WAS IT WISE TO TRY TO IMPLEMENT TRUST LAW *REFORMS* THROUGH THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT?

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I. INTRODUCTION

The Uniform Prudent Management of Institutional Funds Act (UPMIFA)[1] promulgated by the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws (the Commissioners), replaced its predecessor, the Uniform Management of Institutional Funds Act (UMIFA), in order to cause the principles of the Uniform Prudent Investor Act (UPIA)[2] to govern the investment and management of institutional funds by nonprofit corporations. Whereas in UMIFA, the Commissioners looked to the third edition of Professor A. W. Scott's treatise on the law of trusts (Scott on Trusts)[3] and the Restatement (Second) of Trusts[4] of the American Law Institute (ALI) as its primary sources of trust law, in UPMIFA the Commissioners turned instead to the ALI's Restatement (Third) of Trusts[5] and its own Uniform Trust Code (UTC),[6] both of which were relatively new.

The goal of UMIFA was "to establish guidelines for the management and use of investments held by eleemosynary institutions and funds"[7] because universities, nonprofit corporations, and their boards grew concerned over the absence of law clearly defining the scope of their investment authority and duties in managing endowment funds and feared that courts would apply to them the more conservative trust law, prudent man rule. While their fears may have been "more legendary than real," there was still "substantial concern about the potential liability of the managers of the institutional funds even though cases of actual liability are virtually nil."[8]

The Commissioners looked to trust law to guide them in drafting UMIFA because of the many similarities between charitable endowment funds managed by charitable institutions and charitable trusts administered by corporate trustees—i.e., both need to be invested long-term and often restrict both annual fund expenditures and the purposes for which funds can be spent.[9] UPMIFA replaced and updated UMIFA's provisions dealing with the management and investment of institutional funds to reflect the principles

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1. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT (UNIF. L. COMM'N 2006).
2. UNIF. PRUDENT INV. ACT (UNIF. L. COMM'N 1994).
3. A. W. SCOTT, LAW OF TRUSTS (3d ed. 1967).
4. RESTATEMENT (SECOND) OF TRS. (AM. L. INST. 1959).
5. RESTATEMENT (THIRD) OF TRS. (AM. L. INST. 2003–2012). Some of the commentary in UPMIFA cite drafts of the 4 Volume Restatement (Third) of Trusts because parts of it were not yet finished at the time the UPMIFA was adopted. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT (UNIF. L. COMM'N 2006). Volumes were published in 2003, 2007, and 2012. *See* RESTATEMENT (THIRD) OF TRS. (AM. L. INST. 2003–2012).
6. UNIF. TR. CODE (UNIF. L. COMM'N 2010).
7. UNIF. MGMT. OF INST. FUNDS ACT §1, intro. note (UNIF. L. COMM'N 1972); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).
8. UNIF. MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 1972).
9. *See id.*

of the UPIA.[10] Unfortunately, as in UMIFA, the Commissioners did not stick to their mission of guiding the management of endowment funds and chose instead to create and add remedies of their own to provide charitable institutions "an expeditious way to make necessary adjustments"[11] when donor restrictions no longer serve their original purpose. This Article focuses on two topics that are *tangential* to UPMIFA's primary focus on the management and investment of endowment funds and have received little attention: (1) how UPMIFA should apply to institutional funds established between affiliated institutions in light of UPMIFA's new definitions and expanded scope, and more importantly (2) how the Commissioners' preoccupation with *reforming* trust laws creates significant, unnecessary, and avoidable problems under UPMIFA.

II. SUMMARY OF TOPICS CONSIDERED

Recognizing that there are differences between charitable trusts and charitable institutions, the Commissioners sometimes had to choose when trust law principles should apply and when they should not. In UMIFA, for example, the Commissioners adopted an "ordinary business care and prudence" standard of conduct, concluding that "[t]he proper standard of responsibility is more analogous to that of a director of a business corporation than that of a professional private trustee,"[12] and recognizing that the governing board owes duties to the *institution* to consider both its long and short-term needs and "weigh the needs of today against those of the future."[13] These differences cause both UPMIFA and UPMIFA to be a blend of sometimes conflicting legal frameworks.[14]

A. UPMIFA's Expanded Scope and Its Application to Affiliated Institutions

As under its predecessor, UPMIFA does not apply to all charitable trusts.[15] It applies only to those charitable trusts that meet UPMIFA's new definitions of "institution" or "institutional fund" (the latter of which includes endowment funds).[16] In non-UTC states, like my home state of Texas, certain charitable trusts may be subject to both state trust laws (as trusts) and UPMIFA (as institutional funds), and this Article refers to these

10. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).
11. *See* UNIF. MGMT. OF INST. FUNDS ACT § 6 cmt. (UNIF. L. COMM'N 1972); *id*. § 7 cmt.
12. UNIF. MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 1972).
13. *Id.* §§ 6, 6 cmt. (emphasis added).
14. *See* UNIF. MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 1972); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).
15. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2 (UNIF. L. COMM'N 2006).
16. *Id.* §§ 2(2), (4), (5).

charitable trusts potentially subject to two sets of laws as "subset trusts."[17] When state trust law and UPMIFA overlap, an institution managing a subset trust may have very different rights, responsibilities, and remedies depending on which of the two statutory schemes applies (or is chosen to apply), unless the legislature has directed otherwise.[18]

Moreover, because UPMIFA's new definitions now permit an institution to hold and manage endowment funds for *other* institutions and not just itself, it is not clear how UPMIFA applies when different institutions serve as the "donor" and the "beneficiary" of an institutional fund because UPMIFA contains no definition of either term.[19] This is especially true for an endowment fund established by one institution (a supported organization) at a second institution (supporting organization) either for a particular charitable purpose or for the benefit of a third affiliated institution. Adding to the confusion, the Financial Accounting Standards Board (FASB), as part of its codification of generally accepted accounting principles (GAAP), uses terminology similar to that used in UPMIFA.[20] However, its accounting standards are not always in sync with legal rules established in UPMIFA. This Article will explain how I think UPMIFA applies (or should apply) in these situations and suggest that the Commissioners clarify the matter.

B. Remedies

UPMIFA Section 6 creates new statutory remedies to enable institutions to obtain relief from outdated or burdensome endowment restrictions.[21] Especially significant are its (1) new *cy pres* remedy in Section 6(c) based on UTC Section 413 and (2) reformed and expanded extrajudicial modification remedy in Section 6(a).[22] These and other new remedies under UPMIFA are tethered to major reforms of trust law made in the Restatement (Third) of Trusts and the UTC that legal scholars have sought for decades as part of what this Article refers to as the "charity law reform movement," an ongoing effort to reexamine, reimagine, and reform trust law and "charity law." While the Commissioners give reasons for the reforms in commentary, their explanations are often ambiguous and short on discussing their practical consequences, their impact on donors, and public policy and constitutional law issues. This Article aims to show that UPMIFA's new statutory remedies,

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17. *Id.* I should credit my colleague Ms. Amanda Gyeszly of Houston for coming up with this descriptive term.

18. *See, e.g.*, William D. Pargaman, *TUP What? An Introduction to the Texas Uniform Prudent Management of Institutional Funds Act*, ST. BAR TEX. PRO. DEV. PROGRAM, ADV. EST. PLAN., & PROB. ch. 21 § 2.3(e) (2017).

19. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(5)(B) (UNIF. L. COMM'N 2006).

20. *See Presentation of Financial Statements of Not-for-Profit Entities*, FIN. ACCT. STANDARDS BD. 1, 205 (2016), https://asc.fasb.org/imageRoot/56/92564756.pdf [https://perma.cc/PB9Y-MEB2].

21. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. L. COMM'N 2006).

22. *Id.*; UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010).

while well-intentioned, (1) are inconsistent with the UTC remedies on which they are based, (2) are ill-advised and likely unconstitutional under the Due Process Clause of the United States Constitution, and (3) unnecessarily restrict an individual's right to control the disposition of his or her property by establishing special rules applicable only to certain charitable gifts.

III. DISCUSSION

"UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity."[23] While UPMIFA significantly improves guidance to institutions concerning prudent investment and spending policies,[24] it also incorporates new themes and reforms of trust law that originated in the Restatement (Third) of Trusts and the UTC and that spill over to UPMIFA.

