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Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent

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REFORMING THE REFORM OF THE CY PRES DOCTRINE: A PROPOSAL TO PROTECT TESTATOR INTENT

I. INTRODUCTION

Charities and charitable trusts play an important role in American society by providing funds to many worthy causes.[1] Throughout the history of the United States, many of the country's most famous and wealthiest citizens have used charitable trusts to donate part or all of their wealth to needy causes in American society.[2] Carnegie, Duke, Guggenheim, Kellogg, Ford, Hershey, Gates, and now Buffet[3] are a few of many wealthy individuals who have donated significant fortunes to charity over the last few centuries.[4]

The passage of time has the potential to render the trust provisions of some of America's most famous charitable trusts ineffective and inefficient.[5] The cy pres doctrine, originally conceived in its present form in the eleventh century, was equity's answer to the inherent problems of an institution with perpetual existence.[6] Cy pres allows a court to modify the dispositive purpose of a charitable trust, but courts have continually applied the doctrine narrowly to preserve the settlor's intent.[7] Historically, the purpose of a charitable trust was difficult to

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1. *See, e.g.*, Thomas Parrish, *The Foundation: "A Special American Institution," in* THE FUTURE OF FOUNDATIONS 7 (Fritz F. Heimann ed., 1973).

2. *Id.* at 14–16.

3. Carol J. Loomis, *Warren Buffet Gives It Away*, FORTUNE, July 10, 2006, at 57 (describing Warren Buffet's plan to give most of his $40 billion fortune to the Bill and Melinda Gates Foundation).

4. Parrish, *supra* note 1, at 15; Jennifer L. Komoroski, Note, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 WM. & MARY L. REV. 1769, 1772–73 (2004) (retracing the history and importance of the charitable trust in American society).

5. Several notable and highly-publicized examples include the following: (1) the Buck Trust, *see, e.g.*, John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641 (1987); (2) the Barnes Foundation, *see, e.g.*, Jeffrey Toobin, *Battle for the Barnes*, THE NEW YORKER, Jan. 21, 2002, at 34; and (3) the Bishop Estate, *see, e.g.*, Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393 (1999).

6. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 173 (2004).

7. The settlor is the individual who creates a charitable trust by giving property (referred to as the trust corpus or trust res) in trust for a charitable purpose through a will or other

change, but modern scholars, who have proponed a broadened cy pres doctrine, have eroded the settlor's power to define a charitable purpose capable of existing in perpetuity.[8] Influenced by prevailing theories, the American Law Institute and the National Conference of Commissioners on Uniform State Laws redrafted the sections on cy pres in the Restatement (Third) of Trusts ("Restatement (Third)") and in the Uniform Trust Code ("UTC"), respectively, to allow courts to exercise cy pres in a broader range of circumstances.[9]

Although the modern discourse surrounding the cy pres doctrine argues that the narrow application of the doctrine can result in an ineffective and an inefficient use of trust assets, this Comment makes three proposals to ensure that future settlors can continue to rely upon the judiciary to uphold their intent for many years into the future. First, courts should apply the narrow interpretation found in established case law to the terms *impossible*, *impracticable*, or *illegal* under the new UTC and the Restatement (Third). Second, the term *wastefulness*, which the drafters inserted in their latest revisions of the UTC and the Restatement (Third), should apply only when the trust faces a surplus that the trustees are unable to apply, in its entirety, to the original charitable purpose. In such a scenario, a court should limit its application of cy pres to only the surplus portion of the trust corpus—a term for which this Comment offers a definition influenced by the law and economics school of thought. Third, courts should destroy the now meaningless dichotomy between the equitable deviation doctrine and the cy pres doctrine to promote stability in the law and to protect the testator's intent from a whimsical judge. The first two proposals ensure that courts would preserve the narrow set of circumstances in which a court can apply the cy pres doctrine, but all three proposals endeavor to allow testators to effectuate their intent long after their deaths while still addressing the economic efficiency concerns of modern scholars.

Part II examines a charitable trust's legal requirements and the history of its development. Part III provides an elementary explanation of the Rule Against Perpetuities and explains its significance to a charitable trust. Part IV explores the cy pres doctrine, including the legal requirements for its application and the history of its development. Part V provides a brief explanation of the equitable deviation doctrine

governing instrument. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (rev. 2d ed. 1984). *See* discussion *infra* Parts II.A, IV.

8. FREMONT-SMITH, *supra* note 6, at 173–75.

9. *See infra* Part IV.B.

and its importance to this Comment's proposal for reform. Part VI examines two noteworthy examples of recent crises involving charitable trusts. Finally, Part VII examines the modern debate surrounding the application of cy pres and makes three proposals for further reform of the cy pres doctrine.

II. CHARITABLE TRUSTS

A. Legal Requirements

The requirements to create a charitable trust are primarily the same as the requirements to create a private trust, with only two exceptions.[10] First, courts require a charitable trust to have an indefinite number of beneficiaries.[11] More precisely, courts require that the beneficiaries of a charitable trust are undefined; a charitable trust may not have specific beneficiaries.[12] Second, the settlor must create a general charitable purpose.[13] Justice Gray succinctly defined a valid charitable trust and its acceptable purposes:

> A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.[14]

Essentially, a charitable trust requires the following: (1) a settlor with intent to create a charitable trust; (2) the delivery of specific property that becomes the trust corpus; (3) a charitable purpose; and (4)

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10. BOGERT & BOGERT, *supra* note 7, § 323. The creation of a private trust has three requirements: (1) intent that the property be held in benefit for one other than the settlor; (2) at least one beneficiary; and (3) an interest in the property, which must be in existence or at least ascertainable, that is to be held for the benefit of the beneficiary. *Id.* § 1. A trust will not fail for the lack of a trustee because a court can appoint one. *Id.*

11. *Id.* § 363.

12. *Id.*

13. *Id.* § 362.

14. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867).

an indefinite number of beneficiaries.[15] The Restatement (Second) of Trusts ("Restatement (Second)") defines a charitable trust as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."[16] The primary difference between a private trust and a charitable trust is the size and nature of the class of beneficiaries—charitable trusts consist of funds beneficial to a community as a whole.[17]

The purpose of a charitable trust may not be merely benevolent.[18] The Restatement (Second) provides a widely recognized list of acceptable charitable purposes based on the illustrative list of charitable purposes found in the Statute of Elizabeth[19]:

> Charitable purposes include[:]
> (a) the relief of poverty;
> (b) the advancement of education;
> (c) the advancement of religion;
> (d) the promotion of health;
> (e) governmental or municipal purposes; [and]
> (f) other purposes the accomplishment of which is beneficial to the community.[20]

Although the Restatement (Second) allows these enumerated purposes of a charitable trust, a charitable trust's purpose may not be in breach of public policy or facilitate the execution of a crime or of a tort.[21]

The charitable trust's most important attributes are the many advantages that state and federal law afford to it. Unlike private trusts in most states, charitable trusts receive an exemption from restrictive property rules limiting the vesting of property interests, durational limits

15. EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS 174 (1974).

16. RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

17. Domenic P. Aiello & Tracy Adler Craig, *Cy Pres: Reformation of the Charitable Trust*, 81 MASS. L. REV. 110, 111–12 (1996).

