the court examined “other factors that could leave the Foundation open to vexatious litigation.”³³

to on rehearing 834 N.E.2d 705 (Ind. Ct. App. 2005).

³⁰ *Robert Schalkenbach Found.*, 91 P.3d at 1024–25.

³¹ *Id.* at 1026. Footnote 7 comments:

We give little, if any, weight to the nature of the acts complained of and whether there are any allegations of fraud because any plaintiff can allege such misconduct, regardless of the merits of the complaint. If we found that mere allegations of grave misconduct were sufficient to confer standing, the purposes of limiting standing to protect trustees from vexatious litigation would be undermined. Where there are such allegations, we presume that the availability of Attorney General enforcement will suffice to remedy any alleged misconduct.

Id. at 1026 n.7.

³² *Id.* at 1026. The court continued: “For example, other jurisdictions have found a class of students or faculty who could possibly receive a scholarship or be selected to an endowed chair to be too large and remote to be a group with a special interest.” *Id.* at 1026–27 (citations omitted). The court added, “The Appellants do not set forth how many people may be followers of Henry George, how easy or difficult it may be to become a follower of Henry George, or how they are directly affected by the Foundation’s actions.” *Id.* at 1027 n.11.

³³ *Id.* at 1027. Examining these factors the court observed: “One such factor is whether the actions concern the ongoing administration of the Foundation, or whether the Appellants are claiming that the Foundation has taken an extraordinary action that would affect the Appellants’ interest.” *Id.* Analyzing that factor, the court commented:

The allegation that the Foundation has been systematically diverting funds implies that [one appellant] wishes to influence the daily operations of the Foundation. . . . Ultimately, the remedies that the Appellants wish to impose are highly intrusive in the administration of the trust, which could open the Foundation to further litigation by other potential or

A few courts have granted standing under the extraordinary circumstance of a significant change in purposes, when a defined class of current or potential beneficiaries would no longer qualify as such.³⁴

2. *Conditional Gifts Contrasted.* In a definitional section, the *Restatement (Third) of Trusts* distinguishes trusts from other relationships, including corporations, conditions and equitable charges, and contracts to convey or certain contracts for the benefit of third parties.³⁵ In distinguishing trusts from conditions and equitable charges, the *Third Restatement* comments, in part:

An owner of property may transfer it, inter vivos or by will, to another person and provide that, if the latter should commit or fail to perform a specified act, the transferred interest shall be forfeited. . . . *On breach of the condition, the transferor, the successors in interest of*

disappointed beneficiaries.

Id. at 1027–28. The court highlighted the remedy sought:

Appellants seek to have a court order: the Foundation to comply with the terms of the trust; removal of the Foundation as the trustee and appointment of a new trustee that would fulfill John C. Lincoln's intent; removal of one or more of the Foundation's directors and appointment of new directors that would fulfill John C. Lincoln's intent.

Id. at 1027 n.13.

³⁴ These cases have arisen in the context of corporate charities, but the courts in those cases begin with trust principles. *See, e.g.*, *Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. 1999) (citing *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752 (N.Y. 1985)). In *Alco Gravure*, the Court of Appeals of New York declared:

Furthermore, the policy reasons for limiting standing in this area are not applicable in this case. Normally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General in order to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations. However, the present action concerns not the ongoing administration of a charitable corporation, but the dissolution of that corporation and the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds originally donated by Joseph Knapp. The individual plaintiffs, therefore, have standing.

Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 756 (N.Y. 1985) (citation omitted). Compare the discussion of donor standing in such a circumstance, in Part II.B.2, and of the effect of nonprofit corporation statutes, in Part II.C of this Article.

³⁵ RESTATEMENT (THIRD) OF TRUSTS § 5 (2003).

the transferor, or some designated person will be entitled to recover the property from the transferee.

In situations of these types the interests of the transferee are subject to a condition subsequent and are not held in trust. The condition does not create a fiduciary relationship. *Unlike a trust beneficiary's right to compel performance of a trustee's duties, neither the transferor nor a person to be benefited may compel or prevent performance of the act upon which a condition depends, nor can they have the transferee removed and replaced by another. . . .*

Whether a property transfer accompanied by a requirement for the performance of a particular act gives rise to a trust or a condition depends on the manifested intention of the transferor. The mere fact that the word "condition" is used is not necessarily determinative.³⁶

The California appellate court in *L.B. Research & Education Foundation*, described in Part I.A. of this Article,³⁷ explained that the undesirability of the reversion remedy available in cases of conditional charitable gifts leads courts to construe the transaction as a charitable trust when possible.³⁸ Moreover, as discussed in Part

³⁶ *Id.* § 5, cmt. h (emphases added).

³⁷ See *supra* notes 8–20 and accompanying text.

³⁸ The court quoted an earlier appellate decision observing:

Courts favor the construction of a gift as a trust over a conditional gift for several reasons. Because forfeiture is a harsh remedy, any ambiguity is resolved against it. Moreover, the transferor's objective is to use the transferee to confer a benefit upon the public. To ensure that the benefit is conferred as intended, the transferor ordinarily wants the intended beneficiary to be able to enforce that intent. Because the only remedy for the breach of a condition is a forfeiture, a condition is not a very effective method of accomplishing those goals. For both of those reasons, courts will generally construe a conveyance as one upon trust rather than upon condition.

L.B. Research & Educ. Found. v. UCLA Found., 29 Cal Rptr. 3d 710, 714 (Cal. Ct. App. 2005) (citations omitted) (quoting *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859 (Cal. App. 1999)). See also SCOTTON TRUSTS, *supra* note 24, § 401.1 ("The mere fact that the trustees of a charitable trust commit a breach of trust does not cause the trust to fail and entitle the settlor or his successors to enforce a resulting trust. This is true not only where the trustees merely neglect to apply the property to the designated charitable purposes, but also where they divert it to other purposes. In such a case, if it is not impossible or impracticable

IV of this Article,³⁹ the court cautioned that “when the agreement is a contract subject to a condition subsequent and does not create a charitable trust, the Attorney General is not a necessary party to the action.”⁴⁰

3. *Visitors and Trust Protectors.* Co-trustees are in a class by themselves under the *Restatement (Second) of Trusts*, but the standing of a trustee does not pass to the trustee’s heirs.⁴¹ Relying on trust doctrine, the California Supreme Court in *Holt v. College of Osteopathic Physicians and Surgeons* extended co-trustee standing rules to the co-directors of a charitable corporation, concluding: “There is no sound reason why minority directors or ‘trustees’ of a charitable corporation cannot maintain an action against majority trustees when minority trustees of a charitable trust are so empowered.”⁴² There may be situations when a co-trustee or director

to carry out the designated purposes, the remedy is by a suit brought by the Attorney General to compel the trustees to perform the trust, and not by a suit brought by the settlor or his successors to enforce a resulting trust. It is only where the settlor has made the continuance of the trust conditional on the performance of the trust that the failure to perform results in the termination of the trust and the reverter of the trust property to the settlor or his estate.” (footnotes omitted)).

³⁹ See *infra* notes 195–252.

⁴⁰ *L.B. Research & Educ. Found.*, 29 Cal. Rptr. 3d at 715 (citing *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 868 (Cal. Ct. App. 1999)).

⁴¹ See, e.g., *Arman v. Bank of Am.*, 88 Cal. Rptr. 2d 410 (Cal. Ct. App. 1999) (daughter of named individual charitable trustee has no standing to challenge successor trustee appointed by court in accordance with proposal made by attorney general and bank chosen as trustee). The *Arman* court explained:

The fact that [the settlor] Lamerdin was willing to entrust his assets to an individual inexperienced in administering charitable funds or creating tax exempt foundations does not mean that the court is free to do the same. There is no dispute that Lamerdin did not want a bank, a trust company, a charitable corporation, or other large impersonal organization to be the trustee – he wanted Elvira Arman. But acknowledging that still left the trial court with the question of what to do with funds left for a charitable purpose after the testator’s specified trustee has died. The court’s primary focus must be to ensure that funds intended for charitable purposes are in safe hands and properly administered. Rarely will this entail transferring funds to an individual, even one who is as close to the testator and his intended trustee as appellant. Appellant was not named by Lamerdin as a trustee, and she had no evidence to suggest that his will could be interpreted to insert her name as successor trustee in place of her mother’s.

Id. at 415.

⁴² *Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 937 (Cal. 1964). But see *Lundberg v. Coleman*, 60 P.3d 595, 600 (Wash. 2002) (holding that director of

has the obligation, not just the standing, to sue to prevent a breach of fiduciary duty by a co-fiduciary.⁴³

In England, the founder of a corporate charity may “reserve to himself or to a visitor whom he appoints the exclusive right to adjudicate upon the domestic laws which the founder has established for the regulation of his bounty.”⁴⁴ Such a “visitor” not only has the right to ensure proper management of the charity, but also displaces the authority of the chancery courts.⁴⁵

The *Restatement (Second) of Trusts* does mention that “the founder of a charitable corporation may have a visitorial power which is not applicable to charitable trusts.”⁴⁶ Notably, Professor John Gaubatz comments:

[T]he reason for appointing visitors is to ensure that the benefits intended to pass to the public in fact do so, without requiring intervention of the attorney general—a protective function similar to that of a cotrustee, but without the latter’s active duties. . . . The cases recognizing that standing validate the importance of the grantor’s intent in identifying those who will have standing to enforce the trust.⁴⁷

nonmember nonprofit corporation does not have standing to bring derivative action on behalf of corporation against other directors for breach of fiduciary duties).

⁴³ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 350 (Tentative Draft No. 1, 2007) (describing situations that give rise to obligation to take action).

⁴⁴ Page v. Hull Univ. Visitor, (1992) 1 Eng. Rep. 97, 102 (H.L.) (Lord Browne-Wilkinson, opinion). The visitor’s decision may not be appealed to the courts. “The value of the visitorial jurisdiction is that it is swift, cheap and final.” *Id.* at 100 (Lord Griffiths, opinion).

⁴⁵ See COURTNEY S. KENNY, THE PRINCIPLES OF LEGISLATION WITH REGARD TO PROPERTY GIVEN FOR CHARITABLE OR OTHER PUBLIC USE 147 (1880) (quoting the 1835 complaint of one English Charity Commissioner: “[I]n most cases, [visitors] are a burden and inconvenience to the Charity, because the Visitors, being exempted from the jurisdiction of the Court of Chancery, are not subject to any control as to the internal management of the Charity in any respect; and it frequently happens that the advantage which might be derived from the visitorial power is wholly lost, because Charities subject to it are not at all looked into by the special visitors’ ”).

⁴⁶ RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1957). However, the *Second Restatement* acknowledges: “The law as to the power of visitors of a charitable corporation is not within the scope of the Restatement of this Subject.” *Id.* § 391 cmt. g.

⁴⁷ John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 926 (1984).

However, American law typically rejects the English concept of visitorship.⁴⁸ (This should not be confused with what some refer to as the visitorial power of the courts over both charitable trusts and charitable corporations.⁴⁹) Indeed, Professor Kenneth Karst would hold a “swift[] burial of the doctrine of visitation on the basis that it did not permit directors to direct.”⁵⁰ That the English right is hereditary makes it even less appealing in the United States.⁵¹

Nevertheless, a recent trend that bears watching is the use of “trust protectors” in the administration and enforcement of private trusts. Compare cases in which the grantor of a restricted charitable gift, by the terms of the instrument, enjoyed rights of consultation.⁵² The *Restatement (Third) of Trusts* provides: “The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.”⁵³ Professor Gaubatz observes:

⁴⁸ See generally FREMONT-SMITH, GOVERNING, *supra* note 6, 338–42 (surveying visitorships in American law). But cf. N.Y. EST. POWERS & TRUSTS LAW § 8-1.3(a), (d)–(e) (McKinney 2002) (allowing anyone “founding, endowing and maintaining . . . a public library, museum or educational institution” in trust to exercise complete control over administration of trust during his or her lifetime, and, if granted, to pass on these rights to surviving spouse, without any obligation to account).

⁴⁹ See, e.g., *Coffee v. William Marsh Rice Univ.*, 403 S.W.2d 340, 347 (Tex. 1966) (“In the trust indenture before us, Mr. Rice reserved during his lifetime the power to direct and control the investments of the Endowment Fund ‘and the management of the said Institute.’ Then Mr. Rice added a general power of visitation by the courts.”).

⁵⁰ Karst, *supra* note 6, at 446.

⁵¹ See *Wier v. Howard Hughes Med. Inst.*, 407 A.2d 1051, 1057 (Del. 1979) (quoting GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 416 (2d ed. 1978) (“In a country such as the United States, where primogeniture is obsolete, the vesting of a power of visitation in the heirs of a donor is not desirable. . . . [I]n many cases they would be either wholly uninterested in exercising the right of visitation, or would be openly hostile to the institution which deprived them of a part or all of the fortune of their relatives.”)).

⁵² See, e.g., *Assoc. Alumni of Gen. Theological Seminary of the Protestant Episcopal Church in the U.S. v. Gen. Theological Seminary of the Protestant Episcopal Church in the U.S.*, 57 N.E. 626, 627 (N.Y. 1900) (holding that in absence of right of reverter, donor was not entitled to return of gift; “though, as donor and possessor of the right to nominate to the professorship, it had sufficient standing to maintain an action to enforce the trust”). The *Smithers* court relied on this case in holding that the donor’s rights regarding investment and other matters would have bestowed standing on him, and held that standing passed to his widow in her capacity as executrix. *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435 (App. Div. 2001); see also *infra* note 68 and accompanying text.

⁵³ See RESTATEMENT (THIRD) OF TRUSTS § 64(2) (2003); see also *id.* cmt. d & notes on cmts. b–d (discussing powers and liabilities of third parties).

The difficulty with explaining the grantor's standing by analogizing his position to that of a trustee is that the explanation proves too much. Trustees have fiduciary obligations in exercising the oversight power. . . . Mere retention of an oversight power, on the other hand, suggests only the grantor's desire that he have the right to correct trustee abuses, not the duty to do so.⁵⁴

B. RESTRICTED GIFTS TO CORPORATE CHARITIES: DRAWING ON TRUST DOCTRINE

1. *Effect of Restriction.* The treatment of restricted gifts made to corporate charities varies in theory among the states, but not in effect. Generally, the charity has a duty to adhere to the restriction.⁵⁵ Some legislatures have declared that a charitable nonprofit corporation is deemed to be a trust and its board of directors to be trustees.⁵⁶ In other states it is the courts that treat

⁵⁴ Gaubatz, *supra* note 47, at 939. Professor Gaubatz added:

[V]isitors—whose standing to enforce a trust is similarly the result of the grantor's appointment—are not clearly liable for failing to correct abuses by the trustees of the charities for which they are appointed; evidently, they have the power to enforce the trust, but not the duty to do so.

Id. at 940.

⁵⁵ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 647 (1819) (observing that philanthropy was founded on hope that funds would “flow forever in the channel which the givers have marked out for it”). Justice Marshall wrote of those who found charitable corporations: “One great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable.” *Id.* at 647.

⁵⁶ See, e.g., 15 PA. CONS. STAT. § 5547(a) (2006) (“Every nonprofit corporation incorporated for a charitable purpose or purposes may take, receive and hold such real and personal property as may be given, devised to, or otherwise vested in such corporation, in trust, for the purpose or purposes set forth in its articles. The board of directors or other body of the corporation shall, as trustees of such property, be held to the same degree of responsibility and accountability as if not incorporated . . .”). Separate from the question of the corporate charity's obligation to honor a restriction is the potential liability of the corporation's directors. The Revised Model Nonprofit Corporation Act explicitly rejects the view that directors of corporate charities are trustees, providing that “[a] director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of such property.” REVISED MODEL NONPROFIT CORP. ACT § 8.30(e) (1987). The Comments explain that “the corporation, as distinguished from its director, may hold or be deemed to hold property in trust or subject to restrictions.” *Id.* § 8.30 cmt. 1. Even in states that do not treat directors as trustees, a breach of a gift restriction can, depending upon the circumstances, reflect wrongdoing by the charity, its fiduciaries, or both.

the charitable class served by the corporate charity as the beneficiaries of a trust.⁵⁷

Commentary to the *Restatement (Third) of Trusts* declares that it covers those gifts made to corporate charities that carry restrictions, but not gifts made for a corporate charity's general purposes:

An outright devise[] or donation to a nonproprietary hospital or university or other charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust as that term is used in this Restatement. A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee for purposes of the terminology and rules of this Restatement.⁵⁸

⁵⁷ See *Duties of Charitable Trust Trustees and Charitable Corporation Directors*, 2 REAL PROP. PROB. & TR. J. 545, 546 (1967).

⁵⁸ RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003). The *Restatement (Second) of Trusts* provided general commentary addressing corporate charities, including the following relevant paragraphs:

Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations. Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose. Where property is given to a charitable corporation and it is provided by the terms of the gift that it shall retain the principal and devote the income only to the accomplishment of its purposes or one of its purposes, the corporation is under a duty, enforceable at the suit of the Attorney General, to retain the principal and to use the income for the designated purposes.

The doctrine of cy pres . . . is applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes.

RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1957). Cf. *supra* note 26 and accompanying text (showing distinction in *Restatement (Third) of Trusts* between trust and conditional gift).

Applying trust law generally to corporate charities, however, conflicts with the venerable trust doctrine of merger, in which the trust vanishes if the beneficiary and trustee are the same person.⁵⁹ Notably, at a time when charitable trusts were illegal in New York, the state high court saved charitable corporations by ruling: “The corporation uses the property, in accordance with the law of its creation, for its own purposes; and the dictation of the manner of its use, within the law by the donor, does not affect its ownership or make it a trustee. A person . . . cannot be a trustee for himself.”⁶⁰ Nevertheless, the court held:

No authority has been brought to our attention that a gift to a charitable corporation with the express direction that it be applied to a specific corporate purpose in a specific manner may be accepted by the corporation, and then used for a different corporate purpose in a different manner. . . . [The charitable corporation may not] receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands.⁶¹

A Florida appellate court explained the policy difficulties in even stronger language:

Making a gift to a charity for a specific project or purpose does not create a charitable trust. For this court to suggest that it does would create havoc for charitable institutions. A charity has to be able to know when a donation is a gift and when it is merely an offer to fund a trust for which the charity is taking on fiduciary

⁵⁹ *E.g.*, RESTATEMENT (THIRD) OF TRUSTS § 69 (2003) (“If the legal title to the trust property and the entire beneficial interest become united in one person, the trust terminates.”). *But see, e.g.*, *Epworth Children’s Home v. Beasley*, 616 S.E.2d 710, 718 (S.C. 2005) (rejecting application of merger to charitable trust in which charity as both trustee and beneficiary was limited to enjoying only income from bequest each year).

⁶⁰ *St. Joseph’s Hosp. v. Bennett*, 22 N.E.2d 305, 307 (N.Y. 1939).

⁶¹ *Id.* at 308; *see also* N.Y. NOT-FOR-PROFIT CORP. LAW § 513 (McKinney 2005) (codifying *St. Joseph’s Hospital* result); *infra* notes 171–80 and accompanying text (discussing cy pres).

responsibilities. The creation of such a trust must be express.⁶²

More practically, a restricted gift (particularly if not made by will) does not impose on the corporate charity the trust law procedural requirements for providing information to beneficiaries (although the charity would have to respond to a request for information from the attorney general) and for judicial accounting.⁶³

2. *Standing of Donor of Restricted Gift.* “The rule that parties especially interested may sue to compel performance is as applicable to the law of charitable corporations as to the law of charitable trusts.”⁶⁴ However, this generally means that courts have extended the settlor’s traditional lack of standing to donors who make restricted gifts (not in trust) to corporate charities, again leaving enforcement to the attorney general in all but the unusual case.

This typical common law approach to donors is articulated in the Connecticut Supreme Court decision in *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*:

[While] “a donor who attaches conditions to his gift has a right to have [h]is intention enforced” . . . [it] is enforceable only at the instance of the attorney general; and the donor himself has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter, after relinquishing physical possession of it.”⁶⁵

⁶² *Persan v. Life Concepts, Inc.*, 738 So. 2d 1008, 1010 (Fla. Dist. Ct. App. 1999).