Three of those important new themes are (1) the "benefit-the-beneficiaries rule,"[25] which has been controversial and criticized;[26] (2) a new emphasis on prohibiting trust purposes that are "contrary to public policy;"[27] and (3) expanded judicial modification powers (through reformations of trust law doctrines of deviation and *cy pres*).[28] In furtherance of these new themes, UTC Section 105(b)'s new "mandatory" rules limit what a donor can do with his or her property by expanding beneficiary rights and broadening the powers of courts to modify trusts over time to meet changing beneficiary circumstances and preferences (or "public policy" objectives in the case of charitable trusts).[29]

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23. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).

24. *See id.* §§ 3–4.

25. UNIF. TR. CODE §§ 105(b), 404 (UNIF. L. COMM'N 2010). For a discussion of the rationale behind the new benefit-the-beneficiaries rule or standard, *see, e.g.*, John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. L. REV. 1105, 1118 (2004); John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 378–84 (2010).

26. *See, e.g.*, Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1170 (2008); Jeffrey A. Cooper, *Shades of Gray: Applying the Benefit-the-Beneficiaries Rule to Trust Investment Directives*, 90 B.U. L. REV. 2383, 2386–95 (2010); Mary P. O'Reilly & Lee-ford Tritt, *Benefit-of-the-Beneficiary Rule*, AM. BAR ASSOC. (Mar. 2020), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2020/march-april/benefitofthe-beneficiary-rule/ [https://perma.cc/N6LT-6YKJ]; Lee-ford Tritt, *The Benefit-of-the-Beneficiary Rule: How Trustees Must Serve Their Beneficiaries*, ALL CHILDREN'S HOSP. 18TH ANN. EST., TAX, L. & FIN. PLANNING SEMINAR, pts. I, II (Feb. 10, 2016), https://chicagotrustee.org/resources/Documents/The%20History,%20Impact,%20and%20Future%20of%20The%20Benefit-of-the-Beneficiary%20Rule.ver.2.pdf [https://perma.cc/5YPC-YPTW]; Courtney J. Maloney & Charles E. Rounds, Jr., *The Massachusetts Uniform Trust Code: Context, Content and Critique*, 96 MASS. L. REV. 27, 39 (2014).

27. UNIF. TR. CODE §§ 105(b), 404 (UNIF. L. COMM'N 2010); *see, e.g.,* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?* 38 AKRON L. REV. 649, 689–92 (2005) (discussing the new statutory approach).

28. UNIF. TR. CODE §§ 410–17 (UNIF. L. COMM'N 2010).

29. *Id.* §§ 105(b)(3)–(4).

UTC Section 105(b) provides that the terms of a trust do not prevail over (1) "the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve," or (2) "the power of the court to modify or terminate a trust . . . [including *cy pres*].[30] Restatement (Third) of Trusts Sections 28 and 29, respectively, generally describe the purposes that qualify as "charitable" and those that are illegal or contrary to public policy,[31] and both seem to expand the kinds of trust "purposes" that a court might determine to be unacceptable. For example, Restatement (Third) Section 28 commentary nudges open the door for courts to determine that certain charitable purposes supporting "controversial ideas and unpopular causes" might be "initially charitable but cease to be of interest to the public or otherwise to have the social utility necessary to be charitable."[32] Further, in contrast with Restatement (Second) of Trusts Section 377 that prohibited trusts created only for an "illegal" purpose, Restatement (Third) of Trusts Section 29 now expressly invalidates a trust or trust provision that is "unlawful," violates the rule against perpetuities, or "is contrary to public policy."[33]

Perhaps nothing summarizes better the different approach to trust law taken in the new Restatement and the UTC than the following excerpt from the Foreword to Volumes 1 and 2 of the Restatement (Third) of Trusts:

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30. *Id.* As "public policy" changes over time, it may be difficult to determine when a particular charitable purpose violates public policy or justifies reforming a charitable trust having a charitable purpose that is obsolete or wasteful. *See* Newman, *supra* note 27, at 669–71, 689–92.

31. Restatement (Third) Section 28 lists certain specific charitable purposes categories ending with Section 28(f), "other purposes that are beneficial to the community." RESTATEMENT (THIRD) OF TRS. § 28 (AM. L. INST. 2012). Restatement (Third) Section 29 provides: "An intended trust or trust purpose is invalid if: (a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act; (b) it violates rules relating to perpetuities; or (c) it is contrary to public policy." *Id.* § 29.

32. *Id.* § 28 cmt. (a)(2). "The line between what is charitable and what is not is sometimes a difficult one to draw, for the difference may be one of degree *and the line may be drawn differently at different times and in different places*." *Id.* (emphasis added). Purposes "beneficial to the community" are those "of a character *sufficiently of interest* or beneficial to the community to justify permitting the property to be devoted forever to their accomplishment and to justify whatever other special privileges may be accorded to charitable trusts." *Id.* cmt. (l) (emphasis added). *See generally id.* § 67 cmt. (b) (declaring that "it is against the policy of the trust law to permit wasteful or seriously inefficient use of resources dedicated to charity . . .").

33. While the Restatement (Second) of Trusts confirmed that a trust for a purpose "contrary to public policy, although not forbidden by law, is invalid," it gave as an example a charitable trust supporting a medical school course teaching a theory of treatment proven to be dangerous. RESTATEMENT (SECOND) OF TRS. § 377 cmt. (c) (AM. L. INST. 1959). In contrast, under Restatement (Third) of Trusts Section 29, Comments on Clause (c)(i): "The rules allowing and limiting the use of trusts, and the time-divided property ownership usually associated with deadhand control, reflect a compromise between free disposition of private property and other values . . . . Policies concerned with deadhand control limit the use of trusts in ways that do not apply to living individuals . . . . Furthermore, the 'rigor mortis' of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances. Thus, although one is free to give property to another or withhold it, it does not follow that one may give it in trust with whatever terms or conditions one might wish to attach." RESTATEMENT (THIRD) OF TRS. § 29 cmt. (c)(i). *See also id.* § 29, reporter's notes, gen. notes on clause (c) and cmts. *i* – *i*(2), (*m*).

> The principles restated in these volumes have two main themes. One is to make it easier to accomplish the settlor's intentions, *so long as those intentions can be reliably established and do not offend public policy*. The second is to recognize appropriate authority, through doctrines that include [*cy pres*], *to enable the living—especially judges—to adapt the settlor's expressed purposes to contemporary circumstances*. This second purpose is increasingly important because of changes, complexities, and opportunities in tax law, other legal developments, improved life expectancies, and the creation of more trusts that survive long after the settlor expressed his or her intentions.[34]

In sum, the Restatement (Third) of Trusts and the UTC reflect a "top-down" approach to changing the law designed to (1) shift emphasis away from trust law's historical tie to "donor intent" and (2) implement long-sought reforms of trust remedies to create tools to "adapt the settlor's expressed purposes to con-temporary circumstances" and reduce settlors' "dead hand" control.[35]

A. Expanded Scope of UPMIFA: "Donors" and "Donees" Under the Act

UMIFA applied to fewer charitable trusts because a charitable trust (1) arguably might not meet the definition of "institution" under UMIFA as "an incorporated or unincorporated *organization* organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes" since a trust is not a legal entity,[36] but (2) could qualify as an "institutional fund"[37] under the Act. UPMIFA now causes many more

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34. RESTATEMENT (THIRD) OF TRS., foreword (AM. L. INST. 2012).

35. Robert Sitkoff, *Top-Down Versus Bottom-Up Law Reform in Trusts and Estates: Future Interests and Perpetuities*, JOTWELL (Nov. 22, 2010), https://trustest.jotwell.com/top-down-versus-bottom-up-law-reform-in-trusts-and-estates-future-interests-and-perpetuities/ [https://perma.cc/AC5J-982K]. Professor Sitkoff discusses the tension between (1) "top-down" reforms—those sponsored by the ALI or Uniform Law Commissioners "typically designed to update the law in accordance with emerging academic and elite practitioner policy consensus" (the currency for which "is prestige" and the "imprimatur of the ALI or the ULC gives the top-down reforms presumptive policy credibility" but the success of which "depends in significant part on the cooperation of the local bar and bankers associations") and (2) "bottom-up" reforms—those "usually meant to attract trust business . . . [or] to fill a gap in the top-down reforms" (the currency for which is "politics."). *See generally* Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 88–89 (1999) (hereinafter Hirsch I); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2238–53 (2011) (hereinafter Hirsch II) (demonstrating an interesting analysis of "deadhand" control policy issues).