18. *See, e.g.*, Shenandoah Valley Nat'l Bank of Winchester v. Taylor, 63 S.E.2d 786, 789–90 (Va. 1951).

19. EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 10 (1950) (quoting Statute of Charitable Uses, 1601, 43 Eliz. c. 4 (Eng.)). See *infra* note 31, quoting the preamble to the Statute of Charitable Uses.

20. RESTATEMENT (SECOND) OF TRUSTS § 368 (1959); *see also Taylor*, 63 S.E.2d at 789.

21. BOGERT & BOGERT, *supra* note 7, § 361.

placed on trusts, and limits placed on the accumulation of trust income.[22] For example, a charitable trust may exist indefinitely because its duration is not limited by the Rule Against Perpetuities.[23] Charitable trusts may continue their operation so long as they remain funded and distribute their income to the intended beneficiaries. In addition to the multiple state law benefits, federal and state tax laws create preferential treatment for charitable trusts.[24] Unlike a private trust, qualified charitable trusts are exempt from state and federal income tax and from the estate tax.[25] In addition, most states do not impose property taxes on the assets of charitable trusts.[26] Most important to this Comment, however, is the charitable trust's exemption from the Rule Against Perpetuities, which allows a trust to operate indefinitely.[27]

B. History of Charitable Trusts

Although gifts to charity have existed in antiquity,[28] English Courts of Chancery first created charitable trusts, which were enforceable in equity.[29] Charitable trusts were popular in England, but they were commonly abused or mismanaged.[30] As a result of widespread abuse, Parliament enacted the Statute of Charitable Uses of 1601, which acted as an enforcement mechanism to prevent the mismanagement of charities.[31] The Statute of Charitable Uses created a new remedy for the

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22. *Id.* § 245.

23. *Id.*; *see also id.* § 342.

24. *Id.* § 245.

25. *Id.*

26. *Id.*

27. *See infra* Part III.

28. MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 11 (1965) (noting that the concept of charity and organizations for charitable purposes existed in many early cultures). Examples of early charitable gifts include the following: the Ptolemies' endowment for a library in Alexandria; Plato leaving funds for the support of his Academy; and numerous private associations that supported the poor, education, hospitals, asylums, and old people's homes in the early Roman Empire. *Id.*

29. *Id.* at 82.

30. BOGERT & BOGERT, *supra* note 7, § 321.

31. *See* JAMES C. BAUGHMAN, TRUSTEES, TRUSTEESHIP, AND THE PUBLIC GOOD 4 (1987); *see also* FISCH ET AL., *supra* note 15, at 17. The preamble to the Statute of Charitable Uses, which was entitled "An Act to redress the misemployment of lands, goods and stocks of money heretofore give to certain charitable uses," reads as follows:

> Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble progenitors, as by sundry other well disposed persons; some

misapplication of property held in a charitable trust; the statute did not create the jurisdiction of the chancery court, which already existed prior to the enactment of the Statute.[32] The Statute merely created a new remedy to enforce charitable trusts by providing the chancellor with the auxiliary power to investigate and to enforce breaches of charitable trusts through a special commission.[33] The statute did not create the chancellor's jurisdiction over charities, and it did not supersede or supplant the existing remedy allowed by the chancery courts.[34]

The use of charitable trusts and private charities crossed the Atlantic Ocean with the colonization of America,[35] but after the American Revolution, the framers of the U.S. Constitution did not specifically enumerate the enforcement of charitable trusts as one of the powers of the federal government.[36] Charitable trusts were left to the states, and many states passed laws allowing for the creation of charitable trusts.[37] Some states, however, passed laws to repeal all English statutes, and they did not support charities or charitable trusts because of a desire to completely rid themselves of all former vestiges of English rule.[38] Seven states and the District of Columbia rejected the doctrine of charitable

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> for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance of houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftmen and persons decayed, and others for relief or redemption of prisoners, or captives, or for aid or ease of any poor inhabitants concerning payments of fifteens, sitting out of soldiers and other taxes; which lands, tenements . . . nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: for redress and remedy whereof . . . .

FISCH, *supra* note 19, at 10–11.

32. FISCH, *supra* note 19, at 11 (noting that the enumeration of various charitable purposes in the Statute of Charitable Uses led to the erroneous belief that the statute created the jurisdiction of the chancery court over charitable trusts).

33. *Id.*

34. *Id.*

35. FISCH ET AL., *supra* note 15, at 20; FREMONT-SMITH, *supra* note 28, at 36.

36. BAUGHMAN, *supra* note 31, at 5.

37. *See* FISCH ET AL., *supra* note 15, at 20; *see also* FREMONT-SMITH, *supra* note 28, at 36–37 (observing that Massachusetts retained English common law and English statutes through its state constitution and noting that Connecticut enacted specific legislation in 1702 to provide for the validity of charitable trusts).

38. FISCH ET AL., *supra* note 15, at 21; *see also* FREMONT-SMITH *supra* note 28, at 36–37.

trusts.[39] For many years, the only method of providing for a charity in these states was either to leave property to an existing charitable corporation or to leave property to a trustee instructed to create a charitable corporation within the period allowed by the Rule Against Perpetuities.[40]

The development of the law surrounding charitable trusts in this country has been retarded by the U.S. Supreme Court's 1819 decision in *Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*, which addressed the legality of a charitable trust from Virginia.[41] The Court erroneously held that this particular charitable trust failed because the Court believed that the legality of charitable trusts derived from the Statute of Charitable Uses of 1601.[42] Since Virginia had specifically repealed all English statutes and acts of Parliament in 1792, Chief Justice Marshall's opinion reasoned that the charitable trust was invalid because Virginia repealed the Statute of Charitable Uses.[43] Marshall's opinion was based on the historical misconception that the Statute of Charitable Uses created charitable trusts, a misconception based on false historical evidence and dicta in certain English cases that suggested that trusts without defined beneficiaries did not exist prior to the Statute of Charitable Uses.[44] The Supreme Court corrected the error it made in *Hart* in a subsequent decision twenty-five years later, but Virginia, Maryland, the District of Columbia, and West Virginia followed *Hart* for nearly one-hundred years, and *Hart* influenced the development of charitable trust law in New York, Michigan, Wisconsin, and Minnesota.[45]

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39. FREMONT-SMITH, *supra* note 28, at 37–38. The following seven states and the District of Columbia rejected the doctrine of charitable trusts: Virginia, West Virginia, Maryland, New York, Michigan, Wisconsin, and Minnesota. FISCH, *supra* note 19, at 13–55.