⁶³ See 4A SCOTT ON TRUSTS, *supra* note 24, § 348.1 (“Thus where the property is left by will to a charitable corporation, whether it may be used for the general purposes of the corporation or whether the devise or bequest is subject to restrictions as to its use, and the property is conveyed by the executor to the corporation, the corporation is not thereafter bound to account as if it were a testamentary trustee. The situation is different from that which arises where property is left by will to individual trustees, or to a trust company, charged with a duty to make the property productive and to pay the income to a charitable corporation.”).

⁶⁴ *City of Paterson v. Paterson Gen. Hosp.*, 235 A.2d 487, 495 (N.J. Super. Ch. Ct. Div. 1967). Similarly, the District of Columbia Court of Appeals held, in accordance with the parties’ assumptions regarding the law, that the rules that apply to beneficiaries of charitable trusts govern standing with regard to beneficiaries of a charitable corporation. *Hooker v. Edes Home*, 579 A.2d 608, 611 n.8 (D.C. 1999).

⁶⁵ *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997) (quoting *Lefkowitz v. Lebensfeld*, 417 N.Y.S.2d 715, 720 (App. Div. 1979)) (citing *Wier v.*

The court further noted:

By expressly reserving a property interest such as a right of reverter, the donor of the gift or the settlor of the trust may bring himself and his heirs within the “special interest” exception to the general rule that beneficiaries of a charitable trust may not bring an action to enforce the trust, but rather are represented exclusively by the attorney general.⁶⁶

That case further held that Connecticut’s adoption of the Uniform Management of Institutional Funds Act did not expand donor standing.⁶⁷

In contrast to this traditional approach, two recent New York appellate panels (in split decisions) granted standing to donors or their successors, while a third rejected it.⁶⁸ Notably, in *Smithers v. St. Luke’s-Roosevelt Hospital Center*,⁶⁹ an appellate court stunned the nonprofit world by granting standing to a donor’s widow—as a

Howard Hughes Med. Inst., 407 A.2d 1051, 1057 (Del. Ch. 1979)) (other citations omitted).

⁶⁶ *Id.* at 999 n.5. See also *Browne v. Abdelhak*, No. CIV. A. 98-6688, 2000 WL 1201889 (E.D. Pa. Aug. 23, 2000) (holding that plaintiffs lacked standing to bring federal racketeering action for misuse of endowment funds absent evidence of injury).

⁶⁷ See *infra* notes 82–85 and accompanying text.

⁶⁸ See *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435 (App. Div. 2001) (granting standing to widow as executrix of donor’s estate). The *Marcus* court allowed suit for false charitable solicitation brought by a group of supporters of a greater Israel—that is, one augmented by settlements in territories acquired after the Six-Day War. The defendant charity’s fundraising material used a map of Israel that included the territories, although in fact the charity intended to spend (and for the last twenty years had only spent) donated funds in territories within the pre-War “Green Line.” *Marcus v. Jewish Nat’l Fund*, 557 N.Y.S.2d 886, 889 (App. Div. 1990). The dissent asserted:

[T]he defendant has no obligation to use its funds other than in accordance with its charter. There is no contention that the funds are not used for a purpose for which the defendant is organized. Plaintiffs would have the defendant cover all bases while the defendant is satisfied to cover only a portion thereof. Plaintiffs are not deceived, rather they are unsatisfied.

Id. at 891 (Kupferman, J., dissenting). In contrast, see *In re Alaimo*: “Respondent, decedent’s grandson and a person in whose honor the trust was created, lacks standing to challenge petitioners’ administration of the trust. Rather, standing to enforce the trust or challenge petitioners’ administration of it is restricted to the Attorney General.” *In re Alaimo*, 732 N.Y.S.2d 819 (App. Div. 2001) (citations omitted).

⁶⁹ 723 N.Y.S.2d 426 (App. Div. 2001). See the thorough treatment of this case in Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093 (2005).

court-appointed representative of her husband's estate—to challenge a new use of his restricted gift proposed by the donee charity and approved by the attorney general.⁷⁰ The three-judge majority opinion declared: “We conclude that the distinct but related interests of the donor and the Attorney General are best served by continuing to accord standing to donors to enforce the terms of their own gifts concurrent with the Attorney General’s standing to enforce such gifts on behalf of the beneficiaries thereof.”⁷¹ The dissent worried that: “By determining that plaintiff may pursue the instant action, the majority necessarily concludes that a decedent’s estate, which has no interest in a gift, may prevent the New York State Attorney General from exercising his discretion in determining how to prosecute alleged violations of law.”⁷² The matter settled in September 2003.⁷³

A separate issue arises with respect to the possible standing of the donor of an *unrestricted* gift to a corporate charity that changes its charitable purpose.⁷⁴ Presumably standing is doubly unavailable:

⁷⁰ The New York Surrogate’s Court subsequently granted attorneys’ fees to Mrs. Smithers-Fornaci out of her husband’s estate, over the opposition of the attorney general and several charitable remainder beneficiaries. See *In re Estate of Smithers*, 760 N.Y.S.2d 304, 308 (Sur. Ct. 2003) (“To deny this court the right to award reasonable counsel fees to this fiduciary would vitiate the right of a private cause of action created by the Appellate Division. Of course, the fiduciary does not possess a blank check to frolic far afield from her duties to the estate. The court never loses the right to examine a request for attorney’s fees and each case must be decided on the unique facts presented.”).

⁷¹ *Smithers*, 723 N.Y.S.2d at 435–36.

⁷² *Id.* at 442 (Friedman, J., dissenting). The dissent agreed with the majority that Smithers himself had retained enough approval rights that he would have had standing to enforce, but disagreed that these rights continued in the representative of his estate. *Id.* at 441.

⁷³ The settlement document has not been made public, and reports of its terms vary. The agreement requires St. Luke’s-Roosevelt Hospital to transfer either \$6 million (according to the *New York Sun*) or \$8 million (according to the *Daily News*) either to the estate of R. Brinkley Smithers (according to the *Sun*) or to another charity for the original purpose (according to the *Chronicle of Philanthropy*). Adam Cataldo, *St. Luke’s-Roosevelt Settles Smithers Suit*, N.Y. SUN, Oct. 23, 2003, at 2; William Sherman, *Rehab Center on Mend with \$8M Settlement*, DAILY NEWS (New York), Oct. 22, 2003, at 55. Smithers’s original gift was \$10 million, which the hospital spent for a residential rehabilitation facility that it sold for more than \$14 million. Stephen G. Green, *N.Y. Hospital Settles Case Filed by Donor’s Widow*, CHRON. PHILANTHROPY (Wash. D.C.), Oct. 30, 2003, at 14. The hospital is obligated to use the remainder of the sale proceeds for its substance-abuse programs, but the hospital may no longer use the Smithers name. *Id.*; see also Tina Susman, *Gift-Givers Keeping Closer Tabs*, NEWSDAY (New York), Oct. 24, 2003, at A26 (discussing *Smithers* case).

⁷⁴ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §§ 240, 245 (Preliminary Draft No. 3,

because donors generally do not have standing and have no special interest, and because, having made an unrestricted gift, the donor would not have retained a right to bring the action.⁷⁵

C. STATUTORY DEVELOPMENTS

1. *Uniform Management of Institutional Funds Act (UMIFA) (1972)*. Since its adoption in 1972 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Uniform Management of Institutional Funds Act, enacted in forty-seven states and the District of Columbia, has provided a mechanism for releasing donor restrictions on institutional funds.⁷⁶ Generally, an “institution” is an organization formed and operated exclusively for educational, religious, charitable, or other eleemosynary purposes.⁷⁷ (UMIFA, more broadly, has had a liberating effect on charity investment management practices.)

Section 7(a) of UMIFA provides that, with the donor’s written consent, the charity’s “governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.”⁷⁸ If written consent cannot be obtained because of the donor’s death, disability,

2005); *see also* *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 763 (N.Y. 1985) (Jasen, J., dissenting) (“Scholarly commentary supports the view that amendment of the corporate charter by the trustees of a charitable corporation, in an effort to change a corporate purpose, is a legitimate alternative to the cy pres doctrine.”); *supra* notes 22–34 and accompanying text (discussing beneficiary standing in such circumstances).

⁷⁵ *See* Samuel W. Brauer et al., *No Trespassing: Donors Lack Legal Standing to Challenge Corporate Acts of Florida Not-for-Profit Corporations*, 75 FLA. B.J. 50, 51–52 (2001). Compare the denial of a donor’s petition to intervene in a lawsuit brought against a Catholic archdiocese by a victim of priestly sexual abuse. *Fortier v. Hartford Roman Catholic Diocesan Corp.*, No. CV030475096, 2005 WL 758113 (Conn. Super. Ct. Feb. 24, 2005). The *Fortier* court explained:

Carried to its logical extreme, if Frechette’s position is accepted, every Catholic in the state who contributes to the Archdiocese would have a right to intervene since he or she could argue that the value or worth of his contribution is diminished if assets are diverted by the archdiocese to satisfy a successful judgment in one of these cases – less money might be available to accomplish a particular charitable purpose that any contributing Catholic might be interested in and which motivated the contribution in the first place.

Id. at *4.

⁷⁶ UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7, 7A U.L.A. 35 (2006).

⁷⁷ *Id.* § 1(1).

⁷⁸ *Id.* § 7(a).

unavailability, or impossibility of identification, then the governing board may apply to the court for release of the restriction.⁷⁹ The charity must notify the attorney general, who may intervene.⁸⁰ The court may release any restriction, in whole or in part, that it finds to be “obsolete, inappropriate, or impracticable,” a test that was intended to be more flexible than the then-understood cy pres standard.⁸¹

In *Carl J. Herzog Foundation*, however, the Connecticut Supreme Court held that UMIFA Section 7 (Release of Restriction in Gift Instrument) does not give a donor standing to bring a lawsuit in a case where the charity unilaterally altered the restriction over the objection of the donor and the attorney general did not take action.⁸² The court explained:

In the comment to § 7, the drafters of UMIFA expressly provided that the donor of a completed gift would not have standing to enforce the terms of the gift. “*The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.*”

These clear comments regarding the power of a donor to enforce restrictions on a charitable gift arose in the context of debate concerning the creation of potential adverse tax consequences for donors, if UMIFA was interpreted to provide donors with control over their gift property after the completion of the gift. Pursuant to § 170(a) of the Internal Revenue Code and § 1.170A-1(c) of the Treasury Regulations, an income tax deduction for a charitable contribution is disallowed unless the taxpayer has permanently surrendered “dominion and control” over the property or funds in question. Where there is a possibility not “so remote as to be negligible”

⁷⁹ *Id.* § 7(b).

⁸⁰ *Id.*

⁸¹ *Id.* See also *infra* notes 171–80 and accompanying text for additional discussion.

⁸² *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 1001 (Conn. 1997).

that the charitable gift subject to a condition might fail, the tax deduction is disallowed.⁸³

This result must have been particularly galling to the plaintiff, itself a charity. Even if such a remote contingency were a concern (the Treasury regulations declare remote contingencies irrelevant in determining whether a gift is complete), a donor that is itself a charity does not need a charitable-contribution deduction.

The *Herzog Foundation* court commented:

[I]t would have been anomalous for the drafters of UMIFA to strive to assist charitable institutions by creating smoother procedural avenues for the release of restrictions while simultaneously establishing standing for a new class of litigants, donors, who would defeat this very purpose by virtue of the potential of lengthy and complicated litigation.⁸⁴

The two-judge dissent tersely stated:

The majority here holds that the donor itself may not enforce a restriction in a gift to an educational institution when the institution had specifically agreed to that restriction. This decision is simply an approval of a donee, in the words of the donor, “double crossing the donor,” and doing it with impunity unless an elected attorney general does something about it.

This decision will not encourage donations to Connecticut colleges and universities. I fail to see why Connecticut, the home of so many respected schools that would honor their promises, should endorse such sharp

⁸³ *Id.* at 1001 (citation omitted).

⁸⁴ *Id.* at 1002. In omitted footnote 11, the court cites to the amicus brief filed by educational associations, which “persuasively posits that, should the establishment of donor standing become the law, the infinite variety of charitable gift restrictions that affect educational institutions would create the potential for a flood of ‘time-consuming, fact-sensitive litigation.’” *Id.* at 1002 n.11.

practices and create a climate in this state that will have a chilling effect on gifts to its educational institutions.⁸⁵

2. *Uniform Trust Code (2000)*. The NCCUSL adopted the Uniform Trust Code in 2000, amending it in 2001, 2003, 2004, and 2005; it has been enacted in nineteen states and the District of Columbia.⁸⁶ Evidently, it was unhappiness over the result in *Herzog Foundation* that prompted the drafters of the Uniform Trust Code to provide that the “settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”⁸⁷ Similarly, in deliberate contrast to the common law, the Uniform Trust Code permits a settlor to initiate a cy pres proceeding.⁸⁸

No cases have yet been decided under the Uniform Trust Code’s settlor-standing provisions. The statutory provisions’ lack of nuance and specificity raises concerns that should have been addressed in the legislative process, especially if standing were to be extended to donors of restricted gifts to corporate charities. Should there be a dollar threshold to protect charities from nuisance suits? Should private standing be limited to the donor only, or should it be expanded to the donor’s successors-in-interest and certain other parties?⁸⁹ Even if only the donor is granted standing, do we still

⁸⁵ *Id.* (McDonald, J., dissenting).

⁸⁶ According to NCCUSL’s website, as of March 26, 2007, the statute has been enacted in Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming. Unif. Law Comm’rs, A Few Facts About the Uniform Trust Code, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited June 20, 2007). Note that Arizona adopted, but then repealed, the UTC, although evidently for reasons unrelated to the rules on charitable trusts. *Id.*

⁸⁷ UNIF. TRUST CODE § 405(c), 7C U.L.A. 61 (2000); see also Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 628 (2003) (criticizing *Herzog Foundation* rule that denied foundation standing).

⁸⁸ UNIF. TRUST CODE § 410(b), 7C U.L.A. 495. Section 410(b) of the Uniform Trust Code ends: “The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.” *Id.* Commentary provides: “Contrary to Restatement (Second) of Trusts section 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply cy pres to modify the settlor’s charitable trust.” *Id.* § 440 cmt., 7C U.L.A. 496.

⁸⁹ See, for example, DEL. CODE ANN. tit. 12, § 3303 (2001 & Supp. 2006), which the legislature amended in 2005 by adding: “A settlor may maintain an action to enforce a charitable trust under this section and may designate a person or persons, whether or not born at the time of such designation, to enforce a charitable trust under this section.” *Id.*

need a time limit to address gifts made by institutional donors, such as family foundations, which never die? If the gift instrument provides for standing for the donor and for designated others, are there any public policy limits on who those private enforcers can be? More generally, do the answers depend on whether the restriction has become impossible to carry out—that is, whether this is a modification proceeding or an allegation of breach by the charity? The cases that seem to raise judicial sympathies are usually the latter.⁹⁰

3. *Revised UMIFA: The Uniform Prudent Management of Institutional Funds Act (UPMIFA) (2006)*. Some of these questions of statutory design arose during the course of the project by NCCUSL to revise and restate UMIFA.⁹¹ In contrast to the Uniform Trust Code, the UMIFA revision project considered including, but did not pursue, a grant of donor standing.⁹² Specifically, the October 2002 draft included a Section 8, titled “Enforcement of Restricted Gifts,” which read as follows:

(a) If a gift instrument restricts the use of assets transferred to an institution, then the donor may maintain a proceeding to enforce the restriction on the gift.

(b) Any right held by the donor under subsection (a) may be exercised on the donor’s behalf by his [or her] conservator or guardian or by the personal representative of the donor’s estate.

(c) A donor’s right to maintain a proceeding under subsection (a) is limited to enforcing the restriction on the donor’s gift and does not give a donor standing to challenge other actions by the governing board.

⁹⁰ See *infra* note 114 and accompanying text.

⁹¹ For documents prepared and comments submitted during the course of this project, visit the NCCUSL Archives on the University of Pennsylvania Law School Library’s website. Biddle Law Library Archives: NCCUSL Drafts and Final Acts, <http://www.law.upenn.edu/bll/ulc/ulc.htm#umoifa> (last visited June 20, 2007) [hereinafter NCCUSL Drafts and Final Acts].

⁹² As an invited observer to this project, I attended the November 2002 meeting at which this provision was considered. See generally Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277 (2007) (discussing, as reporter, the revision project).

(d) A donor may maintain a proceeding under subsection (a) only if the gift to be enforced had a value that was either (i) greater than [\$500,000] at the time the donor made the gift or (ii) greater than [5%] of the value of the assets of the institution at the time the donor begins the proceeding.

(e) A donor's right to maintain a proceeding under subsection (a) ceases [30 years] after the date of the last donation that was subject to the restriction.⁹³

The Reporter's Notes to this draft concluded:

The right to maintain a proceeding under this section is limited to the gift itself and cannot extend to other decisions of a governing board. For example, if a donor made a gift to a nursing school to provide scholarships to nursing students and the institution that operated the nursing school decided to close the nursing school, the donor could not challenge the decision to close the nursing school but could challenge the use of the donor's gift for purposes other than scholarships to nursing students.⁹⁴

⁹³ UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (200-) § 8 (Draft Oct. 20, 2002), *available at* <http://www.law.upenn.edu/bll/ulc/umoifa/draft1102.pdf>.

⁹⁴ *Id.* § 8 reporter's note. The draft Reporter's Notes for section 8 of UMIFA (200-) began:

If the donor has included a restriction on the gift in the gift instrument, the donor does not need to reserve a right of reverter or a right to redirect in the gift instrument. In *Herzog, Carl J. Herzog Found., Inc. v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997), the court stated that unless a donor not only restricted the uses to which the gift could be put but also reserved a right of reverter or a right to redirect the gift to the restricted purposes, the donor lacked standing to enforce the restriction. The donor should not have to do both.

Section 8 is provided in addition to any other rights available by law, including rights to standing under a relator statute, *see, e.g.*, CAL. CORP CODE § 5142(a) (West 1990), or rights that persons with special interests may have. The rights granted to donors under this section are in addition to rights vested in the state attorney general.

With few exceptions, only a state attorney general has had the right to enforce breaches of fiduciary duties, including failure to carry out an institution's purposes, for charitable trusts and nonprofit corporations. Courts have occasionally permitted persons with "special interests" in an

In her cover memorandum to the UMIFA Drafting Committee describing this draft, project reporter Susan Gary indicated that draft Section 8 raised questions: “Is it appropriate to add conservator or guardian? Should the donor’s right be extended to heirs?”⁹⁵ She also explained:

This new section creates limited donor standing. A donor can enforce a restricted gift, but only if the gift instrument contains the restriction. The statute includes both a temporal limit (at some number of years after a gift the right to enforce ceases) and a monetary limit (the gift must be of a sufficient size to warrant giving the donor standing). The intent is to allow the donor of a significant gift to enforce the terms of the gift, but not give standing to every donor.

The statute creates standing in the donor under these limited circumstances rather than using a relator approach. An alternative would be to write the relator concept into the statute. Using relators requires the involvement of the attorney general. It did not seem necessary, and perhaps not desirable, to require the involvement of the attorney general for the limited purposes identified here.

The Comments should address the issue of the degree to which the restriction must be stated. What will the effect of the charity’s statements in solicitation materials be?⁹⁶

institution to maintain proceeding. . . . Scholars have discussed the advantages and disadvantages of this doctrine. . . . Section 8 neither expands nor abrogates the special interests doctrine. Section 8 grants standing to a donor only if the donor has, in a gift instrument[,] restricted the purposes to which the gift can be put.

Id.

⁹⁵ Memorandum from Susan Gary to UMIFA Drafting Comm. (Oct. 20, 2002), *available at* <http://www.law.upenn.edu/blj/ulc/umoifa/memo1102.pdf>.