36. UNIF. MGMT. OF INST. FUNDS ACT § 1(1) (UNIF. L. COMM'N 1972). Because a "trust" is not a legal entity, a charitable trust might not qualify as an "organization" under applicable state law (and thus an "institution" under UMIFA).

37. *Id.* UMIFA Section 1(2) reads: "'Institutional fund' means a fund *held by an institution* for *its exclusive use, benefit, or purposes*, except a fund held for an institution by a trustee that is not an institution or a fund in which a beneficiary that is not an institution has an interest other than possible rights that could arise on violation or failure of the purposes of the fund." (emphasis added). *Id.* § 1(2). "The 'use, benefit, or purposes' of an institution broadly encompasses all of the activities permitted by its charter or other source of authority." *Id.* cmt. (2).

charitable trusts to qualify as both "institutions" or "institutional funds."[38]

1. Expanded Scope/New Definitions

Under UPMIFA, as relevant to this Article, an **institution** includes (1) a person, other than an individual, organized and operated exclusively for charitable purposes" (with a "trust" now clearly eligible to be an "institution" because specifically included in the definition of "person" under UPMIFA Section 2(6)) and (2) "a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated."[39] As before, UPMIFA applies only to subset trusts (and not all charitable trusts) by excluding from the definition of institution a charitable trust so long as it has a beneficiary that is not an institution (such as a charitable remainder trust) or has a trustee that is not an institution.[40] Consequently, as under UMIFA, the law applicable to a subset trust can change back and forth between trust law and UPMIFA during the term of the trust.[41]

UPMIFA Section 2(5) defines an **institutional fund** as a "fund held by an institution exclusively for charitable purposes" excluding, as relevant to this discussion, (1) under UPMIFA Section 2(5)(B), "a fund held for an institution by a trustee that is not an institution," and (2) under UPMIFA Section 2(5)(C), "a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund."[42] Thus, under the new definition, an institutional fund is no longer limited to a fund "held by an institution *for its exclusive use, benefit or purposes*" as under UMIFA.[43] For example, a donor now can establish (a) an institutional fund (directly or through a trust) at one institution that benefits several different charitable institutions or (b) an institutional fund designed to achieve a specific charitable purpose that, once

38. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT §§ 2(4), (5) (UNIF. L. COMM'N 2006).

39. *Id.* §§ 2(4)(A), (C).

40. Under a strict reading of the definition, a charitable trust having only institutions as beneficiaries arguably could qualify as an "institution" because the definition excludes only an "individual" from qualifying as an institution. *See id.* § 2(4)(A). However, "[t]he term [institution] includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee." *See id.*, prefatory note.

41. For example, assume that an individual donor establishes a charitable remainder trust at an institution (church) providing for distributions to an individual beneficiary during the individual's lifetime and, upon that individual's death, for the trust assets to remain in trust as an endowment fund to support the church's Bible study program. *See, e.g.*, Pargaman, *supra* note 18. Initially, that charitable trust would *not* be an institution or institutional fund subject to UPMIFA because it has a beneficiary other than an institution. *See, e.g.*, *id.* Upon the death of the individual beneficiary, however, the trust would meet UPMIFA's definition of institutional fund (and become a subset trust), and UPMIFA would *begin to apply* to it (and trust law as well unless state law directed otherwise). *See, e.g.*, *id.* If the church were to resign as trustee and a bank were to be appointed as successor trustee, then UPMIFA would *cease to apply,* and trust law would apply. *See, e.g.*, *id.*

42. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(5)(C) (UNIF. L. COMM'N 2006).

43. UNIF. MGMT. OF INST. FUNDS ACT § 1(q) (UNIF. L. COMM'N 1972).

accomplished, can terminate and pour over to a charitable trust established for other charitable purposes (so long as that charitable trust qualifies as an institution under UPMIFA and has an institution serving as the trustee).[44]

As under UMIFA, the first sentence of UPMIFA Section 2(2) defines an **endowment fund** as "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis."[45] UPMIFA added a helpful second sentence to the definition that confirms that "the term does not include assets that an institution designates as an endowment fund for its own use," which refers to a fund commonly known as a quasi-endowment fund or board-designated endowment fund that is an institutional fund, but not an endowment fund, because the board of the institution that established and manages it normally will have the power to dissolve it, change its terms, and spend it.[46]

A **gift instrument** is "a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund."[47] A **record** is "information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form," which appears to mean, in layman's terms, something that can be read, seen, or heard.[48] These two definitions are relevant because, as discussed later, they may limit the evidence that can be introduced in *cy pres* proceedings.[49]

2. Institutions as Donors and Beneficiaries of an Institutional Fund

UPMIFA contains no definition of "donor" or "beneficiary," and the Act does not clearly explain how it applies when the donor, the beneficiary, and the trustee/institution holding and managing an endowment fund are different institutions (and perhaps affiliated or under common control).[50] Adding to the confusion, FASB issued its Accounting Standards Update No. 2016-14 (Aug. 2016) Not-for-Profit Entities (Topic 958) (the FASB Update)[51] to modernize and simplify its previous financial reporting standards relevant to UPMIFA; however, apparently left unchanged were separate consolidation rules that provide that when two charitable institutions are sufficiently related such that one of them is considered to control the other, their financial statements must be consolidated into a single statement in order to present the combined financial picture of the two institutions as if

44. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(5) (UNIF. L. COMM'N 2006).
45. *Id.* §§ 2(2), 2 cmt.
46. *Id.* § 2(2).
47. *Id.* § 2(3).
48. *Id.* § 2(8). I suppose visual or audio information might also qualify as "records." *See id.*
49. *See infra* Section III.B.
50. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2 (UNIF. L. COMM'N 2006).
51. *See Presentation of Financial Statements of Not-for-Profit Entities, supra* note 20.

they were one.[52] This can occur, for example, when one charitable institution has one or more subsidiaries or affiliated organizations.[53] Though not an accountant, I will try to explain my understanding of FASB's accounting standards versus UPMIFA's legal rules and how I think UPMIFA should apply in these situations.

a. FASB's New Accounting Standards

The FASB Update now requires assets to be classified and reported on financial statements in one of only two categories—net assets with donor restrictions or net assets without donor restrictions.[54] A donor-imposed restriction requires the donated asset to be used for purposes more specific than the broader charitable purposes of the institution as a whole, limits expenditures from the donated assets, or both.[55] Net assets without donor restrictions include an institution's unrestricted assets as well as board-designated net assets (assets "subject to self-imposed limits by action of the governing board," such as assets earmarked for future use and quasi-endowment funds holding unrestricted assets set aside for investment to generate income over a long period).[56] With respect to a board-designated endowment, "which results from an internal designation," generally the "governing board has the right to decide at any time to expend such funds."[57]

The rules differ when one charitable institution (supported organization) transfers assets to a second charitable institution (supporting organization) to establish an irrevocable endowment fund containing restrictions, and the supported organization is considered to "control" the supporting organization.[58] GAAP's consolidation rules apparently will not permit the supported organization to be recognized as the "donor" of the endowment fund it established at the supporting organization (or the assets of that fund classified and reported by the supporting organization as net assets with donor restrictions). Instead, those assets must be classified and reported as net assets without donor restrictions.[59] For example:

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52. *See* Eric K. Gorovitz & Rosemary E. Fei, *Perils in Consolidating Financial Statements of Exempt Organizations*, ALDER & COLVIN (2010), https://www.adlercolvin.com/perils-in-consolidating-financial-statements-of-exempt-organizations/ [https://perma.cc/A2EW-VBSJ]; Brian Henry, *What Constitutes Control?*, J. ACCT. (June 1, 1999) https://www.journalofaccountancy.com/issues/1999/jun/henry.html [https://perma.cc/5FPW-NMBW].

53. *See* Gorovitz & Fei, *supra* note 52; Henry, *supra* note 52.

54. *See Presentation of Financial Statements of Not-for-Profit Entities, supra* note 20, at 1, 7.

55. *Id.* at 4, 9.

56. *See id.* at 9–11.

57. *Id.* at 11.

58. *See* Gorovitz & Fei, *supra* note 52; Carlos Hurtado, *A Practical Guide to Consolidation vs. Combination of Financial Statements for Nonprofits*, LINDSAY & BROWNELL, LLP (2018), https://www.lindsayandbrownell.com/consolidation-when-is-it-required-for-related-nonprofit-entities/ [https://perma.cc/DC2T-X5ZJ].