40. FREMONT-SMITH, *supra* note 28, at 37 (noting that the retarded development of the charitable trust in the United States differed significantly from the development of charitable trusts in England).

41. Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1 (1819) (involving a testamentary gift to an unincorporated Baptist association to help young men acquire an education for ministry).

42. *Id.* at 8.

43. *Id.* Virginia, Maryland, and later, West Virginia followed *Hart*, and gifts for charity were restricted to the use of charitable corporations for many years. *See* Gallego's Ex'rs v. Att'y Gen., 30 Va. (3 Leigh) 450 (1832), *overruled by* Protestant Episcopal Educ. Soc'y v. Churchman's Representatives, 80 Va. 718 (1885); Dashiell v. Att'y Gen., 5 H. & J. 392 (Md. 1822); Am. Bible Soc'y v. Pendleton, 7 W. Va. 79 (1873). Subsequent legislation validated the use of charitable trusts in Maryland and West Virginia. FISCH, *supra* note 19, at 18–19, 21–22.

44. FREMONT-SMITH, *supra* note 28, at 37–38.

45. *Id.* at 38.

The Supreme Court's decision in *Hart* inspired further historical research into the origins of equity jurisdiction over charitable trusts.[46] The result of this research definitively determined that charitable trusts did not rely on the Statute of Charitable Uses for their validity.[47] In 1844, the Court heard *Vidal v. Girard's Executors*, and it reversed its holding from *Hart*.[48] The Court held that it was mistaken in its earlier holding in *Hart*.[49] It found that Pennsylvania's repeal of the Statute of Charitable Uses was immaterial because the legality of charitable trusts stemmed from earlier English common law.[50] Although *Vidal* stimulated intense public interest in charitable trusts, the public interest was not capable of changing the decisions of state courts and legislatures, which continued to follow the *Hart* decision for many decades.[51]

III. THE RULE AGAINST PERPETUITIES

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[52] The Rule Against Perpetuities limits the duration of most

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46. *Id.*

47. *Id.*

48. Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127 (1844) (involving the validity under Pennsylvania law of a testamentary charitable trust from the will of Stephen Girard for the establishment of a school or college for "poor white male orphans" in Philadelphia). The Supreme Court was not finished with Stephen Girard's trust. It would come before the Court again over a century later because the college's racial restrictions were a forbidden state action under the Fourteenth Amendment Equal Protection Clause. *See* Pennsylvania v. Bd. of Dirs., 353 U.S. 230 (1957).

49. *Vidal*, 43 U.S. (2 How.) at 196.

50. *Id.*; *see also* FREMONT-SMITH, *supra* note 28, at 38.

51. FREMONT-SMITH, *supra* note 28, at 38; HOWARD S. MILLER, THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY 1776–1844, at 38–39 (1961). Miller noted that the intense public interest in the *Vidal* case was probably due more to the famed counsel before the Court as opposed to the substantive trust issues involved in the case. Horace Binney, representing the City of Philadelphia, succeeded in convincing the Court that Girard's charitable trust was enforceable, and he defeated Daniel Webster, who represented the heirs of Stephen Girard. MILLER, *supra*, at 38.

52. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). Although Gray condensed the Rule Against Perpetuities into one sentence after nearly 200 pages, the development of the rule took centuries to complete. The Rule is an excellent example of judicial legislation, as the case-by-case development of the Rule took hundreds of years. The origin of the Rule is unclear, but the purpose of the statute was to place a limitation upon tying up land in perpetuity, which the Statute de Donis (1285) had previously permitted. *See* Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 366 n.41 (1999).

trusts.[53] Critical to this Comment, however, is the understanding that the law excludes charitable trusts from the Rule Against Perpetuities. The intended purpose of the Rule is to limit "dead hand" control, to promote the alienability of property, and to curtail trusts that allow wealthy families to tie up their wealth for centuries.[54]

The Rule Against Perpetuities achieves its purpose by "voiding certain interests (typically future contingent interests and executory interests but also interests created by option agreements) in land and personalty that vest in interest too remotely."[55] Essentially, interests created in trusts that are not given to persons in existence at the time of the creation of the trust (ascertainable persons) are subject to the Rule Against Perpetuities.[56] Courts created the Rule Against Perpetuities' period—lives in being plus twenty-one years—to allow the settlor to control the assets for, at most, two generations, assuming that grandchildren are lives in being at the creation of the trust.[57] The Rule will strike down any interest as invalid if it has the possibility of vesting beyond the Rule Against Perpetuities' period.[58]

All charitable trusts create contingent interests that are subject to the Rule Against Perpetuities because charitable trusts create interests in unascertained beneficiaries, who are not lives in being at the time of

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53. GRAY, *supra* note 52, § 201.

54. Johnson, *supra* note 52, at 366 (noting that economic reasoning supports the purposes of the cy pres doctrine).

55. *Id.* at 367.

56. For the sake of precision, Professor Johnson explains that even interests given to ascertainable persons at the time of the creation of the trust may be subject to the Rule Against Perpetuities. *Id.* at 367 n.44. If the interest has a condition attached, the Rule Against Perpetuities may still apply, despite the fact that the beneficiary was ascertainable at the time of the trust's creation. For example, consider the following transfer: "Blackacre to Mary if and when the Cubs win the World Series." Mary's interest is a contingent interest because the interest is dependent upon an event that may or may not happen—the Cubs winning the World Series. In addition, Mary's contingent interest is transmissible inter vivos or by will, and her interest reduces the alienability of the subject property because no one would want to purchase a property when Mary's interest in the property may vest in the event—however unlikely—that the Cubs win the World Series. Since Mary's interest may vest beyond lives in being plus twenty-one years, the Rule Against Perpetuities will declare Mary's interest void. Notably, Mary is the only relevant life in being, but she is not the measuring life in this example because the interest passes to Mary or to her heirs if and when the Cubs win the World Series, regardless of whether Mary is still alive at the time of the Cubs' win. If the settlor further restricted Mary's interest by requiring her to be alive at the time the Cubs win for the interest to vest, Mary's life would become the measuring life, and the contingent interest would not run afoul of the Rule Against Perpetuities because the interest does not have the opportunity to exceed the Rule Against Perpetuities period. *Id.*

57. *See id.* at 368.

58. *See id.*

the creation of the trust.[59] If a settlor created the contingent interests in a private trust, they would be subject to the Rule Against Perpetuities.[60] Because the interests would vest too remotely, the Rule would declare the interests invalid.[61] Since the Rule would effectively invalidate most trusts for charitable purposes, the exclusion of a charitable trust from the Rule Against Perpetuities is an important distinction from private trusts. The law provides settlors of charitable trusts with a significant benefit by allowing them to control the trust corpus well in excess of the term that the property could be controlled in a similar private trust. Many settlors consider the ability to control the property in perpetuity an important attribute when they decide to utilize a charitable trust.