⁹⁶ *Id.*

Subsequent drafts of the UMIFA revision did not contain a donor-standing provision.⁹⁷

Separately, however, the final version of the revision—now dubbed the Uniform Prudent Management of Institutional Funds Act (UPMIFA), adopted by the Commissioners in July 2006—permits a restriction not only to be released with the consent of the donor, but also to be modified with the consent of the donor, so long as the new use is for a charitable purpose of the donee's.⁹⁸

4. *Nonprofit Corporation Statutes.* Many nonprofit corporation statutes are silent on the issue of standing—and none focuses on the specific issue of restricted gifts, as distinct from performance of fiduciary duties generally. Under the traditional approach, limited standing protects the governing function of the board. As the Mississippi Supreme Court recently explained in rejecting a suit by members of the community against the sale of a nonprofit hospital:

To presume standing under these facts and permit the Intervenor to challenge the business judgment of a properly elected board of governors of a corporation would be to say that an indefinite class of plaintiffs, who simply might receive benefit from acts of a charitable corporation, should have a legal voice in how the corporation is to be run, and further permit individuals from the benefitted public to improperly be deemed members of non-profit corporations, capable of instituting derivative suits against the corporate board of directors and causing the various courts of this state to dictate to charitable corporate officers how to manage their charitable corporations. This result offends the fundamental tenets of corporate law and the express intent of our state legislature.⁹⁹

⁹⁷ See, e.g., NCCUSL Drafts and Final Acts, *supra* note 91 (showing numerous drafts and their evolution).

⁹⁸ UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (2006), available at http://www.law.upenn.edu/bll/ulc/umoifa/2006final_act.htm.

⁹⁹ *City of Picayune v. S. Reg'l Corp.*, 916 So. 2d 510, 528 (Miss. 2005).

As against this policy, some states worried that public enforcement needs to be supplemented by private enforcement. Accordingly, a few modern statutes grant standing to an expanded class of private persons to bring a derivative suit against a nonprofit corporation.¹⁰⁰ Included in some state statutes are certain classes of donors, sometimes under the general category of those with a special interest. Usually, the attorney general must be given notice of any action brought by the other persons specified, and the attorney general may intervene.¹⁰¹ In one of the more detailed statutes, New York's 1970 statutory revision grants standing in suits for breach of fiduciary duty to the attorney general, the corporation, a director, an officer, members holding 5% of voting power, and, if the certificate of incorporation or the bylaws so provide, any contributor of at least \$1,000; the statute also grants standing to a receiver, a trustee in bankruptcy, or a judgment creditor.¹⁰² Both the Revised Model Nonprofit Corporation Act, adopted by the American Bar Association in 1987,¹⁰³ and its recently proposed revision¹⁰⁴ specify standing provisions for ultra vires and derivative suits.¹⁰⁵ In both versions of both sections, private standing is afforded members of the organization and members of the board; donors as such are not mentioned. Even in the absence of a statute, some courts grant standing to those with a "special interest."¹⁰⁶

¹⁰⁰ See, e.g., CAL. CORP. CODE § 5142(a) (West 1990) (adopted in 1980) (granting expanded standing).

¹⁰¹ See, e.g., *id.* (permitting any of the following to "bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust": (1) the corporation, derivatively; (2) an officer; (3) a director; (4) a "person with a reversionary, contractual, or property interest in the assets subject to such charitable trust" [but note, not donors generally]; and (5) the attorney general, or any person granted relator status by the attorney general).

¹⁰² N.Y. NOT-FOR-PROFIT CORP. LAW § 720(b) (McKinney 2006).

¹⁰³ REVISED MODEL NONPROFIT CORP. ACT § 3.04 (1987), available at http://www.paperglyphs.com/nporegulation/documents/model_unpo_corp_act.html.

¹⁰⁴ MODEL NONPROFIT CORP. ACT, 3D ED. § 3.04 (Exposure Draft 2006), available at http://meetings.abanet.org/webupload/commupload/CL580000/sitesofinterest_files/MNCAexposuredraft.doc. See generally Elizabeth A. Moody, *Revising the Model Nonprofit Corporation Act: Plus Ça Change, Plus C'est La Même Chose*, 41 GA. L. REV. 1335 (2007) (discussing revision project).

¹⁰⁵ REVISED MODEL NONPROFIT CORP. ACT § 6.30(a); MODEL NONPROFIT CORP. ACT, 3D ED. § 7.41(a) (Exposure Draft 2006).

¹⁰⁶ See *supra* notes 22–34 and accompanying text (discussing trust law origin of doctrine); *infra* notes 196–217 and accompanying text (discussing courts granting such standing).

Alternatively, the attorney general may grant “relator” status to a private person to bring suit on behalf of the state. While the relator takes the lead in prosecuting the action and is responsible for costs, the attorney general retains ultimate control of the action and may withdraw, dismiss, or compromise it at any time.¹⁰⁷ Procedural restrictions might apply, though. Recently, an Arizona appellate court ruled: “Appellants must also be interested parties to act as relators to bring an action on behalf of the public. Since Appellants are not interested parties to enforce the trust, they are also precluded from acting as relators.”¹⁰⁸

Following the decision in *Smithers*,¹⁰⁹ the New York legislature considered granting standing to a donor to sue for enforcement of a gift restriction, but only upon notice to the attorney general.¹¹⁰ Reportedly in light of the settlement in *Smithers*, though, no change was made to the statute.¹¹¹ The legal framework thus leaves courts to apply the common law trust rules described above to the question of donor standing. By contrast, it does not appear that courts will import standing granted under the trust statutes: In a recent case (in which the judge ruled from the bench), plaintiffs failed to persuade a Virginia probate judge to apply the Uniform Trust Code to a corporate charity.¹¹² Specifically, plaintiffs were denied

¹⁰⁷ Blasko et al., *supra* note 6, at 49; accord James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 674 (1985) (urging that relators, if successful, should be granted reimbursement for costs and attorneys’ fees).

¹⁰⁸ Robert Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1030 n.18 (Ariz. Ct. App. 2004).

¹⁰⁹ See *supra* notes 64–75 and accompanying text (discussing *Smithers* decision).

¹¹⁰ See S.7805 § 522(c), 1999 Leg., 223d Sess. (N.Y. 2000), available on LEXIS at 1999 Bill Text NYS.B. 7805 (“If a governing board disregards a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund, the donor may, on notice to the Attorney General, apply to the Supreme Court of the judicial district where the corporation has its office or principal place of carrying out the purposes for which it was formed for an order to enforce said restriction.”).

¹¹¹ See William Josephson, *Guiding Practitioners and Fiduciaries on Charities*, N.Y.L.J., Dec. 3, 2001, available at <http://www.oag.state.ny.us/charities/nylj/nylj3.pdf> (mentioning that “the Attorney General last year proposed amendments to Not-for-Profit Corporation Law section 522 to clarify the rights of donors” (footnote omitted)). Josephson was then Assistant Attorney General-in-Charge of Attorney General Eliot Spitzer’s Charities Bureau. Omitted footnote 11 reads: “S. 7805-A (May 2, 2000), which, in light of the *Smithers* decision, the Attorney General did not seek reintroduction of this year.” *Id.* Josephson added: “If the Appellate Division’s decision becomes final, the need for such legislation becomes less pressing.” *Id.*

¹¹² Recent Virginia legislation declares that for purposes of attorney general and court

standing in their bid to have a judge review the decision of the Randolph-Macon Woman's College to amend its articles of incorporation to allow it to admit male students.¹¹³ But other decisions instead apply contract doctrine, which I discuss next.

D. CONTRACT DOCTRINE

1. Contrasting Private Contracts and Restricted Charitable Gifts.

Several recent cases that sympathize with the donor's right to

authority, a charitable corporation is to be treated as a charitable trust. VA. CODE ANN. §§ 2.2-507.1 & 17.1-513.01, added by 2002 VA. ACTS ch. 792 (Apr. 8, 2002). In *Dodge v. Trustees of Randolph-Macon Woman's College*, Cir. Court File No. CL06000894 (Lynchburg Cir. 2007), the plaintiffs unsuccessfully invoked that legislation in arguing that the Virginia Uniform Trust Code applies to corporate charities in Virginia. The court filings and a transcript of the hearing are posted at the plaintiffs' website, <http://www.preserveeducation.alchoice.org>.

¹¹³ The court, ruling from the bench, declared:

[T]he court system is just not set up to be an overseer for every charitable hospital and club or function and college in the state of Virginia. That's not the purpose of, I think, either one of these statutes.

I think if there's an allegation of criminal fraud, misdoing or the Attorney General wants to be involved, the Attorney General could be involved. But I don't think the Uniform Trust Code is really applicable to the assets of Randolph-Macon, because it's not under that code section required to be in the manner of an expressed trust.

Transcript of Record at 79, *Dodge*, Cir. Court File No. CL06000894, available at <http://www.preserveeducation.alchoice.org/Official%20Transcript%201%2023%2007%20Demurrer%20Hearing%20-%20CT%20Suit.pdf>. Plaintiffs filed a notice of appeal on February 19, 2007. On March 13, 2007, the trial court entered an order sustaining the college's demurrer and dismissing the case. In a cover letter sent to counsel, the court explained that it considered the plaintiffs amended complaint, but ruled as follows:

For the reasons stated in the defendant's Memoranda and oral argument, the Court makes the following findings and rulings: The VUTC is only applicable to trusts created by statute and administered in the manner of an express trust; § 2.2-507.1 of the Virginia Code grants the Attorney General standing to address misapplication of charitable trust assets, but does not eliminate the statutory provisions of the Non-stock Corporation Act, which governs the actions of the Trustees of RMWC; and that the defendant has not breached any duties by voting to admit males to RMWC which has been done in the past. This vote was a corporate decision that should not be second-guessed by the courts, students or donors. The Court has further ruled that the doctrine of *cy pres* is not applicable to the facts as alleged in these pleadings, and even if it was applicable the plaintiffs lack standing to bring this cause of action.

Order Granting Demurrer, at 2, *Dodge*, Cir. Court File No. CL06000894, available at <http://www.preserveeducation.alchoice.org/03-15-07%20Granting%20Demurrer%20in%20Trust%20Case%20after%20Amendment.pdf>. The college has changed its name to Randolph College, effective July 1, 2007.

complain about the charity's breach of the gift restriction have characterized the appropriate legal regime as contract rather than property.¹¹⁴ Put this way, why should the donor not be able to enforce the benefit of his or her bargain—even if the benefit is for someone else? Moreover, advisors to donors are becoming more savvy, explicitly demanding such terms in the gift instrument as the charitable donee's waiver of the donor's lack of standing to sue to enforce the restriction. Is the court thereby obligated to hear the dispute, or is jurisdiction not to be conferred by agreement—should the donor's traditional lack of standing not be waivable on public policy grounds?¹¹⁵

¹¹⁴ Such an approach might carry tax risks. See John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 699–700 (2001) (suggesting that gift instrument that looks too much like bargained-for contract might appropriately jeopardize donor's tax deduction for gift). Professor Colombo states:

Fee schedules, either express or enforced by custom, for spiritual auditing, mass intentions, tickets to ceremonies, or “commemorative opportunities” are perfect examples of how the modern charitable organization has structured transactions like purchases ostensibly to overcome the tendency of donors not to give at all, or to “lowball” a particular contribution. In such cases, we should assume that the “substantial indicia of purchase,” even if not technically considered a quid pro quo, surrounding the transaction also overcomes the free-riding tendency of donors and minimizes market failure for the recipient entity. The appropriate response, therefore, is to reduce overall government subsidization of the entity by denying deductibility to these transactions.

Id. Compare I.R.S. Priv. Ltr. Rul. 03-23-006 (Nov. 22, 2002) (holding that value of contractual stadium naming rights results in impermissible private business use under tax-exempt bond rules of I.R.C. § 141(b): “[w]hile the Contract relates only to a narrow set of rights with respect to the Facility, we do not believe that this precludes a finding of private business use. If anything, this impacts the measurement of private business use, not the existence of such use.”). But see Treas. Reg. § 53.4941(d)-2(f)(9) (2006), Example 4 (“A, disqualified person with respect to private foundation S, contributes certain real estate to S for the purpose of building a neighborhood recreation center in a particular underprivileged area. As a condition of the gift, S agrees to name the recreation center after A. Since the benefit to A is only incidental and tenuous, the naming of the recreation center, by itself, will not be an act of self-dealing.”). See also Rev. Rul. 73-407, 1973-2 C.B. 383 (citing example from regulations in holding that contribution by private foundation to public charity made on condition that public charity change its name to that of substantial contributor to foundation and agree not to change name again for 100 years does not constitute act of self-dealing under I.R.C. § 4941(d)(1)(E)).

¹¹⁵ See *In re Barnes Found.*, 672 A.2d 1364, 1366 (Pa. Super. Ct. 1996) (“The matter of standing is jurisdictional and may not be waived by the court . . . electing to proceed on the merits.”).

Recently, a court applied contract law to allow a reverter suit even without such a right reserved in the gift instrument.¹¹⁶ In this case, the appellate court ruled that where a college “promised to name the wing after appellant in exchange for appellant’s \$500,000 donation[,] . . . a cause of action for breach of contract accrued to appellant when the building was completed and the entire building named without any mention of appellant.”¹¹⁷ However, because the donor did not bring suit “within six years after respondent’s breach of contract,” the court affirmed the district court’s finding “that his contract claim was time-barred.”¹¹⁸ Dicta made clear that the court would have enforced the college’s promise, by ordering a repayment of the gift with other funds: “Nonprofit corporations, for-profit corporations, and individuals, are expected to honor their commitments. Courts of law and equity enforce legal contracts. Had appellant timely sued, no harm would come to Augsburg, specifically, or society in general, if just debts were paid. The keeping of one’s promise honors us all.”¹¹⁹

¹¹⁶ *Stock v. Augsburg Coll.*, No. Cl-01-1673, 2002 WL 555944, at *4 (Minn. Ct. App. Apr. 16, 2002).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *6.

Despite occasional similar case law,¹²⁰ the traditional view is that a restricted gift is not a contract. Accordingly, if it becomes burdensome for the charity to perform the restriction, the court will modify the restriction under the cy pres doctrine rather than hold the charity to the benefit of the bargain.¹²¹ For example, *Knights of Equity Memorial Scholarships Commission v. University of Detroit*¹²² involved a 1924 donation designed to fund twenty-four full scholarships into perpetuity.¹²³ The court took judicial notice of “the shrinkage in the value of the dollar, of the hardships visited upon the recipients of fixed incomes,” and the necessity that “the suit must be cut to fit the cloth.”¹²⁴ For several years, the university made up the shortfall between the cost of tuition and the income of the fund out of its other assets, but finally “contended that the intention of the parties in the agreement was not to impose a financial burden upon the school.”¹²⁵ The school also argued “that if this were to be held an ordinary contract, the doctrine of commercial frustration would apply to it.”¹²⁶ The Michigan Supreme Court

¹²⁰ See *Hopkins v. Women's Med. Coll. of Pa.*, 200 A. 32, 33 (Pa. 1938) (involving \$5,000 endowment to medical college obliging it to provide scholarship); *Alumnae Ass'n v. Univ. of Pa.*, 159 A. 449, 449 (Pa. 1932) (involving endowment for bed in private hospital room for association members). *Alumnae Association* involved a donation that obligated the recipient to provide hospital service; the court declared:

Answering that defendant hospital authorities were at liberty to reject the endowment at the time of the merger of the two hospitals, they did not do so, but, in terms not in the slightest degree doubtful, accepted the endowment and have for sixteen years continuously carried out the terms of the contract without questions. They cannot now be permitted to repudiate it.

Alumnae Ass'n, 159 A. at 450. *Hopkins* involved a donation to provide full scholarships, but these could no longer be satisfied from the gift; the court declared:

If conditions subsequently demonstrated the College, in its natural eagerness to secure substantial contributions, had made an unwise bargain, that, of course, would not relieve it from performance. . . . If respondent's viewpoint were to be upheld, the raising of the tuition rates would be permitted to defeat the entire object of petitioners by making their gift hopelessly inadequate for the purpose for which, in good faith, it had been contributed.

Hopkins, 200 A. at 34.

¹²¹ See *infra* notes 157–94 and accompanying text.

¹²² 102 N.W.2d 463 (Mich. 1960).

¹²³ *Id.* at 464.

¹²⁴ *Id.* at 465.

¹²⁵ *Id.*

¹²⁶ *Id.*

found: “The circumstances surrounding the transaction and the expressed intent of the parties, as well as the time of agreement itself, reject any conclusion that this was purely a contract or that it should be so construed.”¹²⁷ In affirming the decision of the chancellor that the scholarships should function only as a credit against tuition, the court commented, “should such inflexibility in the use of trust funds become the rule, a curtailment of the facilities otherwise available to all must be the inevitable result. It is to this situation that the cy pres doctrine has particular applicability.”¹²⁸

In a recent unpublished California appeals court decision, *Glenn v. University of Southern California*,¹²⁹ the parties—and the court—assumed that if the transaction were a gift, the donor would not have standing to sue to enforce its terms, but if the transaction were a contract, the donor would have standing under ordinary contract doctrine.¹³⁰ The appellate court, reversing the trial court, held that the donor is entitled to a trial on his claims of breach of contract:

Appellant alleges he had a partly-oral, partly-written contract with U.S.C. to endow a professorial chair which U.S.C. promised to fund while it waited for him to honor his pledge. He alleges he performed under the contract when he transferred \$1.6 million to U.S.C. He alleges U.S.C. breached the contract by not funding the professorship and by selecting an ineligible recipient. Finally, he alleges U.S.C.’s breach damaged him because he could have put his money to uses other than giving it to U.S.C. Based on these allegations, appellant has pleaded a cause of action for breach of contract.¹³¹

¹²⁷ *Id.* at 467.

¹²⁸ *Id.* In so ruling, the court explicitly rejected the reasoning in the two prior Pennsylvania cases discussed *supra* in note 120.

¹²⁹ No. B151776, 2002 WL 31022068 (Cal. Ct. App. Sept. 10, 2002).

¹³⁰ *Id.* at *2.

¹³¹ *Id.* at *3. The court rejected the university’s argument that the oral terms would necessarily be inadmissible:

Respondents also contend appellant’s allegation that they orally promised immediately to fund the chair violates the parol evidence rule, which bars oral revisions that contradict a written contract. The rule applies, however, only when the written agreement is integrated, which is a

The appeals court also permitted the donor to prosecute his claim of promissory fraud: “Appellant alleges respondents promised to fund the professorship immediately without intending to do so. He alleges respondents made the promise to encourage him to endow the position, and in giving \$1.6 million to U.S.C. he justifiably relied on that promise.”¹³² The *Glenn* case reportedly settled, but the terms were not disclosed.¹³³

It is unclear whether the recent increased invocation of contract doctrine by donors (or their heirs or representatives) is merely accidental or represents a trend.¹³⁴ We can assume, though, that the growing number of reported cases is just the tip of the iceberg: after all, a matter need not reach court to achieve satisfaction for the donor. For example, as reported in the press, Lincoln Center likely forestalled a lawsuit from the family of Avery Fisher by scaling back plans to replace Avery Fisher Hall, and so avoided having to change the Hall’s name to acknowledge the generosity of a new donor.¹³⁵ In reviewing concluded and pending cases brought by donors, the *New*

question of the parties’ intent, which is itself a factual question.

Id. at *4.

¹³² *Id.* at *3. Finally, the court allowed Glenn to proceed with his claims of common law and statutory misappropriation:

Appellant alleges respondents publicized his endowment of the professorship to encourage donations from other philanthropists. He further alleges that he permitted respondents to use his name only on the condition of their complying with the terms of the endowment, but they exceeded the scope of his consent when they breached their agreement. Their breach injured him, he alleges, because it denied him the use of his funds and besmirched his name in the philanthropic community.

Id. at *4.

¹³³ Greg Winter & Jonathan Cheng, *Strings Attached: Givers and Colleges Clash on Spending*, N.Y. TIMES, Nov. 27, 2004, at A1.

¹³⁴ See Stephen G. Greene, *Seeking Control in Court*, CHRON. PHILANTHROPY (Wash., D.C.), Nov. 28, 2002, at 6 (reporting on recent cases).

¹³⁵ See Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002, at E1 (describing threat of legal action by Fisher family); Robin Pogrebin, *Philharmonic to Give Home a New Interior*, N.Y. TIMES, May 20, 2004, at A1 (“At one point the Philharmonic considered tearing down the entire building and starting over from scratch, a plan that was largely rejected as too costly, time-consuming and full of other problems given that the Avery Fisher family threatened legal action if the hall’s name was changed. An internal renovation allows the orchestra to offer the auditorium as a naming opportunity for a large donor, an enticement generally considered essential for such an ambitious fund-raising effort.”). See generally John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375 (2005) (exploring problems that result from charitable naming opportunity contribution).