59. *See* Hurtado, *supra* note 58.

> Example 1. Assume that a church organized as a nonprofit corporation operates a school through a separate nonprofit corporation (school). Assume that a third nonprofit corporation (foundation) holds and manages long-term endowment funds that support the church, the school, and other religious programs of the church. All three organizations have separate boards of directors, but under GAAP, the church is considered to "control" both the school and the foundation.

Suppose an individual church member contributes $100,000 to the foundation pursuant to a gift instrument to establish an irrevocable, permanently restricted, perpetual endowment fund for tuition assistance at the school. In that case, that endowment fund will be a "donor-restricted endowment fund" under GAAP, and its assets will be classified as net assets with donor restrictions on the foundation's balance sheet.[60] On the other hand, if the church transfers $100,000 of its unrestricted assets to the foundation to establish an endowment fund for the school under a gift instrument having identical provisions, the church apparently will *not* be considered to be the "donor" of that fund under GAAP, and the endowment fund assets must be classified and reported on the foundation's books as net assets without donor restrictions.[61]

b. UPMIFA Legal Rules

If the Commissioners intended for certain entities to be ineligible to be a donor of an endowment fund under UPMIFA, they probably would have said so either by defining "donor" or at least by discussing in the commentary any exceptions that might be relevant. The following language in UPMIFA commentary, however, seems to address the point:

> Board-designated funds are institutional funds but not endowment funds. *The rules on expenditures and modification of restrictions in this Act do not apply to restrictions that an institution places on an otherwise unrestricted fund that the institution holds for its own benefit*. The institution may be able to change these restrictions itself, subject to internal rules and to the fiduciary duties that apply to those that manage the institution.
>
> If an institution transfers assets *to another institution, subject to the restriction that the other institution hold the assets as an endowment,* then

60. *Presentation of Financial Statements of Not-for-Profit Entities, supra* note 20, at 7–9.

61. Nor would it seem that the fund established by the church would qualify as the *Foundation's* "Board-Designated Endowment Fund," defined under the FASB Update as one "created by a not-for-profit entity's (NFP's) governing board," because in the example the fund was established by the church, *not* by the governing board of the Foundation. *See id.* at 9. Moreover, if individual donors later were to make contributions to the endowment fund established by the church, the fund's assets would be reported under GAAP partly as assets with donor restrictions and partly as assets without donor restrictions. *See id.*

the second institution will hold the assets as an endowment fund.[62]

The second paragraph is significant in that it confirms that when one institution transfers assets to a second institution subject to restrictions, an "endowment fund" will be created (and by implication, the institution transferring the assets will be considered the "donor" of that fund).[63] The first sentence in the first paragraph reinforces that conclusion by distinguishing (1) an endowment fund, which the second paragraph confirms will be established when the donor institution relinquishes control and possession of some of its assets in a transfer to a second institution upon which restrictions are imposed, from (2) a board-designated fund described in the first paragraph as *not* an endowment fund because the restrictions are self-imposed on funds that the institution continues to hold and manage for its own benefit.[64]

UPMIFA Section 4(a) also lends support for this view, providing that "[u]nless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted until appropriated for expenditure by the institution."[65] More importantly, commentary under UPMIFA Section 4 confirms that there can be differences between legal rules and accounting standards:

> **Distinguishing Legal and Accounting Standards.** . . . An endowment fund is restricted because of the *donor's intent* that the fund be restricted by the prudent spending rule, that the fund not be spent in the current year, and that the fund continue to maintain its value for a long time. Regardless of the treatment of [an] endowment fund from an accounting standpoint, *legally* an endowment fund should *not* be considered unrestricted. Subsection (a) states that endowment funds will be legally restricted until the institution appropriates funds for expenditure.[66]

In sum, the critical legal differences under UPMIFA between a board-designated endowment fund and a donor-restricted endowment fund are that the latter: (1) involves an irrevocable transfer and relinquishment of

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62. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2 cmt. (2) (UNIF. L. COMM'N 2006) (emphasis added).

63. *See id.*

64. *See id.*

65. *Id.* § 4(a).

66. *Id.* § 4 cmt. (a) (emphasis added). For example, the Attorney General confirmed that accounting requirements as to classification of funds for financial statement purposes "do not, under Massachusetts law, remove or diminish the legal effect of donor-imposed restrictions as to: (a) current spendability; or (b) the purposes for which such funds may be expended . . . [and] unless explicitly stated otherwise by the donor, realized and unrealized appreciation on investments of permanently restricted assets of Massachusetts public charities should, until appropriated pursuant to governing board action, be classified in the financial statements in one of the 'restricted' net asset classifications, not as 'unrestricted' net assets . . . ." *See* Mass. Att'y Gen., Position on FASB Statement of Financial Accounting Standards No. 117-1, ¶ 8, and Related M.G.L. ch. 180A Issues (Apr. 2011).

title and possession of property by the donor institution to a *different* institution and (2) thereby results in the establishment of a fiduciary relationship between the donee institution and the donated assets that obligates the second institution to administer that endowment fund pursuant to the terms of (and for the specific charitable purposes and requirements of) the gift instrument. Consequently, I think that even when the donor and the beneficiary of an endowment fund are the same or affiliated entities, the terms of an irrevocable gift instrument between two institutions should be *legally binding and enforceable* in accordance with its terms under UPMIFA no matter how that fund may be classified under GAAP. Additionally, except as other laws might invalidate the gift instrument or specific donations made to an endowment fund (for example, as a result of fraud, duress, mistake, or the law of fraudulent transfers),[67] the fact that the institution holding and managing the endowment fund is controlled by, is affiliated with, or is a supporting organization of the donor institution should not affect the validity and enforceability of the restrictions imposed under the gift instrument.[68] For example,

> Example 2. Assume the same facts described in Example 1. Assume that in 2015, the church contributes $250,000 of its unrestricted funds to the foundation to establish an irrevocable, permanently restricted, perpetual endowment fund to provide tuition assistance for students wanting to attend its school. Assume that in 2020, the church seeks to dissolve the foundation to gain control over the foundation's assets, including those of the endowment fund, and either spend those assets immediately or use them for a different purpose.

I think the governing board of the foundation would be under a duty to resist the church's efforts to circumvent the restrictions under the gift instrument that the foundation is obligated to obey and, if necessary, initiate court action to ensure that incident to its dissolution, the endowment fund assets are placed in trust or otherwise segregated, protected, and used for the school pursuant to the terms of the gift instrument.[69] Similarly, if the church or the school suggested that the foundation release or modify the original restrictions to enable the school either to dissolve the endowment fund or to spend endowment fund distributions to build a new playground, the foundation's board should be reluctant to do so.[70] Finally, the foundation's board should take a similar approach if the church were to operate its school

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67. *See* RESTATEMENT (SECOND) OF TRS. § 333 (AM. L. INST. 1959).

68. *See generally* Terri L. Helge & David M. Rosenberg, *Complex Structures: Entities and Endowments*, 17TH ST. BAR TEX. PRO. DEV. PROGRAM, GOVERNANCE NONPROFIT ORG. ch. 12 § 6(b) (2019) (explaining endowment protection of donor-restricted assets in bankruptcy).

69. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT §§ 3(a), 4(a) (UNIF. L. COMM'N 2006) (standards of conduct and duties incident to the administration of institutional funds).

70. *See id.*

directly as part of its church mission rather than through a separate legal entity.[71] That is, the foundation duty is the same, whether the beneficiary is a separate institution or a designated part of the church's larger mission—i.e., to abide by the restrictions of the gift instrument and the donor's intent.[72]

B. UMIFA vs. UPMIFA, Remedies and the Charity Law Reform Movement

Before discussing UPMIFA remedies, it might be helpful to summarize common law principles of trust and property law as they existed before the UTC, the Restatement (Third) of Trusts, and UPMIFA, as such principles are still relevant today. This Article will then (1) summarize the unique remedies that previously existed under UMIFA, (2) discuss the ongoing charity law reform movement that sparked the ALI's and the Commissioners' efforts to reform trust remedies, and (3) analyze UPMIFA's new remedies (and differences between them and those of the UTC on which they are based), public policy considerations, and constitutional law issues.