IV. THE CY PRES DOCTRINE

A. Legal Requirements

Although there are multiple definitions of the cy pres doctrine, most authorities generally recognize the doctrine as a saving device that courts may apply to charitable trusts when the exact intent of the settlor cannot be completed exactly as directed.[62] The most cited and commonly followed definition of cy pres today is found in the Restatement (Second):

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes *impossible* or *impracticable* or *illegal* to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[63]

Consistent with the doctrine's purpose to approximate the settlor's intent, the phrase *cy pres* developed from the Norman French phrase *cy*

59. *Id.* at 369.
60. *Id.*
61. *Id.*
62. FISCH, *supra* note 19, at 1.
63. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959) (emphasis added).

pres comme possible, which means "as near as possible."[64]

For a court to apply cy pres to reform a charitable trust, the following three elements must be met: (1) an applicant must show that there is a valid charitable trust; (2) current or changed circumstances must frustrate the settlor's specific charitable intent, requiring the use of cy pres to fulfill the settlor's specific directions; and (3) the settlor must have a "general charitable intent" that is not limited solely to the precise purpose specified in the trust instrument.[65] Although a few courts have applied cy pres liberally,[66] most courts apply the cy pres doctrine narrowly to the reformation of trusts.[67] Presumably, many courts reasoned that the intent of the settlor should be controlling, and they were reluctant to modify trusts in a manner that was not consistent with the instructions of the settlor. Some courts argue that a liberal application of the cy pres doctrine would result in less charitable giving because potential settlors would doubt that their charitable gift would be carried out as they intended.[68]

The first element—a valid charitable purpose—creates few problems for courts. Most courts favor charitable distributions of property, and they are willing to liberally interpret the settlor's intent to find a charitable purpose.[69] In comparison to the other elements for the application of cy pres, the first element rarely precludes the use of cy pres.[70]

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64. FISCH, *supra* note 19, at 1. The best pronunciation of the phrase would be "see pray," that being the proper French pronunciation. The Anglicized pronunciation would be as if the phrase were spelled "si press." The common usage today is a mixture of the English and French pronunciation, pronouncing the phrase as "si pray." BOGERT & BOGERT, *supra* note 7, § 431.

65. RESTATEMENT (SECOND) OF TRUSTS § 399 (1957); *see also* FREMONT-SMITH, *supra* note 6, at 173.

66. *See, e.g.*, Gallaudet Univ. v. Nat'l Soc'y of Daughters of the Am. Revolution, 699 A.2d 531 (Md. Ct. Spec. App. 1997) (concluding that cy pres should apply to allow funds designated for the support of a nursing home for DAR members, which was recently closed, to be used instead for the support of all DAR members generally).

67. *See, e.g.*, *In re* Estate of du Pont, 663 A.2d 470 (Del. Ch. 1994) (refusing to apply cy pres to funds donated for the operation of a convalescent hospital in a specific location in order to support another similar facility in a different location after the original hospital ceased to operate due to a lack of need).

68. *See, e.g.*, Bd. of Trs. of Am. Indian, Heye Found. v. Bd. of Trs. of Huntington Free Library & Reading Room, 610 N.Y.S.2d 488, 501 (App. Div. 1994) (refusing to apply cy pres where the trustees of a donor foundation petitioned the court to order the return of books given to the defendant library who had subsequently donated the books to the Smithsonian Institution, resulting in the inability of the donor's beneficiaries to access the books).

69. Johnson, *supra* note 52, at 371.

70. *Id.*

The second element—changed circumstances resulting in the frustration of a settlor's specific charitable intent—creates the greatest impediment to the application of cy pres.[71] This requirement necessitates a fact-specific inquiry by a court,[72] but most courts have been reluctant to discard a strict textual approach to this element of the three-pronged test for cy pres.[73] If the settlor's specific instructions in the trust instrument have not become completely impossible or impracticable, most courts are simply unwilling to alter the terms of the trust.[74]

The third element—a general charitable intent, as opposed to a charitable intent for a specific purpose—creates few problems for most courts.[75] Courts have always liberally construed this requirement,[76] and today, the Restatement (Third) and the UTC contain a presumption of a general charitable intent.[77]

B. History of the Cy Pres Doctrine

The doctrine of cy pres has existed nearly as long as the concept of charity, but the doctrine arose so long ago that its true origin is obscure today.[78] The doctrine existed long before its application in the English courts of chancery, and it existed long before the advent of Christianity and the Church.[79] A case appears in the *Digest of Justinian* where Modestinus, a celebrated jurist, applied the cy pres doctrine to a legacy established in third century Rome.[80] Although the precise reason for

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71. *Id.*

72. *See, e.g.*, *In re* Abrams, 574 N.Y.S.2d 651, 655 (Sup. Ct. 1991) (establishing whether a trust's purpose has become impossible, impractical, or illegal to perform is a fact specific inquiry).

73. Johnson, *supra* note 52, at 371.

74. *Id.*

75. *Id.* at 374.

76. *Id.*

77. UNIF. TRUST CODE § 413 cmt. (amended 2004 & 2005), 7C U.L.A. 509 (2006); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003); *see also* FREMONT-SMITH, *supra* note 6, at 177.

78. FISCH, *supra* note 19, at 3.

79. *Id.*

80. DIG. 33.2.16 (Modestinus, Replies 9) (Alan Watson trans.). The testator left the legacy for the benefit of a city to conduct yearly games. Since the games were illegal at the time, Modestinus proposed the following solution:

> [s]ince the testator wanted a spectacle to be celebrated in the town, but of such a kind as could not legally be celebrated there, it was unfair that the sum which the deceased had intended for the spectacle should fall to the

the adoption of cy pres by the English chancery courts during the Middle Ages is unknown, the most plausible suggestion is that English chancellors, who were ecclesiastics trained in Roman civil law, resurrected the doctrine to save bequests for religious charitable purposes, which thereby subjected the trust property to the control of the Church.[81] Fisch explained the use of cy pres as the chancery court's personification of charity as a fictitious person with all the rights of a real beneficiary but exempt from the Rule Against Perpetuities.[82] Early courts treated the settlor's specific object or charity as a mere means to giving effect to a general charitable intent.[83] Lord Eldon described this attitude of the early courts:

> [W]here a legacy is given so as to denote, that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee.[84]

The cy pres doctrine is not merely limited to English common law; cy pres also exists in French and Spanish civil law.[85]

Today, almost all jurisdictions in the United States recognize the cy pres doctrine.[86] Massachusetts judicially recognized the doctrine of cy pres in the leading case of *Jackson v. Phillips*.[87] The majority of the

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> profit of the heirs. Therefore, the heirs and the chief men of the town should be summoned to discuss how the *fideicommissum* could be transformed so that the testator's memory would be celebrated in some other legal way.

Id.

81. FISCH, *supra* note 19, at 4 (citing Att'y Gen. v. Ministers and Elders of the Dutch Reformed Protestant Church, 36 N.Y. 452, 457 (1867)).

82. *Id.* at 5.