York Times observed that donors' recent "muscle philanthropy" will "almost certainly increase the institutions' costs, not only to defend themselves but also to improve internal financial controls."¹³⁶

From the academic direction, too, commentators subject the topic of settlor standing to contract analysis.¹³⁷ While the pioneering articles focused on private trusts, Professor Ronald Chester was inspired by the Uniform Trust Code to address charitable trusts.¹³⁸ When the gift constitutes a contract, he would allow the grantor (or successors-in-interest, such as the grantor's estate, but not the grantor's heirs) to sue for compliance with the restricted use, "or if specific performance is impracticable because of misappropriation of all or part of the gift, the grantor can sue for damages to restore the gift to its appropriate size."¹³⁹

Despite these recent developments, courts still commonly hew to the traditional approach that a donor cannot maintain a suit to enforce a gift restriction and that a restricted gift is not subject to traditional contract analysis. See, for example, the Michigan appellate court decision in *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute*,¹⁴⁰ in which the plaintiff complained that the donee had failed to maintain the donor family's name on its cancer center following a merger.¹⁴¹ Reversing the trial court, the appellate court ruled that the donor's family lacked standing to bring the suit: "Here, the language of the endowment agreement indicated that the funds were donated for a charitable purpose. The attorney

¹³⁶ Stephanie Strom, *Donors Add Watchdog Role to Relations with Charities*, N.Y. TIMES, Mar. 29, 2003, at A8. The story quotes Janet P. Atkins, chief executive of Philanthropic Advisers, a consulting firm: "We have constructed some really hairy gift agreements recently. . . . Donors are asking for serious accountability and spelling their terms out in great detail." *Id.*

¹³⁷ See Gaubatz, *supra* note 47, at 922–23 (citing a few cases allowing grantor standing from nineteenth and early twentieth centuries); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627, 631 (1995) (finding that "the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract," but excluding from his study charitable trusts, as "quasi-public institutions that must satisfy standards of public benefit").

¹³⁸ Chester, *supra* note 87, at 634.

¹³⁹ *Id.*

¹⁴⁰ 698 N.W.2d 900 (Mich. Ct. App. 2005).

¹⁴¹ *Id.* at 906.

general, a co-trustee, or a person with a special interest may enforce the terms of a charitable trust, but not the settlor or his heirs.”¹⁴²

The Michigan appellate court also reversed the finding that consideration existed for the naming provision:

Here, rather than employing the words “in consideration for” or a similar term indicating that the payment of the \$1.5 million was in exchange for the naming provision, the parties used “[in] recognition of and appreciation to. . . .” The use of these terms did not indicate a bargained for exchange with respect to the naming provision.¹⁴³

Regrettably, though, this analysis implies that the distinction between gift and contract is easily made by the choice of the right magic words. Separately, the press had reported that the donor’s family—which had a representative on the board—waited five years to make its unhappiness known,¹⁴⁴ suggesting that laches might have been a better legal basis for the court’s decision. Importantly, moreover, the appellate court affirmed the trial court’s rejection of the plaintiff’s claim for damages:

[T]he trial court noted that plaintiff had not cited any authority with respect to the value of the loss of naming rights by a family charitable foundation, found that there was no method to measure damages, and concluded that plaintiff’s damages were too speculative. Indeed, plaintiff has not cited any authority to support its claim for damages on appeal.¹⁴⁵

As described above, suits by a current or prospective beneficiary are also amenable to contract analysis (although it is still not easy

¹⁴² *Id.* at 913–14 (citing *St. John’s-St Luke Evangelical Church v. Nat’l Bank of Detroit*, 283 N.W.2d 852 (Mich. Ct. App. 1979), which in turn cites RESTATEMENT (SECOND) OF TRUSTS § 391).

¹⁴³ *Id.* at 915 (footnote omitted).

¹⁴⁴ David Barkholz, *Karmanos Institute Name Disputed; Cancer Center Should Bear Prentis Moniker, Heirs Say*, CRAIN’S DETROIT BUS., Aug. 21, 2000, at 3.

¹⁴⁵ *Prentis*, 698 N.W.2d at 913.

to win such a claim). By contrast, contract analysis would not be so easy to apply in a suit by those other than donors and beneficiaries who purport to guard the guardians.¹⁴⁶ Additionally, most important to our immediate topic, treating a testamentary restricted bequest that was drafted without the knowledge or consent of the charitable donee as an “offer” and the taking of the restricted gift as “acceptance” that provides “consideration” resulting in a contract usurps gift law from its clearest application.

2. *Symmetry for Applying Contract Law?: Charitable Pledges.* Application of contract doctrine to charitable gifts finds perhaps its strongest support in the opposite situation: when donors fail to perform as promised. Under traditional contract law, in the ordinary case, the charity has provided no reciprocal “consideration” to the donor.¹⁴⁷ Nevertheless, courts in most states will enforce a pledge or installment gift if the charity has relied on the donor’s promise to its detriment or if the promise induced others to give.¹⁴⁸ (This assumes that none of the other contract defenses apply, such as the donor’s lack of mental capacity to make the gift, or the charity’s fraud, undue influence, or duress.) Charities seem to be increasing their willingness to sue donors who default on their major pledges—often when the donor dies and the will makes no mention of the promise.¹⁴⁹

¹⁴⁶ See *infra* notes 228–50 and accompanying text (discussing the Hershey School Alumni Association).

¹⁴⁷ Pledges have been upheld under standard contract doctrine, even if courts have sometimes stretched to find consideration. See *Allegheny Coll. v. Nat’l Chautauqua County Bank*, 159 N.E. 173, 176 (N.Y. 1927) (noting that “[t]he longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good”).

¹⁴⁸ See generally Mary Frances Butig, Gordon T. Butler & Lynne M. Murphy, *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 U.S.F.L. REV. 47 (1992).

¹⁴⁹ See Alan G. Artner, *Museum Settles Suit over Reneged Pledge*, CHI. TRIB., July 10, 1998, at 1 (discussing suit over defaulted pledge). In 1991, Paul W. Oliver-Hoffmann made a \$5 million pledge to Chicago’s Museum of Contemporary Art (MCA), to kick off its fund raising campaign for its new building on Chicago Avenue, near the Water Tower. *Id.* At the time, Paul served as chairman of the museum’s board of trustees. *Id.* During the next seven years, he and his wife, Camille, continued to support museum efforts, but in 1992 they moved to Virginia, and Paul resigned from the MCA board. *Id.* In their new home, they became active with the Hirshhorn Museum in Washington, D.C., whose board Camille joined in 1998. *Id.* Paul never fulfilled his pledge to the MCA, based on his view that its management was fiscally imprudent. *Id.* The suit ended in settlement. *Id.* In another dispute, a Texas jury was not sympathetic to a suit by a Pennsylvania college that in 1976 cajoled a major alumnus into

Section 90(1) of the *Restatement (Second) of Contracts* enforces promises generally in cases of detrimental reliance, but only to the extent justice requires.¹⁵⁰ By contrast, Section 90(2) provides for full enforcement of charitable subscriptions without any additional showing of reliance or induced action.¹⁵¹ However, the charity's recovery is still limited to what justice requires—e.g., to the extent of its detriment, or to the extent a mutual promise was performed.¹⁵²

ALI Preliminary Draft No. 3 does not, however, adopt the position of Section 90(2) of the *Second Restatement*. As a threshold matter of terminology, not all pledge instruments are the same. In contrast to an instrument that declares the donor's intent to create a legally binding obligation, some pledges explicitly state that they will not result in a binding obligation. In such a case, the charity cannot be considered to have relied on the donor's promise. On the merits, while the position enunciated in Section 90(2) may be the more enlightened view as de facto recognition of courts' creative efforts to find such promises binding, it remains a minority view.¹⁵³ As the Reporter for the *Second Restatement* observed a few years ago: "The exception for charitable subscriptions has played to mixed reviews. Courts have been less than pellucid in assessing such important

pledging \$4 million and continued to court him over the next two decades, seeking as much as \$50 million. See Daniel Golden, *College Finally Got Alumnus to Pledge; Next Job: Collecting*, WALL ST. J., July 24, 2003, at A1 (discussing suit). The donor had given only \$2 million by the time he died in 1995, prompting the college to sue to collect another \$5 million. *Id.* ("The case affords a rare look at the lengths to which a financially strapped college went to secure big gifts. Interviews and memos filed in a school lawsuit against [J. Howard Marshall II's] estate show that both Haverford and Mr. Marshall were less than candid with each other. Together, they created a cautionary tale for colleges about the hazards of pinning their hopes on reluctant angels."). Specifically, the jury found "that Haverford hadn't been injured because it hadn't relied on Mr. Marshall's pledges but instead had named already-funded projects after him." *Id.* In an interview, the jury foreman said he "didn't like the fact that Haverford kept an extensive file on Mr. Marshall, including details of his and his then-wife's drinking habits, confidential financial information and health." *Id.*

¹⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

¹⁵¹ *Id.* § 90(2).

¹⁵² But see, e.g., Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 861 n.107 (1997) ("Assuming that charitable subscriptions are enforceable on the basis of public policy, rather than on the basis of actual reliance, then based on the principle that the measure of damages for breach of a given kind of promise should be based on the reason that the promise is enforceable, such promises should be enforceable to their full extent, rather than simply to the extent of any reliance.").

¹⁵³ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 480, reporter's note 4 (Preliminary Draft No. 3, 2005).

factors as whether the promise was written or oral and whether the promisor reneged before death or simply died. Scholarly efforts to justify the exception have been varied.”¹⁵⁴

As an alternative approach, Pennsylvania adopted the Uniform Written Obligations Act, which provides: “A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.”¹⁵⁵ In a three-to-two vote, a New York appeals court recently upheld the application of this statute to a pledge agreement executed two months before the promisor’s death in favor of Drexel University.¹⁵⁶

III. DISTINGUISHING IMPLEMENTATION, BREACH, AND CY PRES

¹⁵⁴ E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 404–05 (2000) (footnotes omitted). Professor Farnsworth identified a few dangers that attend enforcing promises to make charitable gifts, including the fact that, “[i]n contrast to the law during the heyday of the seal, the rule for charitable subscriptions does not require a formality to serve a cautionary function.” *Id.* at 404. As a result, a promisor could more easily “squander his future even though ‘he had not so much as a penny.’” *Id.* at 398. While the law recognizes a solution to this problem in the form of a self-declared trust without requiring delivery or anything in writing, such a trust might be revocable and is limited to property owned by the donor at the time of its declaration. *Id.* at 399–400. Farnsworth suggests that “it behooves one who makes . . . a promise [to make a gift] to fashion explicit provisions that take account of the possibility of regret.” *Id.* at 406. Even then, a difficult situation may arise where “the promisee has at least some responsibility for the promisor’s regret,” for example, where the promisor “is shocked at inefficient food distribution by [the] chosen charity.” *Id.* at 408. And finally, there remains the question of whether “the law [should] ignore even a devastating reversal of fortune.” *Id.* at 407. In sum, “[i]t seems safe to hypothesize that the less tolerant a legal system is in excusing promisors from their promises, the more hesitant courts would be in finding promises to be binding.” *Id.* at 405.

¹⁵⁵ PA. STAT. ANN. § 6 (West 1997). Professor Farnsworth characterized the law’s general refusal to enforce a promise to make a gift as paternalistic intervention lacking justification. Farnsworth, *supra* note 154, at 386–87. At the same time, harkening back to the era when a promise made under seal was binding, he would require some type of formality. *Id.* at 409; *see also id.* at 392 (“Because every promise involves an expression of an intention to make a commitment, courts used the formality of the seal to distinguish those promises that were binding under the intention principle from those that were not.”). He suggests a “similar formality,” such as one recommended by a Canadian commission: “enactment of a statute providing that a witnessed, signed writing take the place of the seal.” *Id.* at 409.

¹⁵⁶ *In re Wirth*, 789 N.Y.S.2d 69 (App. Div. 2005). The agreement declared that the signatory, who “intended to be legally bound,” “irrevocably pledged and promised to pay” \$150,000.

Gift restrictions will eventually lead to problems down the road—the tighter the restriction, the sooner the problem. Charities themselves are to some extent responsible for this result. Philanthropic institutions are under constant pressures to obtain funds and to yield to donor demands in doing so, but charities have the obligation to accept restrictions carefully.¹⁵⁷ It might be prudent for a charity to adopt a “gift acceptance policy” calling for board approval before major restricted gifts can be accepted.¹⁵⁸

A. IMPLEMENTATION VERSUS BREACH

As a threshold matter, in carrying out the requirements of a restricted gift, the charity will often have to exercise its judgment. Courts minimize the risk of vexatious litigation by refusing to second-guess decisions committed to the discretion of the trustee or governing board.¹⁵⁹ As described in comments to the *Restatement (Third) of Trusts*: “A court will not interfere with a trustee’s exercise of a discretionary power (or decision not to exercise the power) when that exercise is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee’s fiduciary duties”¹⁶⁰ The same approach will apply in the ALI principles project.

¹⁵⁷ See, e.g., Ass’n of Fundraising Prof’ls, *Emerging Issue: How Much Donor Involvement Is Too Much?*, <http://www.afpnet.org> (follow “Ethics” hyperlink; then follow “Emerging Issues” hyperlink; then follow “Emerging issue: How much donor involvement is too much?” hyperlink) (last visited June 25, 2007) (describing how restrictions might violate a nonprofit’s mission statement or conflicts-of-interest policy, as well as public-benefit legal requirements). Several professional associations have promulgated codes of ethics or standards of practice that deal with restricted gifts. See, e.g., Am. Ass’n of Museums, *Guidelines for Museums on Developing and Managing Individual Donor Support* (Nov. 21, 2002), http://www.aamus.org/museumresources/ethics/indiv_support.cfm (offering restricted gifts guidelines).

¹⁵⁸ See, e.g., University of Vermont, *Gifts* (Nov. 27, 2006), <http://www.uvm.edu/~uvmppg/ppg/advance/gifts.pdf> (containing university’s policy). For a checklist of questions from a legal practitioner’s perspective, see Simpson Thacher & Bartlett’s “Decision Points for Drafting a Grant Agreement Between a Donor and a Charitable Gift Recipient” (July 2, 2002) (on file with author). For additional recommendations, see Eugene R. Tempel, *Donor Intent: Principles of Documenting a Gift*, *NONPROFIT TIMES*, Feb. 1, 2003, at 30.

¹⁵⁹ See RESTATEMENT (THIRD) OF TRUSTS § 87 (2007) (“When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.”); see also *supra* note 34 (quoting from *Robert Schalkenbach Foundation* regarding risk of vexation litigation).

¹⁶⁰ RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. b.

The most spectacular recent litigation over donor intent, still awaiting trial, puts in jeopardy the \$650 million endowment that provides funding for the Woodrow Wilson School of International and Public Affairs at Princeton University. Legal maneuvering has already cost both sides many millions of dollars. The donors, Charles and Marie Robertson, now dead, had funded the Robertson Foundation in 1961 with a \$35 million gift; the Foundation, in turn, devotes its income to supporting the Woodrow Wilson School for the purposes specified by the donors.¹⁶¹ The plaintiffs include the non-Princeton-appointed members of the Foundation's board (these "family trustees" are elected by a majority of the descendants of the donors) and two non-director children of the donors. They filed their suit in 2002 against Princeton University and the four university-appointed members of the Foundation's board.¹⁶² The plaintiffs complain that, contrary to the founders' intent, the school's graduates are seeking employment with non-governmental organizations instead of in government foreign service and international relations. Princeton counters that the field of foreign affairs has changed and expanded over the last fifty years. The suit also alleges that the Foundation's university-appointed board members improperly chose to delegate investment responsibility to PRINCO, Princeton's office that manages its endowment. Without seeking to modify the Foundation's charitable purpose, the plaintiffs want to convert the Foundation to a private foundation whose trustees are appointed by the family. In 2004, the Robertson family amended its complaint to allege fraud, "introducing the prospect of punitive damages to a lawsuit that is already the colossus of its kind, one in which the scale of the money involved is rivaled only by the bitterness it has inspired."¹⁶³

¹⁶¹ Legally, the Foundation is a nonstock corporation, incorporated in Delaware, that is classified as a supporting organization (and thus a non-private foundation) under § 509(a)(3) of the Internal Revenue Code.

¹⁶² See generally E. Daniel Larkin, *Don't Turn a Donor into a Plaintiff*, CHRON. HIGHER EDUC. (Wash., D.C.), May 27, 2005, at B18.

¹⁶³ Winter & Cheng, *supra* note 133, at A12. "Our parents have been betrayed," said Bill Robertson, the 55-year-old son of Charles and Marie. "Really, the university has almost swindled these wonderful people who did something wonderful for this country. It's almost a matter of good and evil." *Id.* In response, Princeton reportedly filed a motion asking the court to order that Princeton University is the only permitted beneficiary of the Robertson Foundation—invoking the private letter ruling that the fund received from the Internal

In 2003, the trial judge denied Princeton's motion to dismiss on grounds of plaintiffs' lack of standing.¹⁶⁴ The court adopted a liberal approach with regard to corporate charities:

The threshold for standing in cases involving charitable corporations is very low. Where accountability for the acts of charitable corporations may be subject to limited oversight, and where the State, through the office of the Attorney General does not have the resources to provide extensive supervision, there is a strong public interest in allowing standing for individuals to bring these kinds of suits that should not be frustrated by stringent requirements.¹⁶⁵

The court then divided the claims into two groups: direct claims brought by the donors' descendants and derivative claims brought by board members.¹⁶⁶ As to the first group, it held:

The by-laws of the Foundation state that the Family Trustees will be designated by the majority of the Robertson's descendants. Robertson, Ernst and Meier are entitled to have a vote in appointing who is designated a Family Trustee and in light of the fact that courts have taken a liberal approach to standing when it comes to charitable trusts the court finds that they hold

Revenue Service granting it supporting organization status. Chanakya Sethi, *University Files New Claims in Suit*, DAILY PRINCETONIAN, Feb. 3, 2005, available at <http://www.dailyprincetonian.com/archives/2005/02/03/news/11887.shtml> (reporting that family's attorney responded: "[The Foundation's] certificate of incorporation allows the University to appoint four of seven trustees. Not seven of seven. And I also understand that the university has a fiduciary and moral duty to use the money in the way it was intended. Nothing that [former University president] Dr. Goheen says here supports the notion that the University's actions are beyond judicial review.'").

¹⁶⁴ *Robertson v. Princeton Univ.*, Civ. Action No. C-99-02 (N.J. Super. Ct. Ch. Div., June 20, 2003) (opinion of Neil H. Shuster) (on file with author).

¹⁶⁵ *Id.* at 25–26 (citing *City of Paterson v. Paterson Gen. Hosp.*, 235 A.2d 487, 495 (N.J. Super. Ct. Ch. Div. 1967) (discussing standing)); see also *infra* notes 209–11 and accompanying text (discussing *Paterson*).

¹⁶⁶ The court complained that "[a]ttempting to decipher which alleged wrongs are pled with respect to the derivative claims, as opposed to the direct claims, is a formidable task due to the style of the pleading." *Robertson*, Civ. Action No. C-99-02, at 26.

a “special interest,” separate and distinct from the beneficiaries of the trust, in seeing that it is enforced. Therefore, the court holds that Robertson, Ernst and Meier have standing to bring their direct claims.¹⁶⁷

As to the second group, the court limited the standing of board members to those acts which occurred after that person joined the board, analogizing the board member to shareholders, who are required by statute to have an ownership interest at the time of the wrong as a prerequisite to standing to bring a derivative suit.¹⁶⁸ While it is understandable that the *Robertson* court tried to find a statutory basis for its rulings regarding enforcement of corporate fiduciary duties, the better view seems to be that those who are members of the board of directors—regardless of when the wrongdoing occurred—should have standing to bring derivative suit (assuming all other requirements are met).¹⁶⁹ More fundamentally, Professor Laura Chisolm has expressed the concern that, because the gift was to the Robertson Foundation, the family’s standing should at most extend to a derivative suit against the Foundation, but not allow them to bring suit against Princeton University directly.¹⁷⁰

B. “SAVING” DONOR INTENT THROUGH DEVIATION AND CY PRES

To deal with unanticipated circumstances, the law protects charitable trusts by the equitable saving devices of deviation and cy pres. These venerable doctrines allow courts to modify restrictions that can no longer be carried out or that impede the purposes of the trust; courts apply similar principles to restricted gifts made to

¹⁶⁷ *Id.* at 25–26.