When a person makes a transfer of real property directly to another person "so long as" it is used solely for a particular purpose and either the transferee thereafter violates the conditions of the gift or the particular purpose becomes impossible to achieve, the gift fails, and ownership of the property reverts to the transferor or the transferor's estate.[73] The reason is that the donor is considered to have transferred less than full ownership of the land (a fee simple determinable) and still owns a possibility of reverter, a *vested* property interest that ripens when the gift fails and fee title automatically reverts, although judicial action is usually required to confirm that a reversion has actually occurred under the particular facts.[74] Lawyers have complained for decades about the impact these restrictions have on the marketability of land titles and the problems they pose for title examiners.[75] These same principles apply to direct gifts of real property to charitable institutions, subject to conditions that the property be used for specific charitable purposes, and while they also have been applied to gifts of personal property such as works of art,[76] in most cases, direct transfers of personal

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71. *See id.*

72. *See id.*

73. *See* JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, MICHAEL SCHILL, PROPERTY 256 (7th ed. 2010). For example, assume that a donor conveys the family farm to his son "so long as" the son retains the land and uses it for agricultural purposes. Should the time come when the land no longer can be used for farming—or the son can make a fortune selling the farm to a real estate developer—the son faces a dilemma: He can either (1) keep the land and continue to use it for agricultural purposes, or (2) change its use by selling it. If he does the latter, though, the land reverts to the donor's estate and might be divided among the son and his nine sisters as residuary beneficiaries.

74. *See* James A. Webster, Jr., *The Quest for Clear Land Titles: Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C. L. REV. 807, 810–13 (1964).

75. *Id.* at 813–23.

76. *Compare* John Chipman Gray, *Future Interests in Personal Property*, 14 HARV. L. REV. 397, 420 (1901) *with* Lewis M. Simes, *Future Interests in Chattels Personal*, 39 YALE L. J. 771 (1930); *see*

property and intangible personal property restricted by the terms of a gift instrument are treated as creating a trust (or a fiduciary relationship similar to a trust) in the hands of the institution to which they are given.[77]

Under trust law, when a private trust fails as a result of a gap in the donor's dispositive scheme, the trustee normally will hold the trust property in resulting trust for the benefit of the donor or the donor's estate, thereby establishing a similar "default" rule that applies to rights of reverter in land and implementing what "would probably have been the intention of the person making the disposition if he had thought of the matter."[78] That is, it is presumed that the donor did not intend for the trustee, as the holder of legal title, to retain ownership of the trust property as the trustee's own and instead preferred for the property to revert to the donor or to those who inherited the donor's estate.[79] Moreover, these equitable reversionary interests in trust property, like rights of reverter, are considered vested, transferrable future interests in property.[80] Analogously, when a charitable trust fails because the donor's charitable purpose becomes illegal or impossible to achieve, the trust property will revert to the donor or the donor's estate *unless* the conditions are met that permit a court to exercise its *cy pres* power and save the gift from failure by substituting a new charitable purpose for the trust.[81] Thus, the *cy pres* doctrine historically was a narrow exception to common law property law principles and not widely accepted in the United States until the 1950s,[82] when lawmakers became more confident that courts would be constrained from overriding donor intent by conditioning the court's exercise of its *cy pres* power on proof that the donor had a broader "general charitable intent" at the time the donor made the gift.[83]

Finally, a donor's transfer of property to the trustee of a charitable trust establishes a fiduciary relationship between the trustee and the trust property

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Alan L. Feld, *Who Are the Beneficiaries of Fisk University's Stieglitz Collection*, 91 B.U. L. REV. 873, 877 (2011).

77. *E.g.*, RESTATEMENT (SECOND) OF TRS. § 348 cmt. f (AM. L. INST. 1959).

78. *Id.* ch. 12, topic 1, intro. note; *id.* § 411.

79. *See id.* § 404. "The inference is, not that the settlor actually intended that the property or surplus should be returned to him, for there is no evidence that he contemplated the possible failure of the express trust or the possible existence of a surplus, but that he did not intend in any event that the trustee should have a beneficial interest. Since the trustee was not intended to keep the property or the surplus, and since no other disposition has been made, in the event which has happened, the court will compel the trustee to return the property or the surplus to the person who created the trust." SCOTT, *supra* note 3, § 404.1 at 3214. If the donor died intestate and without heirs, the property would be held in resulting trust for the donor's estate. *Id.* § 411.4.

80. *See* RESTATEMENT (SECOND) OF TRS. § 407 (AM. L. INST. 1959).

81. *See id.* § 413. The *cy pres* rule under the Restatement (First) of Trusts was the same. Alberto B. Lopez, *A Revaluation of* Cy Pres *Redux*, 78 UNIV. CIN. L. REV. 1307, 1323 (2009).

82. *See* Vanessa Laird, *Note*, *Phantom Selves: The Search for a General Charitable Intent in the Application of* Cy Pres *Doctrine*, 40 STAN. L. REV. 973, 976 (1988) ("Although between 1860 and 1900 only six states expressly applied *cy pres*, between 1900 and 1950 twenty-one jurisdictions applied the doctrine for the first time.").

83. *Id.*; *see infra* text accompanying note 114.

devoted to the donor's particular charitable purpose, with the Attorney General assigned to enforce the trust and to represent members of the public who stand to benefit from the fund under its terms.[84] Unlike Professor Scott's more nuanced view that a charitable trust also could be enforced "by a person who has a special interest in the enforcement of the charitable trust,"[85] UPMIFA only authorizes the Attorney General to enforce an endowment agreement.[86] The donor, who typically does not retain the right to modify the terms of an endowment agreement to obtain a charitable tax deduction, normally lacks standing to enforce the endowment he establishes because the donor is not a beneficiary of the fund.[87] UPMIFA reconfirms that fact.[88] However, the donor and the donor's successors do have standing to bring suits on claims *adverse* to the trust, including a claim that the donor's reversionary interest has ripened.[89]

1. Remedies Under UMIFA

Prior to UPMIFA, UMIFA Section 7 contained two remedies to reform endowment funds, one judicial and one extrajudicial.[90] Section 7(a)'s extrajudicial statutory remedy read: "With the written consent of the donor, the 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."[91] The similar UMIFA Section 7(b) judicial remedy, which could not

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84. "The fundamental distinction between private trusts and charitable trusts is that in the case of a private trust property is devoted to the use of specified persons who are designated as beneficiaries of the trust; whereas in the case of a charitable trust property is devoted to purposes beneficial to the community as a whole." RESTATEMENT (SECOND) OF TRS. ch. 11, intro. note. (AM. L. INST. 1959). "A charitable trust, furthermore, differs from a private trust in regard to its enforcement. A private trust is enforceable at the suit of one or more of the beneficiaries. A charitable trust is ordinarily enforceable at the suit of a public officer, usually the Attorney General." *Id.*; *see id*. § 348 cmt. f (Similar principles are generally applied to transfers to charitable corporations subject to donor restrictions.).

85. *Id.* § 391 cmt. c; SCOTT, *supra* note 3, at 3007–10; *compare* Gray v. Saint Matthews Cathedral Endowment Fund, 544 S.W.2d 488, 490 (Tex. App.—Texarkana 1976, writ ref'd n.r.e.) *with* Nacol v. State, 792 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1900, writ denied).

86. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note, § 6 cmt. (UNIF. L. COMM'N 2006).

87. RESTATEMENT (SECOND) OF TRS. § 391 cmt. e (AM. L. INST. 1959); *see, e.g.*, UNIF. MGMT. OF INST. FUNDS ACT § 7 cmt. (d) (UNIF. L. COMM'N 1972) ("No federal tax problems for the donor are anticipated by permitting release of a restriction. 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.").

88. *See, e.g.,* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note, § 6 cmt. (c) (UNIF. L. COMM'N 2006).

89. RESTATEMENT (SECOND) OF TRS. § 391, cmt. (f) (AM. L. INST. 1959). Similarly, it is also clear under the Restatement (Third) of Trusts that trust "beneficiaries" include "not only persons intended to have enforceable rights in the trust property . . . but also those who take legally implied reversionary interests (that is, 'by resulting trust') and the successors in interest of those who earlier had held beneficial interests under the terms of an express trust or by resulting trust." RESTATEMENT (THIRD) OF TRS. ch. 9, intro. note (AM. L. INST. 2012).