83. *Id.*

84. Mills v. Farmer, (1815) 34 Eng. Rep. 595, 596 (K.B.). For more language to this effect see *Village of Hinsdale v. Chicago City Missionary Society*, 30 N.E.2d 657, 664–65 (Ill. 1940).

85. FISCH, *supra* note 19, at 4.

86. FREMONT-SMITH, *supra* note 6, at 173; *see also* Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 n.6 (1988) (noting that South Carolina does not recognize cy pres). According to Fremont-Smith, only Alaska and North Dakota do not recognize the doctrine, and Hawaii and Nevada have recognized the doctrine only in dicta. FREMONT-SMITH, *supra* note 6, at 173. South Carolina uses the deviation doctrine instead of the cy pres doctrine. *Id.*

87. Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867); *see also* FREMONT-SMITH, *supra*

states that recognize the doctrine apply it when the purpose of a particular charitable trust becomes impossible, impracticable, or illegal.[88] Most courts utilize the three-part test to determine if the application of cy pres is appropriate.[89] These courts continue to apply cy pres only when the settlor's specific intent has become literally impossible or impracticable, despite the uneconomic consequences.[90]

Today, some courts have begun to apply the cy pres doctrine more broadly. With the recent addition of the term *wastefulness* to the UTC[91] and the Restatement (Third),[92] the drafters allow courts to consider the economic inefficiencies of charitable trusts in need of reform.[93] The UTC and the Restatement (Third) represent the broadest application of the cy pres doctrine, but few states have adopted the broader application of cy pres from the UTC or the Restatement (Third).[94] Most

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note 6, at 175.

88. FREMONT-SMITH, *supra* note 6, at 178.

89. *See* Aiello & Craig, *supra* note 17, at 111.

90. FREMONT-SMITH, *supra* note 6, at 178.

91. UNIF. TRUST CODE § 413(a) (amended 2004 & 2005), 7C U.L.A. 509 (2006). The UTC provides as follows:

> (a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:
>
> (1) the trust does not fail, in whole or in part;
>
> (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
>
> (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

Id.

92. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). The latest revision of the Restatement provides for the following:

> Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.

Id.

93. UNIF. TRUST CODE § 413(a); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

94. Only thirteen states and the District of Columbia have adopted the UTC's expanded use of the cy pres doctrine. *See* ARK. CODE ANN. § 28-73-413 (Supp. 2005); D.C. CODE § 19-1304.13 (Supp. 2006); KAN. STAT. ANN. § 58a-413 (Supp. 2005); ME. REV. STAT. ANN. tit. 13, § 4107 (Supp. 2005); MO. ANN. STAT. § 456.4-413 (West Supp. 2006); NEB. REV. STAT. ANN.

states continue to literally interpret the terms *impossible*, *impractical*, or *illegal* from the Restatement (Second).[95]

V. EQUITABLE DEVIATION

The theory of this Comment contrasts the doctrine of equitable deviation and the cy pres doctrine. Equitable deviation applies when "it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust."[96] The important distinction between the equitable deviation doctrine and the cy pres doctrine is that equitable deviation applies only to the administrative provisions of a trust, and cy pres applies only to the substantive provisions of a trust.[97] Despite this seemingly basic distinction, the issue becomes far more complicated when applied to an actual trust. As one commentator observed: "The terms 'substantive' and 'administrative' are obviously conclusionary [sic] and give rise to confused and vague court decisions, particularly when an administrative provision is of such central importance in the trust instrument as to take on a substantive nature."[98] Often, the outcome of a petition for reformation depends on whether a court finds the provision to be administrative under the equitable deviation doctrine or substantive under the cy pres doctrine.

Courts tend to favor the use of the equitable deviation doctrine over the use of cy pres because cy pres "reaches the central purpose of the trust, and is therefore appropriately subject to greater restraint" than the deviation doctrine, which merely changes the methods of the trust's administration.[99] When a court reforms an administrative provision of a trust, it "is merely exercising its general power over the administration of trusts," but when a court applies cy pres, that "doctrine requires the exercise of a more extensive power than the ordinary power of a court

§ 30-3839 (LexisNexis Supp. 2005); N.H. REV. STAT. ANN. § 564-B:4:413 (Supp. 2005); N.M. STAT. ANN. § 46A-4-413 (LexisNexis Supp. 2003); N.C. GEN. STAT. § 36C-4-413 (2005); OR. REV. STAT. § 130.210 (2005); TENN. CODE ANN. § 35-15-413 (Supp. 2005); UTAH CODE ANN. § 75-7-413 (Supp. 2006); VA. CODE ANN. § 55-544.13 (Supp. 2006); WYO. STAT. ANN. § 4-10-414 (Supp. 2005).

95. FREMONT-SMITH, *supra* note 6, at 178.

96. RESTATEMENT (SECOND) OF TRUSTS § 381 (1959).

97. *Id.* § 381 cmt. a.

98. Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 154–55 (1967).

99. Sisson, *supra* note 86, at 648.

of equity in ordering deviation."[100] Equitable deviation "does not touch the question of the purpose or [the] object of the trust, nor vary the class of beneficiaries, nor divert the fund from the charitable purpose designated."[101] As opposed to cy pres, equitable deviation merely allows "the trustees to deviate from the *mechanical means of administration* of the trust."[102] Courts, therefore, are far more willing to utilize the doctrine of equitable deviation to modify "administrative provisions" that are often indistinguishable from substantive provisions that would otherwise require the use of the more unwieldy cy pres doctrine.

VI. RECENT CASE LAW

A. The Barnes Foundation

The Barnes Foundation is an excellent example of the need for a broadened cy pres doctrine. Unforeseen circumstances, which developed over the course of decades after the death of the settlor, led one of the world's most famous art collections to the verge of bankruptcy.[103] Although the foundation's assets were worth several billion dollars, the restrictions placed on the charitable trust by an eccentric settlor led the trust to the brink of financial ruin before a court allowed certain changes to the inefficient provisions of the trust instrument.[104] A broadened cy pres doctrine would have enabled a court—in these extreme circumstances—to modify the eccentric restrictions created by Dr. Barnes.

Dr. Albert Barnes was a famous chemist in the early twentieth century and the self-proclaimed inventor of Argyrol.[105] Dr. Barnes retired from his profession in the early twentieth century, and he spent his time and his fortune acquiring an impressive collection of artwork.[106]

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100. Daloia v. Franciscan Health Sys. of Cent. Ohio, 679 N.E.2d 1084, 1092 (Ohio 1997) (quoting Craft v. Shroyer, 74 N.E.2d 589, 598 (Ohio Ct. App. 1947)) (emphasis omitted).

101. *In re* Estate of Craig, 848 P.2d 313, 321 (Ariz. Ct. App. 1992) (quoting *Craft*, 74 N.E.2d at 598).

102. Anderson v. Wolford, 604 N.E.2d 659, 664–65 n.12 (Ind. Ct. App. 1992) (quoting Sendak v. Trs. of Purdue Univ., 279 N.E.2d 840, 845 (1972)) (emphasis added).