¹⁶⁸ *Id.* at 26. The court applied the law of Delaware, the state of the Foundation’s incorporation.

¹⁶⁹ See, e.g., MODEL NONPROFIT CORP. ACT, 3D ED. § 7.41(b) (Exposure Draft 2006) (“The plaintiff in a derivative proceeding must be a member, director, or member of a designated body at the time of bringing the proceeding.”).

¹⁷⁰ Laura B. Chisolm, Professor, Case Western Reserve Univ. Law Sch., Oral Comments at the Annual Conference of the National Center on Philanthropy and the Law (NCPL), New York Univ. Sch. of Law (Oct. 27–28, 2005).

corporate charities.¹⁷¹ If the gift instrument specifies what should be done, the donor's expressed desires will govern.¹⁷² A charity that accepts a restricted gift should work with the prospective donor to include terms in the gift instrument that set forth clearly the scope of a restriction and the donor's desires for altering the restriction to adapt to unanticipated circumstances and the passage of time.¹⁷³ A charity should refuse to accept any gift carrying a restriction that cannot be released or modified if, in the determination of the charity, the restriction would conflict with its charitable mission or operations. Of course, surprises can always occur, and *cy pres* or deviation relief might save a restricted bequest or devise that the charity received without advance knowledge; otherwise, the charity must choose between accepting the restrictions or disclaiming the bequest.

A *cy pres* proceeding traditionally was not available if the donor did not intend that the gift be irrevocable. Most clearly, if the donor had retained the possibility of a reverter, the donor or her successors could bring a direct action to sue for the gift back once the intended charitable purpose failed.¹⁷⁴ Moreover, under the common law, even

¹⁷¹ If the restriction relates to the donor's charitable purpose, the courts apply the doctrine of *cy pres*: When the restriction becomes impossible, impracticable, or unlawful to carry out, the court—purporting to determine what the settlor would have wanted had he or she known of the unanticipated circumstance at the outset—chooses a new purpose. Traditionally, the court would depart as minimally as possible from the original charitable purpose—the law French term was “*cy pres comme possible*.” By contrast, when the restriction is merely administrative, the courts apply the more flexible trust doctrine of equitable deviation. Although the trend is not universal, recent years have brought a broadening of the circumstances under which these doctrines are applied and, for *cy pres*, a liberalization of how close the new purpose may differ from the original. See generally PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 440 (Preliminary Draft No. 3, 2005) (showing liberalization trend).

¹⁷² See RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003). As described in commentary to the *Restatement (Third) of Trusts*:

A trust provision expressing the settlor's own choice of an alternative charitable purpose will be carried out, without need to apply the *cy pres* doctrine, assuming not only that the initially specified purpose cannot be given effect or continued but also that the alternative purpose is one that properly can be given effect.

Id.

¹⁷³ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §§ 405, 410, 4A.1 (Preliminary Draft No. 3, 2005) (describing advisability of anticipating need for change in gift instrument). Because restrictions can arise from a charity's solicitation, the solicitation material or memorandum of acceptance should contain similar provisions. *Id.*

¹⁷⁴ In contrast to gifts made by individuals, a grant by another charitable institution, such

in the absence of a reverter clause, the donor (or the donor's successors-in-interest) can recover the property where: (1) the restriction cannot be carried out; (2) the law of the state requires the donor to have a "general charitable intent"; and (3) the donor did not have such a general charitable intent. The *Restatement (Third) of Trusts* reverses this approach to reduce the likelihood that charitable gifts will return to private hands: Section 67 makes cy pres available "[u]nless the terms of the trust provide otherwise."¹⁷⁵ Compare Uniform Trust Code Section 413, which eliminates the prerequisite of general charitable intent and provides that a provision in the trust "that would result in distribution of the trust property to a noncharitable beneficiary [will trump cy pres]. . . only if . . . fewer than 21 years have elapsed since the date of the trust's creation."¹⁷⁶ Separately, as discussed in Part V of this Article, the presence of a "gift over" to an alternative beneficiary traditionally defeats a finding of general charitable intent, and thus preempts cy pres; the alternative beneficiary has standing to sue for the gift because of its direct, adverse interest in the property.

The right of private parties to initiate a cy pres proceeding is traditionally limited. After all, a restricted gift is a completed

as a family foundation, might more readily contain a reverter. See *supra* notes 82–84 (discussing *Herzog Foundation* case). Indeed, federal tax law assumes that a granting private foundation, in exercising its "expenditure responsibility," has the right to sue to recover the grant in the event of the donee's breach. *Id.*

¹⁷⁵ RESTATEMENT (THIRD) OF TRUSTS § 67.

Just as it is against the policy of the trust law to permit wasteful or seriously inefficient use of resources dedicated to charity, trust law also favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest. See § 28, Comment *a*. Accordingly, when the particular purpose of a charitable trust fails, in whole or in part, the rule of this Section makes the cy pres power applicable (thus presuming the existence of what is often called a general charitable purpose) unless the terms of the trust (defined in § 4) express a contrary intention.

Id. § 67 cmt. b.

¹⁷⁶ UNIF. TRUST CODE § 413(b) (2000). One commentator observes:

Apparently, the drafters have left to local law the case of when a gift over is charitable, no matter how many years have elapsed since trust creation.

An attempt in earlier drafts of the UTC to deal with the effect on cy pres of a charitable gift over was stricken in the final draft.

Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 708 (2001) (footnote omitted).

transaction; under the common law, a donor who suffers a change of heart may not later alter the terms of a gift.¹⁷⁷ As Austin Wakeman Scott noted, the conditions imposed at the time of the gift “are to be treated like the laws of the Medes and the Persians”—“at stake in modifying the terms of a trust is not only the wishes of an individual donor, but the wishes that the law has previously agreed to honor.”¹⁷⁸ The donor (or successor-in-interest) can participate in a cy pres proceeding in order to avert a reversionary interest in the property.¹⁷⁹ Of course, as described in Part II.C.2, above, in states that have adopted the Uniform Trust Code, the donor may commence a cy pres proceeding. As for others permitted by the court to participate, Marion Fremont-Smith found that it can be significant whether the dispute is over the liquidation of the charity and the final disposition of charitable assets, in which case some courts want to hear from potential beneficiaries.¹⁸⁰

C. “SELF-HELP” MODIFICATION: PERMITTED, BREACH, OR RATIFICATION?

When a charity applies to court for modification of the restriction under the doctrines of deviation or cy pres, it is not thereby

¹⁷⁷ Contrast the statutory approach in the Uniform Management of Institutional Funds Act and the Uniform Prudent Management of Institutional Funds Act. Compare UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a), 7A U.L.A. 35 (1972) (permitting donor to consent to release restriction at request of charity), with UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (2006), available at http://www.law.upenn.edu/1011/ulc/umoifa/2006final_act.htm (permitting donor to consent to a release or modification).

¹⁷⁸ Austin Wakeman Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 13 (1920).

¹⁷⁹ See RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d, notes (2003). With regard to the participation of parties other than the attorney general, trustees or those with a special interest, the *Restatement (Third) of Trusts* comments state: “It is within the discretion of the court whether to permit . . . [third party] intervention. The question frequently arises where . . . a charitable institution seeks to have the trust fund awarded to it.” *Id.* (quoting 4A SCOTT ON TRUSTS, *supra* note 24, § 399); see, e.g., *Sister Elizabeth Kenny Found., Inc. v. Nat’l Found.*, 126 N.W.2d 640, 646 (Minn. 1964) (holding that trial court did not abuse its discretion in denying application to intervene of charity that hoped to receive property in cy pres proceeding).

¹⁸⁰ FREMONT-SMITH, GOVERNING, *supra* note 6, at 333. Fremont-Smith adds: Another factor influencing the court to grant standing, present in the New Jersey cases and those in a few other jurisdictions, has been that the question before the court was an interpretation of the terms of a trust or a complaint for cy pres or deviation, cases that did not involve allegations that reflected negatively on the fiduciaries.

Id.

committing a breach of the restriction. But what if the charity does not go to court before unilaterally altering the use of the restricted gift? This could occur because the charity cannot adhere to a gift restriction but fails to file for cy pres or deviation relief. Alternatively, such relief might not be available but the charity acts anyway to apply the restricted assets to purposes different from those specified by the donor, or in deviating from other requirements (such as investment restrictions). The latter type of action, if material, clearly constitutes a breach by the charity of the restriction, but when does the former?

The ALI draft explores the route of ratification for an unauthorized departure from the gift restriction.¹⁸¹ Comments in

¹⁸¹ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 (Preliminary Draft No. 3, 2005). I explain in comments:

Under the Restatement of Trusts, if the trustee is called to account, the court may ratify the breach and no liability on the trustees will result. However, there is a difference between what the charity (trust or corporation) is obligated to do, and the potential liability of its fiduciaries. This Section extends the trust ratification concept to charities as entities,

Preliminary Draft No. 3 suggest that ratification generally requires “correction” and that ratification may be conditioned on the application of one or more of the following remedies: return of the property to the donor, specific performance, injunction, restoration of funds for the restricted purpose, an accounting, modification of the restriction, and transfer to another charity subject to the same (or modified) restriction.¹⁸² The draft ALI comments express my uncertainty about who should be permitted to ratify the charity’s breach: “[Do we want to require a charity’s correction of the breach to be approved by the donor, the alternative beneficiary pursuant to a gift over, the attorney general, or the court, and condition ratification on satisfying one or more remedies described in § 460(b)?]”¹⁸³

but does not address the separate issue of possible breach of fiduciary duty.

Id. § 460 cmt. a.

¹⁸² *Id.* § 460 cmt. b. Returning the gift to the donor is a doubly troubling remedy, because a “do-over” deprives the charity of the funds while otherwise freeing it of the consequences of any wrongdoing. Indeed, whether a charity that breaches a restriction can simply return the gift consistent with its fiduciary duties is a matter of debate. In many cases where the press reports that the gift was “returned,” it transpires that the gift was actually made to another charity of the donor’s choice (or if the donor itself was a charity, back to that entity).

As a tax matter, a return of the gift results in income equal to the amount deducted in the year of the gift. *See* *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 39, 402–03 (Ct. Cl. 1967) (finding charitable donations to be taxable on basis of tax code at time of recoupment of property, not at time of original deduction). Income tax consequences are not an issue in a case where the donor is itself a charity or is a taxpayer whose contributions exceeded the percentage-of-income annual limits of I.R.C. § 170. Rather, as Lorraine Sciarra commented at the October 2005 NCPL conference, in the latter case the concern is avoidance of gift tax, which is imposed on private, but not charitable, gifts.

¹⁸³ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 (Preliminary Draft No. 3, 2005). Drawing on news reports of David Mugar’s gift to Boston University, I supply the following example:

1. Twenty years after Mr. and Ms. M donated funds to construct a library at B University, their son D donated \$3 million to renovate the M Memorial Library. Five years pass, with no such renovation activity occurring. B University discovers that the gift had inadvertently been added to its general funds, whereupon D demands that B University transfer \$3 million plus interest to other charities on whose boards D sits. B University and D agree to make this transfer of the original \$3 million, thereby remedying the breach. [Is this the right answer?]

See, e.g., Patrick Healy, *Mugar Threatens BU with Suit on ‘Lost’ \$3M*, BOSTON GLOBE, Dec. 11, 2002, at A1 (reporting on Mugar’s threatened suit against Boston University unless money charitably given to Boston University is either returned or used to renovate Mugar Memorial Library); Patrick Healy, *BU Agrees to Give \$3M from Mugar to Charities*, BOSTON GLOBE, Dec. 18, 2002, at A1 (reporting that Boston University agreed to transfer to other charities of Mugar’s choosing); *see also* Goldie Blumenstyk, *Bad Chemistry: Scientist Sues Florida State*

It can be difficult to draw the line between good faith implementation of the restriction, committed to the charity's discretion, and either breach of the restriction or the need for the charity to seek judicial modification (deviation or cy pres) of the restriction. For example, *Smithers* could be viewed as a case where the charity (and the attorney general, who, until a change of administration, agreed with the charity) might have been wise to get court approval of the change in use of the gift; *Herzog Foundation*, similarly, called out for a modification declaration.¹⁸⁴ The Robertson family's complaint about Princeton's performance might go the same route. All of these situations looked like a breach to the plaintiffs.¹⁸⁵

But even going to court might not produce the result the charity desires. See, for example, the May 2005 decision by a Tennessee appeals court involving a seventy-year-old gift that was used to construct a dormitory; the gift was made on condition that the building bear the name "Confederate Memorial Hall."¹⁸⁶ To the dismay of the university, the appellate body reversed the trial court. As described by the appeals court:

The trial court . . . addressed whether changes in society would excuse Vanderbilt from continuing to comply with the contractual naming obligation. The court noted that in the years between the signing of the contracts and the present, racial segregation had been declared unconstitutional, racial discrimination had been outlawed, Vanderbilt had integrated its student body, and a stigma had become attached to the name "Confederate" because of the Confederacy's association with the institution of slavery. The trial court concluded that it would be "impractical and unduly burdensome for

U., *Saying It Reneged on Gift Deal*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 18, 2005, at A33 (reporting on university professor suing Florida State for reneging on agreement to build laboratory from donated funds); Goldie Blumenstyk, *FSU Moves to Return Gift for Building*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 27, 2006, at A29 ("[T]he university abruptly announced that it was returning \$11 million.").

¹⁸⁴ See *supra* notes 65–86 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ Tenn. Div. of United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 104 (Tenn. Ct. App. 2005).

Vanderbilt to continue to perform that part of the contract pertaining to the maintenance of the name ‘Confederate’ on the building, and at the same time pursue its academic purpose of obtaining a racially diverse faculty and student body.” The court found that Vanderbilt had “carried its burden of proof for modification of the contracts[]”. . . .¹⁸⁷

The Tennessee Division of the United Daughters of the Confederacy had sued for breach of contract, a declaratory judgment, and compensatory damages. The appellate court characterized the three “contracts” at issue as “a gift with [] strings attached”; moreover, “the 1927 contract expressly reserves to the Tennessee U.D.C. the right to recall the gift if Peabody College [which later merged into Vanderbilt] fails or ceases to comply with these conditions.”¹⁸⁸ The appellate court observed: “Where a party makes a donation to a charitable organization accompanied by conditions and a right to reclaim the donation if the conditions are not met, the law treats the arrangement between the parties as either a revocable charitable trust or a charitable gift subject to conditions.”¹⁸⁹ The court gave Vanderbilt the choice of maintaining the name “Confederate Memorial Hall” on the dormitory or returning the value in today’s dollars of the original \$50,000 gift.¹⁹⁰ Vanderbilt University ended the matter by agreeing to keep the name on the dormitory—as well as by maintaining the dormitory itself.¹⁹¹

Contrast the Tennessee court’s contracts approach with *Home for Incurables v. University of Maryland Medical System Corporation*,¹⁹² not cited by the Tennessee court. In the Maryland case, the high court applied cy pres to void, on grounds of illegality, a whites-only

¹⁸⁷ *Id.* at 111.

¹⁸⁸ *Id.* at 112–13.

¹⁸⁹ *Id.* The court cited to Eason, *supra* note 135, at 406–07; *see also infra* note 301 and accompanying text (discussing this case further). See further discussion of this case—and of Professor Eason’s article—in Part V.C, below.

¹⁹⁰ *See Vanderbilt Univ.*, 174 S.W.3d at 119 (finding donor’s remedy to be return of gift based on consumer price index).

¹⁹¹ *See* Devin Varsalona, *Vanderbilt U. Drops Fight over Name*, CHRON. HIGHER EDUC. (Wash., D.C.), July 29, 2005, at A3 (stating “confederate” will remain on building, but building will be known as Memorial Hall).

¹⁹² 797 A.2d 746 (Md. 2002).

restriction in a gift to a nursing home.¹⁹³ By so modifying the restriction and allowing the now-integrated nursing home to keep the money, the court defeated the direct action brought by the alternative beneficiary, the University of Maryland (whose gift over was not burdened by a discriminatory restriction).¹⁹⁴

IV. RELEVANCE OF THE REASON FOR LACK OF ATTORNEY GENERAL ENFORCEMENT

Even without statutory authorization, courts will on rare occasion grant standing to those with a “special interest.”¹⁹⁵ The study by Blasko et al. observed: “If a court determines that the attorney general is substantially ineffective, the probability increases that a private party will be allowed to represent, in litigation, the public’s beneficial interest in a charity.”¹⁹⁶ Indeed, Marion Fremont-Smith found that “[t]he overriding factor in almost every one of the cases in which individuals were granted standing was the lack of effective enforcement by the attorney general or another government official.”¹⁹⁷ Some courts that grant standing also comment that the possibility of public enforcement does not displace the standing of others.¹⁹⁸

¹⁹³ *Id.* at 751.

¹⁹⁴ *Id.* at 747, 751; *see also infra* notes 267–68 and accompanying text (discussing tension between applying cy pres and awarding gift to alternative beneficiary).

¹⁹⁵ *See supra* notes 24–34, 99–113 and accompanying text.

¹⁹⁶ Blasko et al., *supra* note 6, at 69.

¹⁹⁷ FREMONT-SMITH, GOVERNING, *supra* note 6, at 333.

¹⁹⁸ *See, e.g.,* San Diego County Council v. City of Escondido, 92 Cal. Rptr. 186, 190 n.1 (Cal. Ct. App. 1971) (“[W]e have not been influenced by the Attorney General’s statement made for the first time at oral argument, he has now filed an action to enforce the trust. Neither [of the plaintiffs here] are parties to that action, and there is little likelihood they ever will be. Whatever position the Attorney General wishes to take on the merits of the controversy, he may properly assert when he is made a party and pleads in this action.”); *see also* Ahmad v. Yale-New Haven Hosp., Inc., No. (X02)CV0401837255, 2004 WL 2361781, at *1 (Conn. Super. Ct. Sept. 29, 2004) (granting standing to plaintiffs to bring an enforcement action under a “bed funds” statute). The court in *Ahmad* commented:

Of critical importance in this case is the fact that the plaintiffs do not ask the court to construe, administer, enforce, modify, or even examine the terms of any charitable gift. Rather, the bed funds statute component of the case focuses on statutory requirements of hospitals—such as giving notice of bed funds and responding to applications for such funds—that do not depend on the language of any particular trust or gift. Largely for these reasons, the attorney general’s office has taken the position that this

Of course, a court concerned about lack of attorney general involvement need not elevate donors above other private parties as having a special interest. Indeed, in several notable recent cases in which the public enforcement mechanism broke down, as perceived by the court, the approved private plaintiff was not a donor (and the courts did not apply contract theory in allowing standing).¹⁹⁹

A. CASES NOT INVOLVING ATTORNEY GENERAL CONFLICT OF INTEREST

Mere attorney general apathy is usually not enough to allow a private party to bring suit.²⁰⁰ One proceeding brought by a neighbor of the Barnes Foundation to compel the attorney general to bring suit to stop the Foundation from using the property as a “Hall-for-Rent” was dismissed for lack of standing, notwithstanding language in the trust indenture providing for payment of legal expenses to “any citizen” who brings a colorable action.²⁰¹ The Orphan’s Court ruled: “Dr. Barnes’ insertion of this clause into the governing instrument did not change the substantive law . . . as to the appropriate parties to enforce charitable trusts. Indeed, the *Restatement* . . . indicates Dr. Barnes *himself* could not maintain this

aspect of the plaintiffs’ case does not infringe on its exclusive power to enforce charitable trusts.

Id. at *5.

¹⁹⁹ Marion Fremont-Smith’s survey of twenty-four cases decided between 1991 and 2001 found that six granted the right to bring suit to private parties, of whom none were living donors and two were successors to donors. FREMONT-SMITH, GOVERNING, *supra* note 6, at 331 (for a discussion of two of these cases, see *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 427 (App. Div. 2001); *supra* notes 68–73 and accompanying text; *In re Trust of Hill*, 509 N.W.2d 168, 169 (Minn. Ct. App. 1993); and *infra* note 210). During the same period, she found, the court denied standing in seventeen cases, four brought by donors or their heirs. *Id.* (citing to several cases discussed in this Article: *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995 (Conn. 1997), discussed in Part II.C.1 above; *Russell v. Yale Univ.*, 737 A.2d 941, 943 (Conn. App. Ct. 1999), discussed *infra* note 200; *In re Alaimo*, 732 N.Y.S.2d 819, 819 (App. Div. 2001), discussed *supra* note 68). One case was remanded to ascertain the existence of a public interest. *Id.*

²⁰⁰ See *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 996 (Conn. 1997) (in which attorney general did not participate, for unknown reasons); see also *Russell v. Yale Univ.*, 737 A.2d 941, 943–44 (Conn. App. Ct. 1999) (affirming denial of standing to plaintiff heir, alumni donors, and students in challenge to reorganization of the divinity school in which the attorney general elected not to appear).