90. UNIF. MGMT. OF INST. FUNDS ACT §§ 7(a), (b) (UNIF. L. COMM'N 1972).

91. *Id.* § 7(a).

be used if the donor was living or did not consent,[92] authorized a court to *release* a restriction on the use or investment of an institutional fund upon the application of the institution *if* the court found the restriction to be "obsolete, inappropriate or impracticable" and following the release the fund remained an endowment fund.[93] Moreover, UMIFA Section 7(d) did not limit the use of *cy pres*, the only remedy traditionally available to modify a donor's *charitable purpose* when that purpose failed.[94]

One would have thought the Commissioners would have patterned their statutory remedies after trust law's doctrine of equitable deviation, a remedy for modifying restrictions impairing the investment or administration of a trust (the focus of UMIFA).[95] Oddly, as the source of its unique remedies, the Commissioners turned instead to Restatement (Second) of Trusts Section 367, which expressly denies the donor the power to modify an irrevocable trust of which the donor is not a beneficiary.[96] The Commissioners observed, however, that Professor Scott suggested: "[I]n minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust."[97] Yet, the Commissioners also indicated that "[a]lthough the donor has no property interest in a fund after the gift [and hence cannot modify it], nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden."[98] The UMIFA commentary goes on to note, "*cy pres* has not been a satisfactory answer [as a remedy] and is reluctantly applied in some states," mentioning (1) that "[a] liberalization of, addition to, or substitute for *cy pres* is not without respectable support," citing a law review article by Professor Kenneth Karst, and (2) that UMIFA's standard is "far less broad" than what Karst suggested because "it applies only to the release of restrictions on the gift under limited

92. *Id.* Section 7(a) permitted an application by the institution only "[i]f written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification." *Id.*

93. *Id.* § 7(b). Neither "obsolete" nor "inappropriate," without more, would have been sufficient cause at the time to allow a trust to be modified under either *cy pres* or the doctrine of equitable deviation. *See* RESTATEMENT (SECOND) OF TRS. §§ 381, 399 (AM. L. INST. 1959).

94. UNIF. MGMT. OF INST. FUNDS ACT § 7(d) (UNIF. L. COMM'N 1972); RESTATEMENT (SECOND) OF TRS. § 399 (AM. L. INST. 1959).

95. Restatement (Second) of Trusts § 381 states the doctrine of deviation as follows: "The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if 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." RESTATEMENT (SECOND) OF TRS. § 381 (AM. L. INST. 1959).

96. UNIF. MGMT. OF INST. FUNDS ACT § 7 cmt. (UNIF. L. COMM'N 1972). Restatement (Second) of Trusts § 367 provides: "If a charitable trust has once been validly created, the settlor cannot revoke or modify it unless he has by the terms of the trust reserved a power to do so." RESTATEMENT (SECOND) OF TRS. § 367 (AM. L. INST. 1959).

97. UNIF. MGMT. OF INST. FUNDS ACT § 7 cmt. (UNIF. L. COMM'N 1972) (citing SCOTT *supra* note 3, § 367.2 at 2846).

98. *Compare id. with* RESTATEMENT (SECOND) OF TRS. § 367 cmt. c (AM. L. INST. 1959).

circumstances."[99]

In sum, the UMIFA commentary was ambiguous, grounding its extrajudicial remedy based on a narrow exception allowing an institution, with donor consent, to release certain donor restrictions in minor matters of administration, but then pivoting and describing their statutory remedy as "far less broad" than reforms Professor Karst suggested should apply in a *cy pres* context.[100] While UMIFA Section 7 confirmed that "a release under this section may not allow a fund to be used for purposes other than . . . [those] of the institution affected," there was little guidance concerning how the donor's original charitable intent might limit the scope of the relief.[101] While the stated purpose of both remedies appears to be limited,[102] the only example given concerning how the statute might work certainly stretches the boundaries of Professor Scott's minor matters exception and allows some purpose modifications:

> This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, *or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school*.[103]

2. "Cy Pres" *and the Charity Law Reform Movement*

"Charity law is in a state of flux: The basic rules, many with roots in earliest common law, are being reconsidered and revised by legislators, scholars, and practitioners."[104] The "charity law reform movement" is more than fifty years of scholarly criticism and debate over a myriad of topics, including whether or not (and how much) trust law should apply to charitable

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99. UNIF. MGMT. OF INST. FUNDS ACT § 7 cmt. (UNIF. L. COMM'N 1972).

100. *Id.*

101. *Id.* § 7(b). It also seems odd for Section 7(c) to prohibit a *judicially authorized release* from converting an endowment fund into one that is not, and yet not apply that same rule to extrajudicial releases (and not to require *cy pres* to be used to change charitable purposes). *See id.* § 7(c).

102. "This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court." *Id.* § 7 cmt.

103. *Compare id. with* RESTATEMENT (SECOND) OF TRS. § 367 cmt. b (AM. L. INST. 1959) ("Thus, if the settlor transfers property in trust to establish and maintain a school, and provides that a certain detailed course of study shall be pursued by the students at the school, and it is found that the restrictions as to the curriculum impede the work of the school, the settlor can permit, although he cannot compel, the trustees to introduce a modified curriculum.").

104. Marion Fremont-Smith, Symposium, *The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change*, 76 FORDHAM L. REV. 609, 609 (2007) (hereinafter Fremont-Smith).

nonprofit corporations, tax policy affecting charitable institutions and donors, the lack of effective regulation and supervision of the nonprofit sector, and especially "dead hand" donor control over long-term endowment funds and countless proposals for liberalizing *cy pres*.[105] Criticism of *cy pres* accelerated during the last thirty years, with reformers seeking to eventually reduce or eliminate *cy pres'* historical tie to donor intent so that donor-restricted assets (1) never revert to the donor or the donor's estate and (2) can be more easily repurposed by charitable institutions to serve current societal needs rather than "wasted" supporting the donor's obsolete but still viable charitable purpose until it became "impossible or impracticable or illegal to carry out" under the Restatement (Second) of Trusts *cy pres* standard.[106]

Charitable institutions "preserve two traditions Americans cherish: voluntarism and capitalism."[107] As Professor John Simon observed over thirty years ago:

> A distinguishing characteristic of the American social order, remarkable to de Tocqueville as a foreign visitor 150 years ago, is that it does not rely exclusively on "private sector" or "public sector" actors to carry out the nation's business. Instead, there is major dependence on a third, nonprofit sector to teach us, heal us, entertain us, expand our scientific and cultural frontiers, and protect our rights, opportunities, and natural resources.[108]

While various explanations might be given for why America relies on the nonprofit sector to help meet society's needs, Professor Simon suggested:

> What most of these explanations have in common is their perception of the charitable world as a setting that avoids the constraints and liabilities of the purely "private" or "public" sectors that are dominated, respectively, by market and ballot, while drawing from the strengths of each of them. *Thus, the charitable organization and the philanthropy that supports it are driven,*

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105. *See, e.g.*, *A Revaluation of* Cy Pres, 49 YALE L. J. 303, 432 (1939); Edith L. Fisch, *The* Cy Pres *Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 377 (1953); MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 428 (Russell Sage Fdn. 1965) ("[C]haritable gifts, unless subject to specific limitation valid for only twenty-one years, would be subject to alteration whenever they become 'obsolete, useless, prejudicial to the public welfare, otherwise sufficiently provided for, or insignificant in comparison to the magnitude of the endowment.'") (citing language from Scottish law); C. Ronald Chester, Cy Pres: *A Promise Unfulfilled*, 54 IND. L.J. 407, 408 (1979) (hereinafter Chester I); John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641, 643–44 (1987); Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of* Cy Pres, 74 VA. L. REV. 635 (1988); Ronald Chester, Cy Pres *or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK UNIV. L. REV. 41, 41–44 (1989) (hereinafter Chester II); Rob Atkinson, *Reforming* Cy Pres *Reform*, 44 HASTINGS L.J. 1111, 1113–14 (1993) (hereinafter Atkinson I).

106. RESTATEMENT (SECOND) OF TRS. § 399 (AM. L. INST. 1959); *see* Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 ALB. L. REV. 565, 573 (2018).

107. Chris Abbinante, *Protecting "Donor Intent in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 UNIV. PENN. L. REV. 665, 701–02 (1997).