103. Carol Vogel, *Judge Rules the Barnes Can Move to Philadelphia*, N.Y. TIMES, Dec. 14, 2004, at A1.

104. *See id.*

105. HOWARD GREENFELD, THE DEVIL AND DR. BARNES 16, 21–22 (1987); *see also* Toobin, *supra* note 5, at 35. Argyrol became a highly profitable treatment for various inflammatory infections, but Hermann Hille, Dr. Barnes's business partner, actually created the Argyrol compound. GREENFELD, *supra*, at 16, 19.

106. Toobin, *supra* note 5, at 35.

Art critics criticized Barnes's artistic taste during his lifetime, but the Barnes collection—including 181 Renoirs, 69 Cézannes, 59 Matisses—is now reputed by many to be "the greatest private art collection in American history."[107] After the death of many of the artists, experts estimated the collection to be worth billions of dollars.[108]

Dr. Barnes had been shunned by high society and art critics, who criticized his purchases; therefore, he displayed his artwork in a museum that was open only to "plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores, and similar places."[109] Dr. Barnes built his museum in rural Merion, Pennsylvania, and he strictly limited the number of visitors to the museum.[110] In addition, Dr. Barnes refused to allow the museum to charge admission or to host any fundraising events in the gallery.[111] Dr. Barnes also had peculiar ideas concerning art education and aesthetics.[112] When Dr. Barnes died in 1951, he famously stipulated that the Barnes Foundation should never lend, move, or sell a single painting in the entire collection.[113] At that time, a meager $9 million endowment supported the Barnes Foundation, and when the last of Dr. Barnes's trustees died in 1988, the new trustee, Lincoln University, petitioned a court to authorize deviation from the rules set forth by Dr. Barnes.[114]

The Barnes Foundation possessed a legendary art collection, but Dr. Barnes's restrictions, including the museum's inability to lend paintings and its inability to attract a large number of patrons, severely limited the museum's ability to produce revenue.[115] The trust instrument held one of the world's most prized art collections captive in a rural Pennsylvania town where the collection was inaccessible to most art connoisseurs, and the collection remained in a rapidly deteriorating building.[116] The trustees of the Barnes Foundation finally received monetary support from three other foundations to move the collection to a new facility in Philadelphia.[117] The trustees of the Barnes Foundation petitioned a

107. *Id.* at 34.
108. *Id.*
109. *Id.* at 35.
110. Vogel, *supra* note 103, at A1.
111. Toobin, *supra* note 5, at 35.
112. *Id.*
113. Vogel, *supra* note 103, at A1.
114. Toobin, *supra* note 5, at 36–37.
115. *See* Vogel, *supra* note 103, at A1.
116. *Id.*
117. *Id.* The Annenberg Foundation, the Lenfest Foundation, and the Pew Charitable

court to apply cy pres, and the court applied the doctrine, holding that it could see "no viable alternative" other than moving the museum.[118]

B. The Bishop Estate

The Bishop Estate is another recent and noteworthy example of the need for a broadened cy pres doctrine in limited circumstances. The Bishop Estate possesses far more assets than necessary for the trust to achieve its charitable purpose. The use of a broadened cy pres doctrine would have helped the trustees to broaden the charitable purpose of the trust and efficiently use the enormous assets that the settlor placed in the charitable trust.

Princess Bernice Pauahi Bishop was the last surviving descendant of King Kamehameha I.[119] When Princess Bishop died in 1884, she founded a charitable trust, which became known as the Bishop Estate, for the benefit of two schools.[120] Article thirteen of Princess Bishop's will directed the trustees of the Bishop Estate "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools."[121] The will did not explicitly limit admission to only Hawaiians, but her trustees had the discretion to decide who could attend the schools.[122] Princess Bishop's will suggests that she envisioned the trust funding two trade schools, which would also emphasize moral and religious training.[123] Princess Bishop gave her trustees the power to make specific rules and regulations regarding the operation of the schools, but she ultimately wanted to create two schools that would produce "good and industrious men and women."[124]

Princess Bishop funded the Bishop Estate with her massive real estate holdings.[125] At its inception, the trust corpus was already enormous.[126] It included land with an estimated value of $470,000 and

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Trusts provided pledges totaling $150 million to finance the construction of a new location for the Barnes in Philadelphia. *Id.*

118. *In re* Barnes Found., No. 58,788, 2004 WL 2903655, at *19 (Pa. Ct. Com. Pl. Dec. 13, 2004).

119. SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST 26–28 (2006).

120. *Id.* at 31–32.

121. *Id.* at 31.

122. *Id.* Nevertheless, the trustees have long understood that Princess Bishop implicitly intended that the schools would benefit primarily native Hawaiian children. *See id.* at 32.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

an annual income of $36,000.[127] At its peak, the trust owned 440,184 acres in Hawaii.[128] By the 1990s, modern travel and technology had led to a massive increase in Hawaiian real estate prices, and the trust corpus had an estimated value of $10 billion.[129] The Bishop Estate became the largest charity in the country: at the time, larger than the combined endowments for Harvard and Yale.[130] Each trustee received statutory trustee fees of nearly $1 million every year, and the five members of the Hawaii Supreme Court retained the power to appoint the trustees, which led to a corrupt relationship and to severe conflicts of interest among the trustees.[131] In the early 1990s, the size of the trust corpus had become so large that the Kamehameha schools could no longer spend all of the trust's annual income.[132] Due, in part, to the shrinking native Hawaiian population and due to the increasing land values in the Hawaiian Islands, the trust assets now produced more income than the school could spend on every student enrolled at the Kamehameha schools.[133]

VII. REFORMING THE CY PRES DOCTRINE

A. The Modern Debate Surrounding the Reform of the Cy Pres Doctrine

The argument for a broadened cy pres implicates the traditional controversy surrounding the proper amount of dead-hand control. Proponents of a narrow cy pres support the right of the testator to control his or her wealth after death. Conversely, the proponents of a broadened cy pres subordinate the intent of the settlor to the current needs of society and to the most efficient use of the trust corpus. The drafters of the UTC and the Restatement (Third) have answered the proponents of a broadened cy pres doctrine by adding the term *wastefulness* to their respective cy pres provisions.[134] This Comment's proposal recognizes the need for reform of the cy pres doctrine, but it argues that the current reform should apply only to trusts that have

127. *Id.*

128. *Id.*

129. *Id.* at 1.

130. *Id.*

131. *Id.* Princess Bishop vested the power to choose trustees in the members of Hawaii's Supreme Court because they also served as the probate court for the Islands in the late nineteenth century. *Id.* at 65.

132. *Id.* at 1.

133. *Id.*

134. *See supra* notes 91–94 and accompanying text.

developed significant surpluses, thus preserving the intent of the settlor and the incentive to accumulate wealth during one's life. Although no rational settlor would desire to see his assets squandered on a purpose that had been rendered inconsequential by the passage of time, many settlors would not wish to place their assets in the hands of a judge armed with an expansive cy pres. An effective solution to the modification of charitable trusts must continue to support the settlor's intent.