²⁰¹ *The Barnes Foundation, a Corporation* (No. 10), 21 Pa. Fiduciary Rptr. 2d 351, 351, 353–54 (Orphans’ Ct. Aug. 1, 2001), *aff’d without opinion*, 803 A.2d 802 (Pa. Super. Ct. 2002).

action.”²⁰² Even when the attorney general was involved, some parties want to sue in opposition to the attorney general’s position in the hope that the judge, who has the last word, may disagree with the attorney general’s position.²⁰³ In matters requiring court approval, the court can obtain information necessary to reach a decision short of admitting the private party as an intervenor; these facts may instead be supplied by witnesses and amicus curiae.²⁰⁴

²⁰² *Id.* at 353.

²⁰³ *See In re Trust Under the Will of Fuller*, 636 N.E.2d 1333, 1333 (Mass. 1994) (holding probate and family court not bound by settlement agreed to by trustees and attorney general). *But see Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 444 (App. Div. 2001) (Friedman, J., dissenting) (arguing for general rule that standing is limited to attorney general).

²⁰⁴ *See, e.g., Wigger v. Attorney Gen. of Cal. (In re Estate of Leitner)*, No. B164824, 2004 WL 440202, *3 (Cal. Ct. App. 2004) (“[W]e note that Wigger properly carried out a valuable function in this matter by bringing to the attention of the Attorney General possible problems with the proper distribution of funds under the terms of the will.”).

In a 2004 proceeding involving the Barnes Foundation, the Orphans’ Court complained that the attorney general failed to bring a sufficiently critical eye to the charity’s proposed modification of a trust restriction:

The Attorney General, as *parens patriae* for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of standing, which has been repeated so many times in opinions concerning The Barnes Foundation by this court and Pennsylvania appellate courts, permits only trustees, the Attorney General, and parties with a special interest in the charitable trust to participate in actions involving the trust. *In these proceedings, the three students were granted amicus curiae status, but their participation was limited to exploring the impact of the proposals on The Foundation’s education programs.* Thus, the Attorney General was the only party with the authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not proceed on its authority and even indicated its full support for the petition before the hearings took place. In court in December, the Attorney General’s Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses and undermining the students’ attempts to establish their issues. The course of action chosen by the Office of the Attorney General prevented the court from seeing a balanced, objective presentation of the situation, and constituted an abdication of that office’s responsibility. Indeed it was left to the court to raise questions relating to the finances of the proposed move and the plan’s financial viability.

The Barnes Foundation, a Corporation, No. 58,788, Memorandum Opinion and Order Sur Second Amended Petition to Amend Charter and Bylaws, Court of Common Pleas of Montgomery County, Pennsylvania Orphans’ Court Division, slip op. at 20–21, 24 Pa. Fiduciary Rptr. 2d 94 (Jan. 29, 2004) (footnotes omitted) (emphasis added). Omitted footnote 14 conceded: “The Attorney General’s Office did advocate for changes in the petition as originally filed by The Foundation in September of 2002. These changes, which were incorporated in The Foundation’s amended and second amended petitions, did not touch on the

Rather, courts that grant standing to private parties often appear to require an unacceptable level of regulatory neglect, if not an outright disabling conflict of interest that impedes attorney general action.²⁰⁵ The contrary is also true: private standing will usually be denied when the attorney general affirmatively determines not to act. In the recent *Schalkenbach Foundation* case,²⁰⁶ the court considered “whether the Attorney General’s Office would be able to enforce the trust if it concluded that Arizona citizens were being harmed by the Foundation’s alleged breach, or whether the lack of enforcement by the Attorney General is due to a conflict of interest, ineffectiveness, or lack of resources.”²⁰⁷ The court noted:

[A]t oral argument, the Office of the Attorney General stated that its decision to not enforce this trust was not influenced by lack of resources. While the Office of the Attorney General cannot be expected to enforce any and all violations of charitable trusts, no matter how trivial, we do not see evidence of neglect of the public interest in this case.²⁰⁸

Some states appear more liberal, but it is difficult to determine from the few cases that exist whether the courts intend their rulings to extend beyond the particulars of the cases. Recall the dicta, quoted above by the trial court in the Robertson family’s suit against Princeton, from the New Jersey chancery division decision in *City of Paterson* (a case not involving donors) that “[t]he threshold for standing in cases involving charitable corporations is very low” and that, due to lack of resources granted the attorney general “to provide extensive supervision, there is a strong public interest in

proposal to relocate the gallery to Philadelphia.” *Id.* at 107 n.14. The Pennsylvania Supreme Court separately ruled that a student whose petition to intervene was denied long before trial and who waited until its conclusion lacked standing to challenge the decision. *In re Barnes Found.*, 871 A.2d 792 (Pa. 2005). See generally Terrance A. Kline, *Comment on the Barnes Foundation*, 31 ACTEC J. 245 (2005) (written by attorney for students appointed amicus curiae by court).

²⁰⁵ See *infra* notes 219–50 and accompanying text.

²⁰⁶ See *supra* notes 29–33 and accompanying text.

²⁰⁷ *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1028 (Ariz. Ct. App. 2004).

²⁰⁸ *Id.* at 1028.

allowing standing for individuals to bring these kinds of suits that should not be frustrated by stringent requirements.”²⁰⁹ In a Minnesota case that similarly employed expansive language (in a proceeding to modify a charitable trust), the appeals court granted standing to a descendant of the charitable settlor, but the plaintiff was also a former trustee, which could alone be grounds for standing.²¹⁰ Unfortunately, that court did not explain why the attorney general did not participate.²¹¹

Finally, in two specific situations where the attorney general is divested of jurisdiction, courts might allow private parties to proceed. First, two California appellate court decisions held that if the transfer is a conditional gift that does not create a charitable trust, the donor has standing to sue for the return of the property, and the attorney general is not a necessary party.²¹² As mentioned,

²⁰⁹ See *supra* note 165 and accompanying text.

²¹⁰ *In re Trust of Hill*, 509 N.W.2d 168, 172 (Minn. Ct. App. 1993):

When the attorney general does not appear to represent the interest of trust beneficiaries, other courts have granted standing to members of the public in order to protect the public interest. As a former trustee and a Louis W. Hill, Sr. descendant, Louis Fors Hill is in a position to understand the purpose and operation of the trust. Given the absence of a party to protect the public interest and Louis Fors Hill's status as a former trustee and as Louis W. Hill, Sr.'s descendant, we hold Louis Fors Hill had a sufficient interest in the trust to give him standing under Minn. Stat. § 501B.16.

Id. (citations omitted). The appellate court found that the trial court exceeded its authority in approving the trustees' proposal to amend the process for selecting trustees; under the process determined by the settlor, the court appoints the trustees, and the proposal would have required the court to select from those nominated by a committee appointed by the trustees. *Id.* at 170 & n.1, 172–73. The proposal would also have had the effect that “both Louis Fors Hill and Louis W. Hill, Jr., as descendants of Louis W. Hill, Sr., could be excluded from the nominating committee if either one was a director of the Foundation [owned by the trust].” *Id.* at 170.

²¹¹ The court commented only: “The attorney general was notified of a hearing that was scheduled on the matter, but did not appear or participate in the proceeding.” *Id.*

²¹² See *supra* notes 14, 38–40 and accompanying text. Specifically, the court in *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 867–68 (Cal. Ct. App. 1999) ruled:

Under the Uniform Supervision of Trustees for Charitable Purposes Act (Gov. Code, §§ 12580 – 12599.5), “[t]he primary responsibility for supervising charitable trusts in California, for insuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General” (*id.*, § 12598, subd. (a)). Accordingly, “no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings.” (*Id.*,

the alarming potential that the attorney general might be bypassed in a private suit to reclaim the gift argues even more strongly against characterizing restricted gifts as conditional gifts.²¹³

Second, some states' statutes explicitly exempt religious organizations from attorney general oversight. In a recent Michigan appellate court case, the court granted standing to a charitable foundation that was the residuary beneficiary of the will of a woman who had devised \$300,000 to a church, to be used solely for purposes of building a new church.²¹⁴ The charity filed a petition under the state's version of UMIFA to release the restriction, because it did not and would not foreseeably need a new facility.²¹⁵ Citing *City of Paterson* in addition to Michigan case law, the court ruled:

Because the Attorney General has been divested of jurisdiction, and no beneficiary or cotrustee has stepped forward to challenge CUMC's petition, we believe that dismissal of this appeal would be inappropriate without taking a broad view of the Foundation's standing in this matter. Thus, we concur in the trend, recognized by this Court, toward "substantially liberal[izing] the concept of standing so as to greatly reduce standing as a bar to litigation." In this respect, we are convinced that the Foundation's participation has assured sincere and vigorous advocacy.²¹⁶

§ 12591.) Noting that he has never been made a party to the City's action, the Attorney General asserts that the trial court lacked subject matter jurisdiction over that action.

As explained above, the Deed created a fee simple subject to a condition subsequent, not a charitable trust. Therefore, the Attorney General is not a necessary party to the action, and the trial court did not lack subject matter jurisdiction.

Id.

²¹³ See *supra* notes 36–40 and accompanying text.

²¹⁴ *In re Estate of Estes*, 523 N.W.2d 863, 864–65, 867 (Mich. Ct. App. 1994).

²¹⁵ *Id.* at 865.

²¹⁶ *Id.* at 867 (citation omitted). The court also noted:

[W]here trust property is held by an officer or officers of a religious organization, the religious organization is exempted from provisions of the [Supervision of Trustees for Charitable Purposes] act. Thus, because the governing board of [the church] is the sole trustee of the charitable trust created under [the will,] the Attorney General was not an interested party and accordingly was divested of jurisdiction in the matter.

Standing in the religious context is not, however, universally resolved in favor of members.²¹⁷

B. ATTORNEY GENERAL CONFLICT OF INTEREST

Even an attorney general conflict of interest might not be enough to bestow standing on a private party. In a case involving the enforcement of a trust for a chair at the University of Georgia, the donors were unsuccessful in obtaining standing based on their assertion that the attorney general, who also represented the defendant board of regents, had a conflict of interest.²¹⁸ The court concluded that “the remedy for a conflict of interest is to involve the district attorney or appoint a Special Assistant Attorney General. Such a conflict certainly would not mandate that persons with no ‘special interest’ (such as plaintiffs here) be granted standing to enforce a charitable trust.”²¹⁹

In an unusual case that might better be classified as a direct, rather than a derivative, action, a New York trial court granted “quasi-derivative standing,” over the objection of the attorney general, to plaintiffs (including the Consumers Union) who contested the conversion to for-profit status of the billion-dollar health insurer, Empire Blue Cross.²²⁰ As directed by the legislation authorizing the conversion, 95% of the proceeds would go to New York state to fund pay increases for health care workers.²²¹ The court commented that while the attorney general usually has exclusive standing to enforce charitable assets, anyone with a “special interest” also has standing.²²² Moreover, the court noted that the attorney general, as

Id. at 866 (citation omitted).

²¹⁷ Compare *Weaver v. Wood*, 680 N.E.2d 918, 923 (Mass. 1997) (denying standing), with *Niemann v. Vaughn Cmty. Church*, 113 P.3d 463, 473–80 (Wash. 2005) (addressing merits of parishioner’s suit without discussing standing).

²¹⁸ *Warren v. Bd. of Regents*, 544 S.E.2d 190, 194 (Ga. Ct. App. 2001).

²¹⁹ *Id.*

²²⁰ *Consumers Union of U.S., Inc. v. State*, N.Y.L.J., Mar. 12, 2003, at 18 (N.Y. Sup. Ct. Mar. 6, 2003).

²²¹ *Id.* At the time of the conversion it was expected that the deal was worth about \$1–\$2 billion, but subsequent merger discussions with WellPoint valued the public fund’s holdings at more than \$4 billion. See Andrew Ross Sorkin & Milt Freudenheim, *WellPoint Near Deal to Acquire Big Rival*, N.Y. TIMES, Sept. 27, 2005, at C1.

²²² *Consumers Union of U.S., Inc.*, 229 N.Y.L.J., Mar. 12, 2003, at 18.

required, is defending the statute, and so “the beneficiaries . . . are here cast upon their own devices.”²²³ The court concluded:

In any event, the rules limiting standing to enforce the terms of charitable trusts, and the exceptions to those rules, apply to lawsuits brought against the directors or managers of such trusts. Defendants have adduced no case, and I know of none, that holds, or even suggests, that those rules limit the general rules that govern standing to challenge the constitutionality of a state statute. The individual plaintiffs and CU have shown that they, or the members whom they represent here, are likely to suffer injury-in-fact, as a result of the conversion of Empire, which injury will not be shared by the general public. Accordingly, these plaintiffs have standing to challenge the Statute.²²⁴

The New York Court of Appeals affirmed by granting the plaintiffs “quasi-derivative standing,” writing:

[W]hile plaintiffs are not true beneficiaries, as subscribers they benefit from whatever vestiges may remain from Empire’s traditional role as the “insurer of last resort” for those New Yorkers otherwise unable to obtain needed health care. Nor can we ignore the billions of dollars at stake. Accordingly, because of the Attorney General’s and the Board’s unique position after the adoption of Chapter 1, we hold that plaintiff subscribers have standing to prosecute this action solely for purposes of protecting Empire’s not-for-profit assets.²²⁵

²²³ *Id.*

²²⁴ *Id.* As the Court of Appeals later made clear, though, Empire Blue Cross, while nonprofit, was not a charity (it was classified under I.R.C. § 501(c)(4), not § 501(c)(3)). *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 728 n.3, 84 & n.25 (N.Y. 2005).

²²⁵ *Id.* at 81–82.

On reaching the merits, however, the trial court had rejected the charge of breach of fiduciary duty and further rejected the charge that the legislation amounted to an unconstitutional taking.²²⁶ The New York high court agreed and ordered the case dismissed.²²⁷

For the most thorough analysis of standing granted in a case of asserted attorney general conflict of interest, see the 2005 four-to-three decision by the Pennsylvania Commonwealth Court granting standing to an alumni association to contest a new settlement entered into by the Milton Hershey School and the Pennsylvania attorney general.²²⁸ Ultimately, however, as described below, the Pennsylvania Supreme Court reversed.

The Milton Hershey School Alumni Association, a nonprofit corporation separate from the school, had long been active in voicing its complaints over the school's management.²²⁹ On July 31, 2002 the Hershey School, governed by the Hershey Trust, entered into a closing agreement with the attorney general calling for some management and policy changes.²³⁰ The Commonwealth Court credited the alumni association not only with alerting the attorney general "to what the Association believed were serious improprieties associated with the administration of the Trust" but also with funding the investigation when the Office of Attorney General "initially resisted conducting an investigation and only agreed to proceed if the Association committed more resources to the investigation."²³¹ The court added: "The Association participated in an advisory role and contributed millions of dollars to the process. Though it was not a party to the ultimate agreement, the Association acted to protect its own central purpose of preserving bonds formed in orphanhood and furthering the child-saving mission of the Trust."²³²

Several months after the school and the attorney general reached their settlement, the Hershey School and Trust radically

²²⁶ *Consumers Union of U.S. Inc.*, N.Y.L.J., Mar. 12, 2003, at 18.

²²⁷ *Consumers Union of U.S. Inc.*, 840 N.E.2d at 85.

²²⁸ *In re Milton Hershey Sch.*, 867 A.2d 674 (Pa. Commw. Ct. 2005), *rev'd*, 911 A.2d 1258 (2006).

²²⁹ *Id.* at 678–79.

²³⁰ *Id.* at 679 n.2.

²³¹ *Id.* at 679.

²³² *Id.*

restructured the governing board.²³³ This move followed dramatic legal events involving the Hershey Trust's attempt to diversify its portfolio by selling its controlling interest in the Hershey Foods Company.²³⁴ The attorney general—asserting a duty to protect the community—had promptly sought and won an injunction against the attempted diversification, and the legislature had adopted special charitable-investment legislation to preserve local ownership.²³⁵ The school, trust, and attorney general modified their 2002 settlement on June 27, 2003, to prevent fiduciary conflicts of interest and to tighten the qualification standards for students.²³⁶ Unhappy with this re-struck agreement, the alumni association brought suit.

The Commonwealth Court acknowledged:

In Pennsylvania, and all other states, for that matter, the attorney general under its *parens patriae* authority is the watch dog that supervises the administration of charitable trusts to ensure that the object of the trust remains charitable and to ensure that the charitable purpose of the trust is carried out.²³⁷

However, the strategy of the attorney general in seeking to block the Hershey Trust's sale of Hershey Foods Corporation came back to haunt it:

Unlike other states, however, the OAG [Office of Attorney General] takes the position that it has the power to oppose that which may be in the best interests of the trust and examine the effects that the actions of the trust have on the larger community. In its petition opposing the Trust's proposed sale of its controlling interest in HFC [Hershey Foods Company], the OAG acknowledged that the sale would likely diversify and

²³³ *Id.* at 680.

²³⁴ *Id.*

²³⁵ See Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 985–99 (2004).

²³⁶ *In re Milton Hershey Sch.*, 867 A.2d at 680.

²³⁷ *Id.* at 685.

increase the assets of the Trust, but nonetheless objected to the sale because any sale would have profound negative consequences for the Hershey community and surrounding areas, including but not limited to the closing and/or withdrawal of HFC from the local community, together with a dramatic loss of the region's employment opportunities, related businesses and tax base. Agreeing with that view, the trial court, in that case, held that the OAG could take those views into consideration and ordered that those concerns were sufficient to stop any efforts by the Trust to sell its interest in HFC. As defined by the OAG, its role, in certain circumstances, is to protect the interests of both the beneficiaries of the Trust and the surrounding community and, where necessary, to balance those interests.²³⁸

The court began its analysis of standing by observing: "Pennsylvania has its own standing jurisprudence, although the doctrine of standing in this Commonwealth is recognized primarily as a doctrine of judicial restraint and not one having any basis in the Pennsylvania Constitution."²³⁹ In sum: "Fundamentally, the standing requirement in Pennsylvania 'is to protect against improper plaintiffs.'"²⁴⁰ The court characterized Pennsylvania's standing doctrine as "flexible," in contrast to the federal standards, "perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction, whereas a lack of standing in the federal arena is directly correlated to the ability of the court to maintain jurisdiction over the action."²⁴¹ Pennsylvania

²³⁸ *Id.* at 686 (footnote omitted) (citation omitted). The court cited Brody, *supra* note 235, for the proposition that the attorney general's political goals can lead to conflicts of interest that undermine the policy of exclusive attorney general standing. *In re Milton Hershey Sch.*, 867 A.2d at 686–87 n.22.

²³⁹ *Id.* at 683.

²⁴⁰ *Id.* (quoting *In re Biester*, 409 A.2d 848, 851 (Pa. 1979)).

²⁴¹ *Id.* at 683–84. The standing requirement also allows the courts to avoid disputes committed to another branch of government, a policy enforced particularly vigorously at the federal level. Thus, a taxpayer as such has no standing to complain about the tax exemption that Congress granted to a given class of charities, or about the decision of the Internal Revenue Service not to seek revocation of a particular charity's exemption. *See In re U.S.*

requires the plaintiff to have a “substantial, direct, and immediate interest” (not necessarily pecuniary).²⁴²

The Commonwealth Court then turned to the special interest ground for private standing, endorsing a multi-factor test that would result in “fairness and predictability.”²⁴³ In conclusion, the court ruled:

Given the nature of these events, given the enormous amount of money at stake, and given that the Association merely seeks to determine whether the July

Catholic Conference, 885 F.2d 1020, 1027–28 (2d Cir. 1989) (finding that taxpayers lacked standing to challenge tax exempt status of Catholic Church); *cf.* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring) (“I cannot now imagine a case . . . where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.”). In a footnote, the Commonwealth Court expanded on the federal requirements for standing, beginning with a citation to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992): “The federal test is a three part inquiry: (1) Has the party bringing the action alleged an ‘injury in fact’? (2) Is there a causal connection between the alleged wrongdoing and the injury suffered? (3) Will a favorable ruling by the court likely redress the alleged injury?” *In re Milton Hershey Sch.*, 867 A.2d at 683 n.15. Moreover,

[b]eyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, [the U.S. Supreme] Court has held that “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (quoting *Warth v. Seldin*, 422 U.S. 190, 499 (1975)).