108. Simon, *supra* note 105, at 653–54.

> *more than any government activity is driven, by an individual choice system of decision-making*.[109]

Prior to the twentieth century, there were few charitable trusts and only an occasional need for judicial relief as a result of the failure of a trust's charitable purpose.[110] As Professor Edith Fisch observed nearly seventy years ago, American courts were "hostile to the [*cy pres*] doctrine" as inconsistent with Montesquieu's theory of separation of powers, out of "great reverence for private property prevailing at this period" and the view that "the court could not substitute a new scheme merely because the court or the trustees believed that it would be a better plan than that created by the settlor and which, if permitted, might make public charities 'the subject of change with every fluctuation of popular opinion.'"[111] Professor Fisch also noted that "after 1900 the tide of public thinking flowed away from emphasis on the individual and towards society as a whole," with the "transition from stress on the dead hand" to one of "balancing between individualism and collectivism" in harmony with Roscoe Pound's sociological jurisprudence theory and writings.[112] Another commentator observed that it was in the early 1900s when "steel magnate Andrew Carnegie gave credence to the notion that great wealth was a public trust to be administered not for the excessive benefit of private heirs, but for the good of the public."[113] Still, America remained committed to limited government and to maximizing individual freedoms (including an owner's freedom to keep, use and dispose of private property as he or she wishes), a philosophy of government described by Professor Iris Goodwin as one originating from "a distinction long recognized as fundamental in liberal [democratic] thinking . . . between the 'right' and the 'good.'"[114] That is, individuals should be free to make their own choices about what is "good" for them *unless* their choices impinge on the "right"—the system of justice guaranteeing *every person* the ability to pursue as freely as possible what that person thinks is "good" for him or her individually.[115] Under this philosophy, the government's obligations are

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109. *Id.* at 654–55 (emphasis added).

110. Chester I, *supra* note 105, at 411.

111. Fisch, *supra* note 105, at 377, 381–82 (including an excerpt from *President, etc., of Harvard College v. Society for Promoting Theological Education*, 3 Gray 280, 301 (Mass. 1855)*; see* Joseph Willard, *Illustrations of the Origin of* Cy Pres, 8 HARV. L. REV. 69, 91–92 (1894).

112. Fisch, *supra* note 105, at 383–85 ("The problem, therefore, of the present is to lead our law to hold a more even balance between individualism and collectivism. Its present extreme individualism must be tempered so as to meet the ideas of the modern world" (citing ROSCOE POUND, SPIRIT OF THE COMMON LAW, 384 (1st ed. 1906)).

113. Chester I, *supra* note 105, at 414.

114. Iris J. Goodwin, *Ask Not What Your Charity Can Do for You: Robertson v. Princeton Provides Liberal Democratic-Insights into the Dilemma of* Cy Pres *Reform*, 51 ARIZ. L. REV. 75, 80 (2009) (citing WILLIAM DAVID ROSS, THE RIGHT AND THE GOOD (1930)); *see* JOHN RAWLS, A THEORY OF JUSTICE 291 (2d ed. 1999).

115. *See* Goodwin, *supra* note 114, at 80, 110–14.

(1) to intervene to protect the "right," and (2) equally importantly, to otherwise "remain neutral" and *not* to interfere with each individual's own choices.[116] Because charitable gifts, by definition, are "good," the government's duty generally was to refrain from interfering with a donor's charitable plans *unless those restrictions violated a fundamental right of another person*, such as a restriction discriminatory on the basis of race, gender or religion.[117]

Consistent with that view, *cy pres* traditionally allowed courts to intervene and substitute a new charitable purpose only when (1) the donor's own purpose became "impossible or impracticable or illegal to carry out" and (2) the donor "manifested a more general intention to devote the property to charitable purposes."[118] As mentioned earlier, absent evidence of general charitable intent, property and trust law dictated that upon the failure of a donor's gift, the donor's property should revert to the donor or, if not alive, to the donor's estate. As pointed out by one author: "By making it possible for judicial cy pres to seem consistent with American ideas about property rights and about government, the [*cy pres*] doctrine's 'general charitable intent' requirement facilitated its acceptance in the United States."[119] In sum, prior to recent reforms, in a *cy pres* proceeding, the court would decide either (1) to take no action if it found that the donor's charitable purpose was still viable, or (2) if the court found that the donor's purpose was "impossible or impracticable or illegal to carry out," then to return the assets to the donor or the donor's estate *unless* the court also found that the donor had a general charitable intent at the time of the original gift, thereby empowering the court

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116. *Id.*

117. *Id.* at 114–21 (discussing the "right" and the "good" and various United States Supreme Court cases in which the government has intervened when donor restrictions impinge on the constitutional rights of others).

118. RESTATEMENT (SECOND) OF TRS. § 399 (AM. L. INST. 1959); RESTATEMENT (FIRST) OF TRS. § 399 (AM. L. INST. 1935). Prior to the Restatements, *cy pres* was viewed as "only a liberal rule of construction to ascertain intention. The intention of the settlor is the point steadily aimed at by all courts. Any arbitrary rule that substitutes the arbitrary conjectures of a court for the intention of the donor would be an outrage in a country governed by established laws . . . ." RAYMOND C. BALDES, PERRY ON TRUSTS AND TRUSTEES § 1240 (7th ed. 1929). In Professor Scott's view, the "court may fairly infer an expectation on the part of the settlor [that after the lapse of time his particular charitable purpose might fail] . . . and that in such case the settlor would prefer a modification of his scheme rather than that the charitable trust should fail [and his property distributed to numerous remote heirs]." RESTATEMENT (SECOND) OF TRS. § 399 cmt. i (AM. L. INST. 1959); *see A Revaluation of* Cy Pres, *supra* note 105, at 313–14, 318. Yet, if the settlor actually had such an "expectation," he could have either softened the restrictions imposed on his gift or designated an alternative charitable use for the funds. While Professor Scott felt there was a stronger reason to exercise *cy pres* after the lapse of time, in his treatise and in the Restatement (Second) of Trusts he effectively encourages courts to continue to choose charity as the winner in cy pres proceedings on "public policy" grounds: "As a matter of public policy, it might well be held that in the case of a subsequent failure of the particular purpose the doctrine of cy pres should always be applied, and that the property should never revert to the settlor or his estate. The longer the period between the creation of a charitable trust and the failure of the particular purpose, the more undesirable it is that the property should revert to the settlor's estate." SCOTT, *supra* note 3, § 399.3.

119. Laird, *supra* note 82, at 976.

to exercise its *cy pres* power[120] *in furtherance of the donor's general charitable intent* by substituting a new charitable purpose that was close to the donor's original one.

However, even diligent courts rarely found any real evidence of what the donor *actually* intended at the time of the gift,[121] and over time courts began finding general charitable intent existed based on "some generalization concerning *what people like the testator usually want in that situation*"[122]—that is, "based on facts about how other people behave rather than on the details of . . . [the donor's] own personal history."[123] Moreover, as courts became more lenient and charitable in their findings, they likewise became more accommodating in granting relief somewhat broader than what would have been as near as possible to the donor's original charitable purpose.[124] One could argue that the mere fact that the donor made a gift to charity is evidence of the existence of general charitable intent.[125] Yet, absent specific evidence to the contrary, the court's duty is not to guess what the donor might have wanted done in order to "save" the gift but instead to follow the default "presumed donor intent" favoring reversion that applies under property and trust law.[126]

Charitable trusts and endowment funds differ from private trusts in three main ways: (1) of course, they must be charitable, a qualification commonly,

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120. "The phrase [*cy pres*] is Anglo-French and is equivalent to the modern French *si près*, meaning so near or as near." SCOTT, *supra* note 3, § 399 at 3084. The Restatement (Second) of Trusts Section 399 reads: "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*." RESTATEMENT (SECOND) OF TRS. § 399 (emphasis added).

121. "Yet, because the testator rarely contemplates the failure of the trust's specified purposes, there is seldom any evidence in the will that directly proves what he would have wanted in the event of impossibility." Laird, *supra* note 82, at 978.

122. *Id.* at 979.

123. *Id.* at 982 (emphasis added); *see* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L. J. 295, 303–06 (1988).