The modern reform of the cy pres doctrine, which has broadened the circumstances to which the doctrine might apply, has its foundation in the law and economics school of thought. Richard Posner defined the economic purpose of the cy pres doctrine in his *Economic Analysis of Law* as follows:

> Where the continued enforcement of conditions in a charitable gift is no longer economically feasible, because of illegality . . . or opportunity costs . . . , the court, rather than declaring the gift void and transferring the property to the residuary legatees (if any can be identified), will authorize the administrators of the charitable trust to apply the assets to a related (cy pres) purpose within the general scope of the donor's intent.[135]

Posner envisions a cy pres doctrine that is broader than the current law in most jurisdictions.[136] Only those states that have enacted the latest revision of the UTC or the Restatement (Third) consider the existence of high opportunity costs sufficient to modify the purpose of the trust.[137] In economic terms, one could consider a settlor's inefficient devise to charity as a negative externality placed upon society.[138] A settlor suffers from two conditions that may restrict the efficiency of his or her devise. First, the settlor may not act rationally because he or she does not incur the full costs of his or her actions after death. Second, the settlor of a charitable trust is incapable of rationally foreseeing

135. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.4 (6th ed. 2003).

136. *Id.*

137. *See supra* notes 91–94 and accompanying text.

138. Negative externalities are costs individuals impose on third parties; therefore, rational individuals do not take those costs into account in their decision-making process. Since the costs imposed on third parties do not enter the traditional marginal benefit-marginal cost calculus of rational actors, an individual may decide to engage in a socially inefficient activity because some or all of the costs associated with the activity fall on third parties. *See, e.g.*, POSNER, *supra* note 135, § 3.10.

changed circumstances that may affect the operation of a trust. Economics, therefore, suggests that a settlor should not be able to control the trust corpus indefinitely when circumstances unknown to the settlor could render the trust purpose inefficient. Modern scholars argue that no rational settlor would believe that his or her charitable purpose should continue to bind society hundreds of years into the future. As John Stuart Mill noted, "no reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found."[139] Nevertheless, a settlor establishes a charitable trust for a purpose, and no settlor would wish to see that purpose destroyed by a court wielding an expansive cy pres.

The broadened use of the cy pres doctrine is subject to three criticisms.[140] First, philosophical precepts involving democracy and individual rights dictate that a court should not be able to interfere with an individual's right to control property after death.[141] This argument suggests that the settlor can best determine the highest and best use of the trust assets.[142] The case of *President and Fellows of Harvard College v. Society for Promoting Theological Education* exemplified this ideology when the court refused to apply the cy pres doctrine to alter the terms of a trust.[143] Responding to the trustees' request to change the trust terms to what the trustees believed was a more effective use of the trust, the court declared:

> A contrary decision would furnish a precedent dangerous to the perpetuity and sacredness of all our great public charities, leaving the question of the management and supervision of our public charities to be the subject of change with every fluctuation of popular opinion as to what may be the more expedient and useful mode of administering them.[144]

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139. 1 JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 36 (1882).

140. *See, e.g.*, Sisson, *supra* note 86, at 649–51.

141. Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 380–83 (1953).

142. *Id.* at 382.

143. President and Fellows of Harvard Coll. v. Soc'y for Promoting Theological Educ., 69 Mass. (3 Gray) 280, 301 (1855).

144. *Id.*

The second argument against a broadened cy pres suggests that failing to respect testamentary schemes of settlors will result in fewer gifts to charity.[145] Third, courts may also impede philanthropic variety by altering trusts that serve causes that may otherwise be ignored except by those settlors with a special interest in them.[146] Ultimately, settlors desire to control their charitable dispositions after their deaths; therefore, this Comment offers three proposals to ensure that the modern reform of the cy pres doctrine does not destroy the incentives that promote charitable giving and the accumulation of wealth.

B. Three Proposals for Change

This Comment makes three basic proposals for the reform of the cy pres doctrine. It recognizes that a minority of states has adopted the latest revision of the UTC or the Restatement (Third), and it argues that courts in those states should continue to apply the cy pres doctrine narrowly in order to provide further incentive for charitable giving. While the drafters of the UTC and the Restatement (Third) address a valid concern in the law of charitable trusts, courts should construe the term *wastefulness* narrowly, lest its expansive use should destroy the incentive for potential settlors to leave funds in charitable trusts.

1. A Narrow Interpretation of *Impossible*, *Impracticable*, and *Illegal*

First, this Comment proposes that the terms *impossible*, *impracticable*, and *illegal* should continue to have the same literal interpretation that courts have applied for decades. Although the true meaning of those terms has always been diaphanous, courts have literally construed the meaning of these words for decades. This proposal, standing alone, is not revolutionary. The drafters of the UTC and the Restatement (Third) likely intended that courts should continue to narrowly apply these terms; otherwise, the drafters would have made more extensive revisions to their cy pres provisions. However, the rigid adherence to a literal interpretation of these terms is fundamentally important to the incentive to accumulate wealth and to make charitable gifts. A court that relaxes the interpretation of *impossible*,

145. *See, e.g.*, ARTHUR HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 224–25 (1880) (reciting the argument but ultimately contending that the proponents of this argument lack evidence and validity); John S. Bradway, *Tendencies in the Application of the Cy Pres Doctrine*, 5 TEMP. L.Q. 489, 527–28 (1931).

146. HOBHOUSE, *supra* note 145, at 224–26.

impracticable, or *illegal*—allowing for a modification of the trust purpose even when the operation of the trust was not quite *impossible*—deters a settlor from placing funds in a charitable trust. Settlors desire to place funds in the hands of trustees to serve a specified charitable purpose; they do not seek to put their assets in the hands of a court capable of altering a trust according to society's or to an individual judge's whimsy.

2. A Narrow Interpretation of *Wastefulness*

Second, this Comment proposes that the term *wastefulness* should allow a court to utilize the cy pres doctrine only when the trust has experienced significant growth after the death of the settlor, resulting in a significant trust surplus. Because few states have adopted the latest revision of the UTC and the Restatement (Third), few courts have been presented with the opportunity to interpret the term, and a broad application of *wastefulness* could prove damaging to the amount of charitable giving effectuated through charitable trusts.

Wastefulness has the potential to become the broadest term included in the application of the cy pres doctrine. In opposition to the other terms that allow a court to apply cy pres and to modify a charitable purpose, a court could declare almost any purpose *wasteful*. For example, a conservative-minded settlor may choose to fund a charitable trust for the purpose of educating students in the principles of free-market economics. Education is a valid charitable purpose, and the settlor could select a trustee or trustees sympathetic to his or her political viewpoint to further his or her intent in accordance with the charitable purpose. However, the attorney general, who has standing to sue under all charitable trusts by utilizing the common law power of *parens patriae*,[147] may not be sympathetic to the hypothetical, conservative settlor. The attorney general may bring suit and convince a similarly-minded judge to declare that the expenditure of even one dollar from the trust corpus is *wasteful*, allowing for the modification of the fundamental trust purpose. While this hypothetical approaches hyperbole, courts have the potential to utilize their broadened cy pres powers in many other circumstances that are not so extreme, thus creating an environment far less amicable to charitable giving.