²⁴² *In re Milton Hershey Sch.*, 867 A.2d at 684 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 281 (Pa. 1975), and citing *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989)). Moreover, observed the court, state-level “taxpayer standing” cases relax even these general standing rules,

where the party asserting the action can show that (1) government action will otherwise go unchallenged unless standing is granted; (2) those most directly affected by government action would benefit and would not challenge the action; (3) judicial relief is appropriate; (4) alternative remedies are not available; and (5) no one other than the party asserting the action is better suited to demonstrate an injury distinct from that of an ordinary taxpayer.

Id.

²⁴³ *Id.* at 688. The court’s five-part test to determine special interest standing considers: (1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general’s availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances.

Id. at 689; *see also* *Blasko et al.*, *supra* note 6, at 61–78, 83–84 (making recommendations that were quoted extensively in *In re Milton Hershey School*).

2002 Reform Agreement will better serve the charitable purpose of the Trust instead of the June 2003 Agreement struck by the OAG, the School, and the Trust, the Association has pled a special interest in this matter.²⁴⁴

Moreover, the court found that the association “is the only other party with a sufficient relationship to the Trust that would have any interest in assuring that its charitable purpose was achieved.”²⁴⁵ Finally, the court observed:

That inquiry is neither vexatious nor unreasonable. Given the nature of this Trust, its status as the largest residential childcare charity in the world, and the fact that the OAG agreed to modify the July 2002 Reform Agreement, this scrutiny will serve the public interest in assuring that the Trust is operating efficiently and effectively to serve its beneficiaries.²⁴⁶

The three-judge dissenting opinion asserted simply:

It is clear from the historical background of this saga that the Settlers in no way intended to give the Alumni Association standing in the administration of the Trust. The Settlor, Milton Hershey, was also the creator of the Alumni Association. To now give the Association legal rights that were expressly excluded by the Settlor of the Trust is a dangerous expansion of standing not supported by over 300 years of case law within the Commonwealth.²⁴⁷

The dissent added: “To allow the Alumni Association standing, no matter how eleemosynary its purpose may be, interferes with the efficient performance of the Attorney General’s statutorily-mandated duties, as well as being violative of the wishes of the Settlor of the

²⁴⁴ *In re Milton Hershey Sch.*, 867 A.2d at 690.

²⁴⁵ *Id.*

²⁴⁶ *Id.* (footnote omitted).

²⁴⁷ *Id.* at 691 (Colins, J., dissenting).

Trust and founder of the Alumni Association.”²⁴⁸ The dissent concluded: “Such a quantum leap away from historical concepts of standing, based upon public policy considerations, and a judicially-created ‘special interest,’ may only be undertaken by the Supreme Court of the Commonwealth.”²⁴⁹

On December 28, 2006, the Pennsylvania Supreme Court unanimously reversed, agreeing with these dissenters.²⁵⁰ The court concluded: “To give the Association ‘special interest’ standing where the settlors of the Trust specifically denied beneficiary status to its members, would surely contravene the settlors’ intent expressed through their written trust.”²⁵¹ Moreover:

Nothing in this litigation would affect the Association itself; it loses nothing and gains nothing. The Association’s intensity of concern is real and commendable, but it is not a substitute for an actual interest. Standing is not created through the Association’s advocacy or its members’ past close relationship with the School as former individual recipients of the Trust’s benefits. The Trust did not contemplate the Association, or anyone else, to be a “shadow board” of graduates with standing to challenge actions the Board takes.

. . . . Current law allowed the Association, an outside group, to urge the Attorney General to enforce the Trust. However, the Association’s disagreement with the Attorney General’s decision to modify the 2002 agreement does not vest the Association with standing to challenge that decision in court. Ultimately, the Association’s dismay is more properly directed at the Attorney General’s actions and decisions; it is insufficient to establish standing here.²⁵²

²⁴⁸ *Id.* at 692.

²⁴⁹ *Id.*

²⁵⁰ *In re Milton Hershey Sch.*, 911 A.2d 1258, 1258 (Pa. 2006) (Baldwin, J. and Saylor, J., not participating).

²⁵¹ *Id.* at 1263.

²⁵² *Id.* (citation omitted).

V. DESIGNING A POSITIVE LAW OF “GIFTRACTS”

A. INTRODUCTION

While I might differ with reformers on particular design features, I agree with those who believe that neither traditional charitable trust law nor pure contract law is appropriate for addressing donor standing and that the legal framework would benefit from a declaration of a “third way” to handle restricted gifts to corporate charities.²⁵³ Although I do not use the term “giftracts” in my ALI project, I use it here to emphasize that although a restricted gift constitutes an agreement between the donor and the charity, it is not merely a contract in the private law sense—rather, an unascertainable group constitutes the true beneficiaries.

Moreover, underlying the approach taken in the ALI draft is my general wariness of over-privileging “donor intent,” because I view that term as shorthand for a web of actors and actions. A gift can be legally restricted because of conditions initiated and drafted by the donors’ attorneys, or by actions taken by the charity itself in soliciting the gift. The wooing of a major donor is a long-term endeavor, but neither the current development officer nor the donor might be available when it is time to deal with imprecise or poorly-thought-through restrictions. While determining intent is a general problem in contract law, the longevity of the restriction in the charity context argues for increased scrutiny—and even skepticism—of claims about what the donor intended.

²⁵³ Chester, *supra* note 87, at 630: “Rather than using property, contract, or other lenses that Professor Gaubatz suggests to help determine standing, I prefer to look at the nature of the charitable transfer for answers.” *Id.* (footnote omitted). Professor Chester “would argue that the charity’s express acceptance of the terms that define the use of the gift should confer standing, but only as to the enforcement of those terms” and not “to seek return of the gift itself.” *Id.* at 632–33. He adds that “if specific performance is impracticable because of the misappropriation of all or part of the gift, the grantor can sue for damages to restore the gift to its appropriate size, at which point specific performance of the original purpose may become feasible.” *Id.* at 634.

In preliminary reaction to questions I raise in my ALI draft, Professor John Simon suggested to me: “[H]ow about (a) requiring that the donor request that the AG proceed as a precursor to donor suit – which may discourage some litigants” Email from John Simon to author (June 2, 2005).

Fundamentally, recognizing a restriction as perpetual clashes with the reality that a charity or restricted gift must be carried out by mortal persons. Donors, trustees, directors, and officers—as well as the beneficiaries and clients—all come and go, as fate and circumstances dictate, and have their own, possibly diverging, interests.²⁵⁴ After a donor is dead, those who purport to speak for the donor might have very different goals. Children might resent the charitable gift or bequest that would otherwise have gone to them. The officers and employees of an institutional donor might have their own career desires. On the receiving charity's end, despite their best intentions, many charities suffer incentive and agency problems, including poor internal communication and frequent staff turnover.²⁵⁵ By the time a question about compliance with the restriction arises, relations between the charity and the donor (or the donor's descendants) might have soured. Memories can fail, or become self-serving, about promises that were made. Consequently, under ALI Preliminary Draft No. 3 the passage of time affects both the *cy pres* proceeding and the ability of a private party to enforce a gift restriction.²⁵⁶

The issues raised in this Article are addressed in two separate chapters of the part on charities in the ALI project, Chapter 4 (Gifts) and Chapter 7 (Oversight and Enforcement). Preliminary Draft No. 3, published in May 2005, left open many important issues. I will be revising Chapter 4 for discussion with the project's Advisers and

²⁵⁴ See generally Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996) (examining various consistencies of charity).

²⁵⁵ A charity that accepts restricted gifts (or that raises funds for specific, identified purposes) should take steps to ensure that its staff and advisors are aware of their obligations and adhere to specified requirements. Section 513(b) of New York's Not-for-Profit Corporation Law contains specific requirements, providing, in relevant part:

The governing board shall cause accurate accounts to be kept of such assets separate and apart from the accounts of other assets of the corporation. Unless the terms of the particular gift instrument provide otherwise, the treasurer shall make an annual report to the members (if there be members) or to the governing board (if there be no members) concerning the assets held under this section and the use made of such assets and of the income thereof.

N.Y. NOT-FOR-PROFIT CORP. LAW 513(b) (McKinney 2002).

²⁵⁶ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 (Preliminary Draft No. 3, 2005).

Members Consultative Group in June 2007.²⁵⁷ Following customary ALI practice, I will revise that Preliminary Draft No. 4 for discussion with the ALI Council. If they approve the text, I will revise the Council draft to take into account their suggestions and comments and prepare a tentative draft to present to the ALI membership for approval. Separately and next, I will redraft Chapter 7 (to be renumbered as Chapter 6 and retitled Supervision and Enforcement). That draft chapter will set forth the principles for donor standing (as well as sections on the standing of a variety of charity constituents) to enforce the performance of restricted gifts (as well as the performance of fiduciary duties in general).

The discussion in this Part of the Article addresses relevant provisions of ALI draft Chapter 4 separately from the standing provisions in draft Chapter 7. As a threshold matter, draft Chapter 4 provides that a gift once made is no longer the donor's property (see Section 400),²⁵⁸ and that the fiduciaries of a charity must, within the bounds of their fiduciary duties, be trusted to exercise their wisdom and discretion in implementing donor intent (see Section 425).²⁵⁹ (See also Chapter 3, addressing governance and fiduciary duties generally.²⁶⁰) Moreover, society depends on the fiduciaries, supported by the state, to recognize that "the" charitable interest changes over time and with changes in circumstances, and, when appropriate, to take action to seek modification of a restriction (see Sections 430 and 440).²⁶¹ As discussed in Part V.B of this Article, draft Chapter 7 provides that while restricted gifts are enforceable by the attorney general, they are not enforceable by the donor unless the donor, with the consent of the charity, expressly retained the right to sue.²⁶² As discussed in Part V.C of this Article, Section 450 addresses the effects of the passage of time, both on the substantive issue of the how closely to adhere to the donor's intent

²⁵⁷ Preliminary Draft No. 4 will also contain a revised Chapter 2 on organization of a charity and structural change. See *id.* § 240; *supra* note 74 (describing Section 240).

²⁵⁸ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 400 (Preliminary Draft No. 3, 2005).

²⁵⁹ *Id.* § 425.

²⁶⁰ Chapter 3 is the subject of Tentative Draft No. 1 (March 19, 2007), to be presented for vote of the ALI membership at the May 2007 Annual Meeting.

²⁶¹ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §§ 430, 440 (Preliminary Draft No. 3, 2005).

²⁶² *Id.* § 750.

and on the procedural issue of permitting private parties to enforce.²⁶³ The discussion also describes the open policy and design issues. Part V.D of this Article, proposes answers to the four hypothetical cases set forth at the beginning of this Article.

B. STANDING OF DONOR (OR ALTERNATIVE BENEFICIARY): DIRECT AND DERIVATIVE SUITS

The section on donor standing in Preliminary Draft No. 3 appears in Section 750 (to be renumbered Section 650 in subsequent drafts). The black letter provides that “[t]he donor or successor in interest (including an alternative beneficiary of a ‘gift over’) has standing”—

(a) To initiate an action to obtain the property if so permitted by the gift instrument [and law and public policy]; and

(b) To enforce a gift restriction as may be provided by the gift instrument [and the court] or to bring a derivative suit as provided in § 780.²⁶⁴

The uncertainties expressed by the brackets recognize the following policy questions, drawn from the draft Comments to Section 750.

1. *Direct Action by Donor or by Alternative Beneficiary of a Gift Over.* Consistent with current law, as described above in Part II, Preliminary Draft No. 3 distinguishes “direct” actions from “derivative” actions.²⁶⁵ In a direct action, the plaintiff seeks to enforce his or her own rights, and any monetary recovery would generally go to the plaintiff. Since standing is appropriately recognized for a private party whose own rights are injured, a donor should be permitted to bring suit to recover a restricted gift that fails—but only if the donor has expressly reserved the possibility of reverter.

As mentioned in Part I.A of this Article, a “gift over” performs both a substantive and a procedural function. Substantively, at

²⁶³ *Id.* § 450.

²⁶⁴ *Id.* § 750.

²⁶⁵ *Id.* cmt. a.

least in theory, the gift over is a declaration of intent by the donor that the specified purpose is more important to the donor than the identity of the charity carrying out the restriction. Procedurally, the technique is designed to induce the original donee to adhere to the restriction while providing an incentive to the alternative charity to exercise vigilance in monitoring the initial donee's use of the funds. In practice, though, a gift over might just reflect the donor's fear that the original recipient could fail or otherwise terminate existence. In any event, many gifts over designate an established institution as the alternative beneficiary and do not impose any restriction on the alternative beneficiary's use of the gift.

What can a donor do who wants to use the gift-over technique in order to ensure a vigilant monitor, but who does not want the initial donee to lose the funds when the change in use is not its fault—that is, when the donor does not want simply to make a conditional gift? First, intentions expressed in the gift instrument will control. Otherwise, draft Section 440 suggests that deviation, but not *cy pres*, would appropriately apply to defeat the claims of the alternative beneficiary, as an interpretation of the restriction.²⁶⁶ Specifically, if the restriction is administrative rather than material to the donor's charitable purpose, Subsection (d) of draft Section 440 proposes that a deviation proceeding will trump a suit by the alternative beneficiary. However, in *cy pres* cases, the gift over generally takes effect rather than modification of the restriction, based on the policy that the occasional perceived windfall to the alternative beneficiary could be viewed as the price of effective monitoring and enforcement.²⁶⁷ As just suggested, the donor, of course, can override

²⁶⁶ *Id.* § 440(d).

²⁶⁷ See generally Ronald Chester, *Cy Pres or Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989) (discussing effect of gift over on ability to modify restriction). Courts do not universally accept that a gift over negates the current charity's ability to seek deviation or *cy pres* relief. *Id.* Preliminary Draft No. 3 proposes that the better approach to take in cases like this could be to liberally construe situations in which the doctrine of deviation rather than *cy pres* might be applied, and then to defeat application of the gift over only in cases of deviation. See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 440 cmt. f (Preliminary Draft No. 3, 2005). In the deviation context, see *Trustees of Dartmouth College v. Quincy*, 258 N.E.2d 745, 753 (Mass. 1970), in which the court rejected the claim of the alternative beneficiary and instead granted deviation to the original donee. *Id.* The *Quincy* court cited to DiClerico, *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 192–95,

this policy, and the draft Principles encourage the donor to set forth the conditions for ignoring the gift over and instead for applying cy pres.²⁶⁸ Draft Comment f to Section 750 concludes with questions about the interaction of the ability of an alternative beneficiary to bring a direct action to sue for the gift with the policy that puts a time limit on private enforcement:

If the donor or donor-designated private party lacks enforcement powers after a certain period of time, what logic allows the donor to sue for reverter or the alternative beneficiary to sue for a gift over after this time period? Do we want to maintain a distinction between a suit to enforce the restriction and a suit in which the plaintiff has an adverse interest?²⁶⁹

2. *Derivative Suit by Donors: Open (Legislative?) Issues.*

a. Allowance of Donor Standing to Enforce Restriction.

Preliminary Draft No. 3 reflects the general rule that donors have no legal authority to sue to enforce charitable duties.²⁷⁰ This leaves the

where it is suggested, we think correctly, that (a) noncompliance with detailed provisions of a charitable trust should not give rise to a transfer to an alternative trust, if such provisions are not of controlling importance in relation to the general framework of the testator's scheme, and (b) a 'gift over . . . [should] be resorted to only when it appears to the court that more benefit to the community would be derived from the alternative disposition and that nobody would be substantially damaged by terminating the original trust' (p. 194).

Quincy, 258 N.E.2d at 753. In the cy pres context, see generally *Home for Incurables v. University of Maryland Medical System Corp.*, 797 A.2d 746 (Md. 2002) (applying cy pres rather than the gift over, refusing to enforce illegal racially discriminatory condition).

²⁶⁸ Preliminary Draft No. 3, Section 750, Comment b provides the following illustration:

5. Donor H made a gift to U University for stem cell and cloning research, with a gift over to H University if U University does not comply with the restriction. These activities were legal when the gift was made, and not in violation of fundamental public policy. Aware of the controversial nature of these activities, though, H stated in the gift instrument that if both of these activities should become illegal, U University may retain the funds for such medical research purposes as it determines to be most useful to society. H University may sue for the gift only if U University breaches the purposes of the restriction for reasons other than illegality.

PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 750 cmt. b (Preliminary Draft No. 3, 2005).

²⁶⁹ *Id.* cmt. f.

²⁷⁰ See *supra* notes 22–156 and accompanying text.

legal question of whether parties, by agreement, can confer donor standing on the courts in the absence of a statute.²⁷¹

Despite my reservations, draft Section 750 permits a charity to waive a donor's lack of standing under the common law, but only by explicit agreement. Moreover, Comment c provides that not all restricted gifts give rise to donor standing: "First, the restriction must arise in a gift instrument, or through a written or otherwise recorded charity solicitation. Second, a donor's legal rights to monitor and enforce are only those as are set forth in the gift instrument. Of course, the charity should reasonably keep donors and other constituents informed as a matter of good practice. . . . Finally, overriding interests of public policy can nullify donor powers set forth in the gift instrument."²⁷² Notably, the nonprofit sector rightly fears the prospects of ever-lengthier gift instruments drafted by counsel purporting to express donor intent.²⁷³

That Comment in the ALI draft also addresses complications (some of which were discussed in Parts II.C.2 and 3)²⁷⁴ implicated by the donor standing provision in the Uniform Trust Code and UPMIFA's abandonment of a similar provision. A sensible resolution seems to require a legislative solution, such as to provide threshold dollar amounts. The draft Comment does the best it can, by suggesting that the charitable donor lacks standing unless the amount of the restricted gift is "material,"²⁷⁵ and adding: "Even in the absence of legislation, a court should ordinarily dismiss a suit involving a gift of less than [\$10,000], and could justify on policy

²⁷¹ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 750 cmt. c (Preliminary Draft No. 3, 2005). Reporter's Note 6 asks, in brackets: "[So can standing be bestowed by the parties – i.e., waived by the charity?]." *Id.*

²⁷² *Id.* §§ 415, 460.

²⁷³ At the NCPL conference, *supra* note *, attorney Victoria Bjorklund commented that she had just finished reading a fifty-two page gift instrument and wondered whether the donor really meant all the terms that the drafter had included. She suggested not only that charities should "push back," but also that donors' counsel must do a more thoughtful job of crafting appropriate terms.

²⁷⁴ See *supra* notes 86–113 and accompanying text.

²⁷⁵ Cf. RESTATEMENT (FIRST) OF RESTITUTION § 58 (1937). The Comments end: "It is suggested that gifts of considerable size may be assumed to be conditional, that other gifts not involving peculiar features, such as heirlooms, and not for the primary purpose of being used after marriage by the parties, should be regarded as absolute and should be incapable of recovery." *Id.* cmt. c, notes.

grounds dismissing a suit involving a gift of less than [\$_____].”²⁷⁶ Similarly, legislation could add certainty to the provision in Section 450(c) that cuts off private but not attorney general enforcement rights after the passage of a period of time.²⁷⁷ Professor Harvey Dale suggests a different tack for a legislative fix: instead of focusing on substantive donor intent, statutes should emphasize procedural donor intent. Specifically, he recommends that statutes set forth one or more procedural mechanisms for decisionmaking to adapt to future change, and require attorneys general and courts to give “substantial deference” to the donor’s up-front choice of procedure.²⁷⁸

Draft Comment d to Section 750 declares that when the donor as donor is granted enforcement rights by the gift instrument or by statute, that right does not extend to fiduciary decisions not involving the use of the gift.

Finally, how readily should the law honor negotiated standing for private parties other than the donor such as the donor’s successor in interest or even, for the donor that is an institution, once it is not populated by the same persons who made the gift? Draft Comment d asks whether the rule should be absolute that the donor’s standing may not be assigned, devised, or carried out by a personal representative.²⁷⁹ That draft Comment then asks how such a rule squares with the gift instrument that provides for a “visitor” or “trust protector” to enforce the intent of the donor.²⁸⁰

b. Attorney General Behavior. Draft Chapter 7’s Introductory Note to Topic 2—Private Enforcement: Responsibility and Standing—raises the issue of whether the standing of any or all

²⁷⁶ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 750 cmt. c (Preliminary Draft No. 3, 2005).