Since courts may easily abuse the cy pres doctrine by declaring any purpose *wasteful*, a court should limit its application of cy pres, when it

147. BOGERT & BOGERT, *supra* note 7, § 411.

utilizes *wastefulness*, through a two-prong test. A court should deem a charitable purpose wasteful if the following prongs are met: (1) the trust corpus has increased substantially after the settlor's death, and (2) the trustee could not reasonably expend the entire trust income on the original charitable purpose. Although one could criticize this proposal for merely replacing one diaphanous term, *wastefulness*, with two more terms, *substantially* and *reasonably*, it should provide some guidance to a court that seeks to preserve the settlor's intent.

In addition to the two-prong test, a court should further limit its cy pres powers when invoking *wastefulness* by applying cy pres to only the surplus portion of the trust. A court should preserve the original trust corpus for the original charitable purpose, allowing the tesator's original intent to remain intact. A simple number is not sufficient to quantify the original trust corpus. A rational donor anticipates that his or her trustee will invest the corpus in accordance with reasonable and prudent standards required by a fiduciary duty. Therefore, the original trust corpus, calculated when a court decides an action for cy pres, should equal the amount that the original trust corpus would have amassed to while holding a trustee to his or her fiduciary duty—whether or not the trust corpus actually equals such an amount at the time of the action. A court will further promote charitable giving and the incentive to accumulate wealth by limiting its cy pres power to the surplus portion of the trust when the application of the entire trust income to the original charitable purpose has become *wasteful.*

3. Destroying the Cy Pres and Equitable Deviation Dichotomy

Third, this Comment adopts Johnson's proposal to collapse the distinction between the cy pres doctrine and the equitable deviation doctrine because courts are able to manipulate the equitable deviation doctrine too easily.[148] The distinction between the two doctrines has become meaningless, and courts commonly consider the outcome under both doctrines prior to determining which doctrine to apply.[149] Johnson argues that courts should develop firm and predictable rules, and since courts no longer have a principled basis to distinguish the equitable deviation doctrine, it should be absorbed by the cy pres doctrine,

148. Johnson, *supra* note 52, at 380. Johnson also argues that a narrow cy pres doctrine should apply during the first twenty-one years after the testator's death, and a broadened cy pres should apply thereafter. *Id.* at 381–86.

149. *Id.* (describing this process as "peek[ing]" at the outcome before applying either doctrine).

resulting in a singular doctrine that a court may apply consistently.[150]

This final proposal is necessary to effectuate the narrowing purpose of the prior proposals because any court could propone a narrow interpretation of the cy pres doctrine in theory but usurp the settlor's rightful control by applying the equitable deviation doctrine in its stead. A court will acutely diminish the incentive to accumulate wealth and the promotion of charitable giving by failing to properly restrict its application of the equitable deviation doctrine. Since the temptation to misuse the doctrine has proved too great in the past, courts should be deprived of the equitable deviation doctrine because the broadened cy pres in the UTC and the latest Restatement are sufficient to promote the effectiveness and the efficiency of charitable trusts in the face of changing circumstances.

C. Application of the Three Proposed Reforms of the Cy Pres Doctrine

The Barnes Foundation and the Bishop Estate are two examples of the circumstances under which a court would be able to apply this Comment's modified cy pres doctrine by declaring the charitable purpose *wasteful.* The three proposals recognize that rational settlors cannot foresee future circumstances that may render a charitable purpose ineffective or inefficient, but the cy pres doctrine should apply only in extreme circumstances when the current operation of the trust has become *wasteful.* Both examples would satisfy the two-prong test proposed in this Comment. The trust corpus of both trusts increased substantially, and the growth in trust assets occurred after the death of the settlor.

The second proposal of this Comment, therefore, would limit a court's application of the cy pres doctrine to the surplus trust corpus—calculated as the excess over the original trust corpus increased by an expected rate of return—that a rational settlor would have been unlikely to apply to the original trust purpose. The Barnes Foundation and the Bishop Estate represent examples of charitable trusts where the settlor was unlikely to anticipate the changed circumstances that would significantly change their trusts after their death. Dr. Barnes could hardly have anticipated the importance and the value of a world-renowned art collection, which contemporary art critics had shunned during his lifetime. Similarly, Princess Bishop could not have foreseen the future of the Hawaiian Islands, the development of modern travel

150. *Id.*

and tourism, and the massive increase in the trust corpus that occurred after her death. In these circumstances, courts are presented with extreme circumstances where the benefit to society of modifying the trust is far greater than the harm to society of altering a testator's intent. The proposals in this Comment attempt to attain a careful balance between the circumstances under which society requires the modification of a charitable trust and the circumstances under which a court harms society by destroying the incentives that promote charitable giving.

VIII. CONCLUSION

Charities have played an important role in American society, and many worthy causes rely on their contributions. Courts have favored charitable trusts by removing many of the typical restraints applicable to private trusts. The favored status of the charitable trust, however, has rendered some trusts ineffective and inefficient with the passage of time. Modern science and technology, for example, have the ability to render charitable purposes inefficient shortly after the settlor's death. When courts developed the cy pres doctrine hundreds of years ago, settlors never imagined that certain ailments or diseases would cease to exist in the future. Today, modern science, for example, has the ability to render an early-twentieth century trust, which the settlor established for the purpose of benefiting individuals afflicted with polio, ineffective and inefficient within a few decades. Modern scholars have seen the need for change by broadening the latest model cy pres provisions. Despite the need for change, courts must exhibit self-restraint with their newfound ability to apply a broader cy pres doctrine.

To ensure that society continues to promote charitable giving and to promote the accumulation of wealth during a settlor's lifetime, this Comment makes three proposals to protect testator intent. The first proposal merely protects the application of the current law. Courts should continue to literally interpret the terms *impossible*, *impracticable*, or *illegal*. The second proposal is more complex. Since a court could broadly interpret *wastefulness*, thus allowing a court to apply cy pres in an expansive range of circumstances, courts should exhibit judicial restraint by limiting the application of cy pres to only the surplus trust corpus of a charitable trust. Finally, the third proposal prevents a determined court from avoiding the restrictions created by the preceding proposals. The third proposal eliminates the equitable deviation doctrine, requiring a court to apply cy pres to modify a trust that is in need of reform. All three proposals endeavor to address the

concerns of modern scholars, but this Comment attempts to offer a solution that continues to provide adequate incentives for potential settlors to place their assets in trust to benefit a charitable cause.

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