²⁷⁷ See *infra* notes 284–302 and accompanying text.

²⁷⁸ Comments of Harvey Dale, as discussant on this Article at NCPL conference discussed *supra* note *.

²⁷⁹ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 750 cmt. d (Preliminary Draft No. 3, 2005). And if “the donor is incompetent—who wins as between a court-appointed conservator and the trustee?” *Id.*

²⁸⁰ Compare comments of Harvey Goldschmid, as discussant on this Article at NPCL conference discussed *supra* note *: He would allow standing, regardless of the terms of the gift instrument, to appropriate parties to enforce restricted gifts but not to sue for return of the gift. He would also honor a gift instrument that provides that the donor or the donor’s family *not* have standing.

private parties, other than that of the charity or cofiduciaries, should depend on what the attorney general has done or failed to do. As described in Part IV of this Article, the recent Pennsylvania Supreme Court decision rejecting standing for the Hershey alumni association suggests that the law is not liberalizing along these lines, but a nuanced approach might be necessary.²⁸¹

C. DONOR'S ROLE IN CY PRES PROCEEDING AND EFFECTS OF THE PASSAGE OF TIME

Section 450 is entitled "Role of the Donor in a Modification Proceeding; Effects of Passage of Time." The draft black letter provides that in a judicial proceeding under Section 440 (Cy Pres and Deviation)—

- (a) The relevant donor intent is that expressed in the gift instrument, not at the time of modification.
- (b) If permitted by court rules, the donor may be a proper party if standing under such circumstances is provided in the gift instrument.
- (c) The policy of adhering to a gift restriction, whether going to administration or charitable purpose, and including any enforcement right of the donor or other private party, diminishes with time and unanticipated circumstances.

The draft attempts to give maximum flexibility to the charity, while recognizing articulations of donor intent expressly agreed to by the charity. As to Subsection (a) of the black letter, draft Comment a states:

Donor intent at the time of the restricted gift includes any provisions in the gift instrument addressing the possibility that unanticipated circumstances would require modification. Where it is not clear what the donor would have intended regarding the effect of

²⁸¹ See *supra* notes 196–250 and accompanying text.

unanticipated circumstances on the gift restriction, or if the gift instrument is silent, it would ordinarily be fair to infer that the donor intends to defer to the charity in offering a reasonable proposal to modify to the restriction.²⁸²

Draft Comment b observes that it is not uncommon for a major inter vivos gift to be followed by continuing communication between donor and charity.²⁸³ During the post-gift course of dealings, the donor might object to how the charity is carrying out the obligations, as perceived by the donor, set forth in the gift instrument. But if the donor acquiesces in the charity's conduct—especially by providing additional financial or other support to the charity, including service on the governing board—then the donor's intent should be interpreted in light of this waiver.²⁸⁴

As to standing, draft Comment e to Section 750 rejects extending the approach adopted in the Uniform Trust Code that permits a trust settlor to bring suit to modify a charitable trust.²⁸⁵ However, subsection (b) of draft Section 450 recognizes donor standing to commence or otherwise participate in such a cy pres proceeding if provided in the gift instrument. The general policy for allowing a

²⁸² PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. a (Preliminary Draft No. 3, 2005).

²⁸³ *Id.* § 450 cmt. b.

²⁸⁴ *See* *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 436 (App. Div. 2001) (Friedman, J., dissenting). The dissent explained:

As the majority aptly notes, the relationship between Mr. Smithers and the hospital was at times strained. Yet, like the loving parent of an errant child, Mr. Smithers resolved his disputes with the hospital and kept contributing over the course of a relationship spanning 23 years, notwithstanding the hospital's failure to honor some of his wishes and its use of funds for other than anticipated purposes.

Id. *See also* *Amarillo Area Found. v. Metro. Opera Ass'n*, Cause No. 91214-A (Potter County, Texas, July 22, 2003) (on file with author). In Paragraph 42 of the opinion, the court notes:

Throughout the more than twenty (20) years of its relationship with Mrs. Harrington, the Trust and the Foundation, the Met has consistently failed to abide by the terms of Mrs. Harrington's bequest. Its persistent and willful violation of the terms of the bequest necessitate the appointment of a trustee to oversee and control the Met's expenditure of the moneys contained in the Harrington Fund and to ensure the Met's compliance with the terms of the 1987 and 1988 Agreements.

Id. *See* *Winter & Cheng*, *supra* note 133; *supra* notes 159–70 and accompanying text.

²⁸⁵ *See supra* notes 64–75 and accompanying text.

donor standing to participate in a cy pres proceeding seems weaker than to enforce the gift, because by definition if cy pres relief is necessary a new purpose will have to be chosen.²⁸⁶ Nevertheless, the new UPMIFA project provides an expanded role for donors, so in a state whose legislature adopts UPMIFA, the charity will be able to release *or* modify a restriction with the donor's consent.²⁸⁷ In a non-UPMIFA state, where resort to court would be required for cy pres relief, it might therefore be appropriate for a charity to agree that the donor could participate in the proceeding even when the Uniform Trust Code does not apply. This raises a difficult issue, however: If the charity itself does not believe that a cy pres proceeding is necessary—that is, if the charity thinks that its use of the gift comes within its discretion to implement the restriction—can the donor challenge that threshold finding in court?²⁸⁸ (See the discussion of implementation versus breach versus cy pres in Part III.C, above.)

Subsection (c) of draft Section 450 provides that the passage of time affects any rights of enforcement provided by agreement. Draft Comment d(2) emphasizes that the restriction remains legally binding on the charity, and so the policy of limiting the standing of private parties has no effect on enforcement by the attorney general²⁸⁹ or by co-trustees or directors.²⁹⁰ The passage of time also affects the merits of a modification proceeding. Subsection (c) takes the position that the more time has passed from the date of the gift, the more flexible should be the court's threshold of willingness to grant relief and the type of relief granted.²⁹¹ Draft Comment d(1) states that the requisite amount of time is a matter for the court to determine under the circumstances.²⁹² A variety of reformers have

²⁸⁶ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. c (Preliminary Draft No. 3, 2005).

²⁸⁷ See *supra* notes 91–113 and accompanying text.

²⁸⁸ See *supra* notes 181–92 and accompanying text (discussing implementation versus breach versus cy pres).

²⁸⁹ Harvey J. Goldschmid, as discussant on this Article at the NCPL Conference, *supra* note *, suggested that the term “attorney general” should also include a person (including the donor) granted relator status by the attorney general.

²⁹⁰ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450(c) cmt. d(2) (Preliminary Draft No. 3, 2005).

²⁹¹ *Id.* § 450(c).

²⁹² *Id.* cmt. d(1).

described the policy behind a range of time limits.²⁹³ The draft Comment identifies several complicating factors. First, a particular gift (or fund) may have multiple donors with possibly different intentions.²⁹⁴ Second, the restricted gift may be one of many to the institution, and the burden of compliance increases over time and as gifts multiply.²⁹⁵ Third, a corporate charity, in contrast to a charitable trust, might be engaged in a range of complex operations, and its board must make business decisions regarding a variety of revenue and expense categories.²⁹⁶ Tying the use of restricted donations too closely to the original purpose can unduly hamper the responsible management of charitable programs.

That draft Comment explains that there is no explicit common law precedent for subsection (c).²⁹⁷ However, the Comment explains that relaxing a restriction after the passage of time can be justified on the following four policy grounds:

- i. The more time that passes, the more likely will the donor's scheme lose its relevance. This is particularly true for administrative and secondary restrictions, which can grow increasingly idiosyncratic and ineffectual, and less socially worthwhile.
- ii. The more time that passes, the more likely will public benefits arise that the donor could not have anticipated.
- iii. In economic terms, if donor intent is honored for a long time, the donor will have "recovered" most if not all of the present value of the restriction, and thus decisions to make gifts will not be discouraged.
- iv. The more time that passes, the more likely will an individual donor of an inter vivos gift have died, and

²⁹³ See generally Brody, *supra* note 1 (noting reformers have suggested various time limits including specific time periods, lives in being plus twenty-one years, and one generation of trust administrator).

²⁹⁴ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. d(1) (Preliminary Draft No. 3, 2005).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

these Principles do not accord rights to monitor and enforce a restriction to the donor's successors in interest or other related parties, unless specified in the gift instrument. For institutional donors, while the entity has perpetual life, the individuals who govern the entity do change over time.²⁹⁸

Indeed, an attorney general might similarly find that, with the passage of time, public policy for enforcing the restriction has weakened, and thus decide not to bring suit.

Compare the observations by Professor John Eason regarding the claim asserted by Avery Fisher's family:

[E]ven if specific performance is an available remedy, the request would require that Avery Fisher's name adorn any substantially renovated or even new concert hall that ever graces the Lincoln Center campus. The pro-donor perspective would no doubt embrace the argument that it is sufficient that the contribution did some immediate and future (though limited in duration) good and was accepted. From the standpoint of society's stake in this venture, however, such an outcome concedes too much to Mr. Fisher.²⁹⁹

²⁹⁸ *Id.* at 332–33.

²⁹⁹ Eason, *supra* note 135 (footnote omitted). After noting judicial precedent for alternative ways to accommodate a donor's name perpetuation desires—such as “applying the name to an alternate facility serving the same or a related charitable class or purpose, or, similarly, creating a named fund to serve those ends”—Eason comments:

In the case of Avery Fisher Hall, for example, can anyone truly say that after thirty years of recognition, Mr. Fisher would (or should) not be satisfied with an ongoing prominent display of his name and the history of his contribution in the lobby of a substantially renovated and renamed concert hall, perhaps amplified by special annual performances specifically commemorating his contribution? In fact, an annual performance to commemorate Mr. Fisher's gift could easily recur into perpetuity and would actually embody the very essence of his obvious charitable desires. Moreover, such a tribute would arguably call attention to his interests and efforts in a manner comparable, if not superior, to that occasioned by letters etched in cold granite above a slowly deteriorating doorway. Ultimately, long-delayed but carefully tailored deviations from the particulars of a past naming contribution do not deprive donors of substantial returns on their contribution “bargains.”

Eason concludes with the normative question:

[I]f Mr. Fisher would not, today, accept any compromise regarding the display of his name, the real question that society should ask is whether charities should ever be permitted to give so much away in the first instance, when the lure of immediate dollars may readily threaten to overwhelm thoughtful concern for the future implementation and accomplishment of that charity's public mission.³⁰⁰

Note, moreover, that the Avery Fisher gift was actually made by the family foundation, an institutional donor with no natural life.

Id. at 453–54 (footnote omitted).

³⁰⁰ *Id.* at 454 (footnote omitted).

Finally, the passage of time can affect the remedy.³⁰¹ Where restitution is appropriate, at least one court has ruled that the amount must be increased to reflect the change in the value of a dollar from the time the gift was made.³⁰²

³⁰¹ Compare the opposite approaches taken in 2005 by appellate courts in Indiana and Tennessee. In *St. Mary's Medical Center, Inc. v. McCarthy*, 829 N.E.2d 1068, 1077 (Ind. Ct. App. 2005), the court (while not addressing standing) found "there are Indiana cases suggesting that St. Mary's use of the chapel for nearly fifty years constituted substantial compliance with any charitable trust or condition subsequent imposed by Haney's will." In *St. Mary's* the will did not specify the form that the memorial would have to take or how long it was to last. The court "note[d] that although charitable gifts should be encouraged so far as possible, charities themselves should not be bound to one particular use of bequeathed property for multiple generations unless they are on clear notice that such is a requirement of the bequest." *Id.* at 1076–77 (footnote omitted). In footnote 4, the court commented:

There was evidence presented here that the Chapel of Mary, Queen could stand for another fifty to seventy-five years, if not longer. McCarthy essentially asserts that St. Mary's must allow the chapel to stand for at least that long; the wording of the trial court's order also would seem to require St. Mary's to do nothing that might hasten the chapel's demise and that it would have to wait until the chapel crumbled of its own accord before it could put the property on which it stands to another use. We decline to so hold in the absence of clear evidence that St. Mary's knew it was irrevocably tying up a substantial piece of its grounds for at least 100 to 125 years when it agreed to use the funds from Haney's estate to build the chapel.

Id. at 1077 n.4. But compare the contracts approach in *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W.3d 98, 118 (Tenn. Ct. App. 2005), where the court held that the donee could not now, after seventy years of performance, repudiate a now-unwanted name on a dormitory while the building still stood:

Vanderbilt's argument that it should be excused from complying with the inscription condition contained in the 1933 contract because the Tennessee U.D.C. has already received enough value for its original contribution to the construction of the building is likewise without merit. The courts must interpret contracts as they are written.

Id. The court did not impose a perpetuity, however:

Given the nature of the project and the content of the conditions, we conclude that these conditions were not meant to bind Peabody College forever but instead were to be limited to the life of the building itself.

Thus, as long as the building stands, these . . . conditions apply to the gift.

Id. at 117. The court declared that "allowing Vanderbilt and other academic institutions to jettison their contractual and other legal obligations so casually would seriously impair their ability to raise money in the future by entering into gift agreements such as the ones at issue here." *Id.* at 118–19.

³⁰² *Id.* at 119 ("[I]f Vanderbilt continues to elect not to comply with the terms of the gift, it must pay the Tennessee U.D.C. in today's dollars the value of the original gift in 1933."). The court explicitly rejected the alternative approach that would require Vanderbilt to pay interest:

Any requirement that Vanderbilt pay interest on the original donation would necessarily be premised on the idea that the Tennessee U.D.C. was

D. PROPOSED APPLICATION OF LEGAL REGIME TO PARADIGMATIC CASES

Returning to the four cases set forth at the beginning of this Article, the draft ALI provisions just summarized would result in the following consequences:

- CASE 1: D gives \$100,000 to C University to establish a fund to support library operations. D has no standing to sue to recover the gift, to enforce the restriction, or to commence a cy pres proceeding.
- CASE 2: D gives \$100,000 to C University to establish a fund to support library operations. C agrees that D may bring suit to specifically enforce the restricted gift. D may not sue to recover the gift or to commence a cy pres proceeding. D may sue, however, to enforce the restriction (this amount being material) within a period of time supported by public policy. A court will construe the restriction with greater flexibility as more time passes.
- CASE 3: D gives \$100,000 to C University to establish a fund to support library operations. C agrees that D and D's descendants may bring suit to specifically enforce the restricted gift. The results are the same as in CASE 2 except that

deprived of all beneficial use of the funds from the time of the original donation to the present. Such an approach would invite an offset defense by Vanderbilt and would require the trial court to attempt to quantify the value to the Tennessee U.D.C. not only of the housing awards [students designated by the plaintiff lived in the dormitory], but also of having the inscription on the pediment of the building for the past seventy years. Determining the value of an inscription is not a matter that is subject to easy proof or to reasonably definite calculation, and any attempt to do so would lead to a calculation of damages that was impermissibly speculative in nature.

Id. at 119. The court cited to *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute*, 698 N.W.2d 900, 906 (Mich. Ct. App. 2005), which found that there was no method to measure damages for the loss of naming rights. *Id.* See discussion of *Prentis*, *supra* notes 140–45.

the time limit for private enforcement also applies to D's descendants.

CASE 4: D gives \$100,000 to C University to establish a fund to support library operations, but that if C University does not carry out the purposes of the gift, the gift shifts to H University. The results are the same as in CASE 2 except that H's rights trump in a *cy pres* (but not a deviation) proceeding. Presumably, H's rights to bring a direct action for the gift over do not terminate within any period of time.

These results may change in subsequent drafts. For example, the ALI project might propose that if in CASE 1 the attorney general had a disabling conflict of interest and therefore refused to bring suit to enforce the restriction, a court could find that D (and any other appropriate private party) has a special interest. Additional commentary might usefully distinguish between charges of mismanagement and disagreement over implementation, with agreed-to donor standing limited to the former case.

VI. CONCLUSION

The courts' increased and continued confusion over what law to apply to private enforcement of charitable gifts suggests that the existing legal classifications are not working. Charitable trust law does not by its terms apply to restricted gifts not made in trust. To allow the donor to obtain enforcement rights by agreement—and to spell out what could be quite detailed and long-lived powers for the donor and others—fails to take into account the public policy limits on private ordering that should apply to charitable assets. A better solution might be to acknowledge the unique character of these “giftracts” and to craft a tailored legal regime for them. Such a regime would address not only standing but also consider imposing such conditions as notification of the attorney general, time limits on private (but not attorney general) enforcement, and a circumscription of appropriate remedies in order to protect the charity. I have undertaken such a project as part of the larger topic

of enforcement (both public and private) of charitable duties in my work as Reporter for the American Law Institute's Principles of the Law of Nonprofit Organizations.³⁰³ Several of the issues, however, will likely require a legislative solution.

One final word: Many of these cases could have been avoided by more sensible and sensitive behavior by the charity. Mrs. Smithers (discussed in Part II.B.2) learned of St. Luke's plans when at the last minute it cancelled a gala that she had been working on for a year. Princeton University and the Robertson family do not really seem to have substantive differences (see discussion in Part III.A). Countless additional situations fly below the radar screen. One appellate court, while ruling against the donor, recently distinguished between legally mandated and appropriate behavior:

The record illustrates that the Hospital, in accepting Ms. Courts' generous gift, failed to take great care to see that it was adequately recognized in a manner acceptable to the generous don[or], and failed to ensure that there were no misunderstandings regarding how it intended to utilize the gift. Essentially, it appears that the Hospital and its administration, though initially openly appreciative of the gift, became insensitive to the fact that the elderly Ms. Courts had unselfishly donated her life's savings to the Hospital. We do not wish to condone such callousness, as it will act only to discourage the generosity of private citizens necessary to serve the public good.³⁰⁴

Failure to abide by internal processes for honoring donor restrictions can bedevil the best of institutions: Recently, the Metropolitan Museum of Art reportedly withdrew a piece of sculpture it planned to auction "after realizing that it had violated

³⁰³ Moreover, steering disputes such as these to Alternative Dispute Resolution appears promising, a route I have only begun to explore in my project for the ALI.

³⁰⁴ *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 867 (N.C. Ct. App. 1993). Note that the court ruled on the merits of whether the gift was restricted and did not address standing. *Id.* Compare the concluding sentence in the *Herzog Foundation* dissent, quoted in Part II.C.1 of this Article.

its own de-accessioning policy. Met guidelines call for the museum to consult the donor of an object or his estate if it decides to sell it within 25 years after the gift was made.”³⁰⁵ According to this news report, the donor (who made the gift in 1986) “contacted The New York Times . . . to complain that the Met had never informed him of the planned sale and that he had learned of it only after a friend pointed it out to him at Sotheby’s Web site.”³⁰⁶ In general, Professor Stephen Schwarz recommends that charities make regular reports to donors on compliance with gifts, explain how fees are assessed against restricted funds, and consult with donors should circumstances change.³⁰⁷

The *New York Times* obituary of philanthropist Enid Haupt observed: “She was once asked how often the projects she supported ended up as she had visualized them. ‘When they think I’ll see it,’ she said.”³⁰⁸ Not all charity benefactors can live long enough to fulfill their specific goals. But even while they live, to the extent donors are unable to enforce their desires in court—or even perceive that they cannot—what form will philanthropy take in the future? That question lies tantalizingly beyond the scope of this Article.³⁰⁹

³⁰⁵ Michael Kimmelman, *Met Yields to Donor, Canceling Sculpture Sale*, N.Y. TIMES, Jan. 14, 2006, at B7.

³⁰⁶ *Id.*

³⁰⁷ Comments of Stephen Schwarz at NCPL conference discussed *supra* note *.

³⁰⁸ Enid Nemy, *Enid A. Haupt, Philanthropist, Dies at 99*, N.Y. TIMES, Oct. 27, 2005, at B13.

³⁰⁹ See, e.g., Evelyn Brody, *The Charity in Bankruptcy and the Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEG. J. 471 (2005) (discussing, in a symposium issue on bankruptcy in the religious nonprofit context, how donors concerned about use of Catholic church’s funds might design their giving). See also Siegel, *supra* note 5.