124. RESTATEMENT (SECOND) OF TRS. § 399, cmt. b (AM. L. INST. 1959).

125. *Id.*

126. "If the concept of the unique individual is not substantively relevant to *cy pres* determinations, then neither is the principle that individuals have the right to do what they want with their property. By leading people to believe that this principle does generate outcomes in *cy pres* cases, judges who do not explicitly acknowledge that their predictions of what the testator would have wanted are based on a view of what people like him usually want, or public welfare concerns, make the concept of the unique individual seem to be more powerful in the *cy pres* context than it really is. If concept of the unique individual is not substantively relevant to *cy pres* determinations, then neither is the principle that individuals have the right to do what they want with their property. By leading people to believe that this principle does generate outcomes in *cy pres* cases, judges who continue to depict the presence or absence of a general charitable intent as playing the primary determinative role provide us with a false sense of confidence in the adequacy of our traditional beliefs, and make it less likely that we will confront the important normative question of what our criterion for disposing of private property should be when respect for the individual proves inconclusive." Laird, *supra* note 82, at 987; *see A Revaluation of* Cy Pres, *supra* note 105, at 303.

but not always, established by the donee's federal tax-exempt status; (2) they can be perpetual; and (3) they often have no identifiable beneficiaries.[127] The second difference is far less relevant today than before because many states have repealed or liberalized the Rule Against Perpetuities that previously limited the duration of private trusts.[128] The third difference has drawn the attention of legal scholars because (a) the public (or some part of it) ultimately benefits from charitable endowments; (b) nonprofit corporations exist (and are given special status under the law) because of the social benefits they provide to the public; and (c) consequently, reformers argue, "the public" has an interest in protecting and maximizing the benefits it realizes from donor-restricted assets (with the debate centering on whether and how much influence the public should have in *cy pres* matters, and why).[129]

Because donor restrictions are often "impulsively conceived, indefinitely expressed and planned with lamentable shortsightedness,"[130] a charitable institution may find itself handicapped by donor restrictions that compel it to spend endowment funds for purposes that are "insufficiently attuned to societal needs, as not flexible enough to permit the kind of judicially supervised updating . . . needed to ensure the socially optimal use of charitable assets" by putting those assets to *better* use elsewhere.[131] Critics acknowledge that donors, their advisors, and charitable institutions could do a better job negotiating and drafting donor restrictions and documenting a donor's broader charitable goals (if any),[132] which if properly done would make *cy pres* unnecessary or at least help guide courts in determining what relief should be granted if and when *cy pres* were to become necessary.[133]

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127. *See, e.g.*, Gary, *supra* note 106.

128. *See id.*

129. *See id.* Also of interest is a precursor of Professor Gary's article, a paper prepared for an NYU conference on *Wrestling With Donor Intent: Strategies for Enforcement or Relaxation*. SUSAN N. GARY, *History and Policy: Who Should Control Charitable Gifts*, NAT'L CTR. ON PHILANTHROPY & L. (2016), https://ncpl.law.nyu.edu/wp-content/uploads/2017/09/Revised-Gary-NYU-History-and-Policy-.pdf [https://perma.cc/F547-5S2Y] (hereinafter Gary Paper).

130. *A Revaluation of* Cy Pres, *supra* note 105, at 303. "In such instances a court may be forced to balance frequently antagonistic considerations: to protect the social benefits derived from charitable endowments, to evaluate interests of contesting heirs and residuary legatees and, finally, to effectuate the donor's intention." *Id.; see* Gary, *supra* note 106, at 588–89 ("No one today can craft a restriction with the assurance that the restriction will continue to make sense over time.").

131. Atkinson I, *supra* note 105, at 1113–14.

132. *See* John K. Eason, *The Charitable Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 696–708 (2007). Of course, a charitable institution could avoid these obsolescence issues on the front-end by rejecting a gift when the donor is unwilling to grant the institution enough leeway to modify the fund's charitable purpose in the future; however, most accept gifts and worry about "obsolescence" problems later *if and when* they arise. *See* Atkinson I*, supra* note 105, at 1117–19.

133. Ironically, as the Rule Against Perpetuities began to be abolished for private trusts and reforms, lawyers began to develop strategies to deal with address obsolescence issues for private trusts that could have been used in the past for charitable trusts. *See, e.g.*, Gary, *supra* note 106, at 581 n. 132, 590–91; Richard C. Auness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and*

Most critics also discuss high profile, high stakes, and hotly contested *cy pres* cases to illustrate how difficult and expensive *cy pres* proceedings can become,[134] the unpredictability of their results, and how the court's selection of a new charitable purpose for an endowment fund can become politicized or resolved in unexpected ways. Some add that, due to the cost of court action and the uncertainty in the result, charitable institutions are tempted not to go to court at all and simply modify the donor's charitable purpose unilaterally—i.e., "JUST DO IT."[135]

Reformers have also argued for decades that the general charitable intent requirement needed to be changed or eliminated to ensure that a donor's assets remain committed to benefit the "public" rather than revert to the donor's family as a failed gift, sometimes mentioning that England and other countries began relaxing that requirement as early as 1960.[136] Commentators have complained that the "impossible or impracticable or illegal" standard is too restrictive and needs to be more flexible[137] and more economically efficient so that scarce charitable resources are not wasted supporting the donor's increasingly obsolete charitable purpose by enabling the redeployment of those assets sooner to purposes "that, in the view of the charity, are more efficient or provide greater benefit to the public."[138] For example, Judge Richard Posner maintained that a rational donor would not want the donor's financial resources wasted supporting a useless purpose and would prefer instead that the donor's funds be applied to carry out his broader charitable intent.[139] Professor Jonathan Macey, on the other hand, critiqued Judge Posner's analysis, suggesting that allowing the donor's gift to fail and

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Termination of "Irrevocable" Trusts, 28 QUINNIPIAC PRO. L.J. 237, 294–302 (2015); Lawrence P. Katzenstein, *Enforcing Donor Intent*, 1, 20 (2016), https://ncpl.law.nyu.edu/wp-content/uploads/2017/03/Tab-B-Katzenstein-paper.pdf [https://perma.cc/NSA9-MWHK]; John K. Eason, *Choose Your Battlefield, Choice of Entity as a Weapon for Preserving Donor Intent*, NAT'L CTR. ON PHILANTHROPY & L. 1, 26–27 (2016), https://ncpl.law.nyu.edu/wp-content/uploads/2017/03/Tab-D-Eason-paper.pdf [https://perma.cc/JX6L-WMHX].

134. *Cy pres* proceedings often are more adversarial and expensive because of other factors, such as poor management, poor donor relations efforts, or an institution that simply ignores its obligations under the gift instrument. *See* John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 126 n. 11 (2010).

135. *See, e.g.*, *id.*; Rob Atkinson, *The Low Road to* Cy Pres *Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. L. REV. 97, 139 (2007) (hereinafter Atkinson II).

136. *E.g.*, Edith L. Fisch, *Changing Concepts and* Cy Pres, 44 CORNELL L. QUARTERLY 382, 393 (1959); Chester I, *supra* note 105, at 424–25; *see* Frances Howell Rudko, *The* Cy Pres *Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 474 (1998); (citing Lionel Astor Sheridan, Cy-pres *in the Sixties: Judicial Activity*, 6 ALBERTA L. REV. 16, 16 (1968)); *In Re* Oshkosh Found., 213 N.W. 2d 54, 57 (citing SCOTT, *supra* note 3, § 399.4 at 3125–26 n.19).

137. Gary, *supra* note 106, at 566; *see, e.g.*, Sisson, *supra* note 105, at 648–53.

138. Gary, *supra* note 106, at 566; *compare* Sisson, *supra* note 105, at 648–53 *with* Abbinante, *supra* note 107, at 694–98 (summarizing and commenting on competing *cy pres* efficiency arguments made by Judge Richard A. Posner and Professor Jonathan R. Macey in his article); Macey, *supra* note 123 at 303–06.

139. Abbinante, *supra* note 107, at 697 (citing RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 482–83 (3rd ed. 1986)); *see* Gary, *supra* note 106, at 600–05.

revert to the donor's beneficiaries is at least as economically efficient (if not more so) than letting a court intervene and save the trust from failure through costly *cy pres* proceedings.[140] Additionally, absent evidence of the donor's true intentions, allowing a court to exercise *cy pres* can as easily defeat as promote the settlor's intent.[141] Others point out that relaxing the standard might (1) discourage donors from making gifts that they cannot completely control, (2) motivate donors to add even more restrictions on their gifts in order to curtail the charitable institution's increased flexibility under a more lenient *cy pres* standard, and (3) lead to higher upfront "transaction costs" for both donors and institutions in negotiating gift instruments to deal with obsolescence issues that will arise, if at all, many decades down the road.[142]

Other legal scholars make a public good argument, suggesting that when a donor makes a charitable gift, the donor enters into a bargain with the public, sometimes referred to as a "giftract,"[143] under which the donor receives a charitable tax deduction and the right to establish a perpetual charitable fund subject to his or her specific restrictions essentially as a quid pro quo for giving the public a role in decisions over what should happen to that fund when a donor's restrictions become obsolete or unduly burdensome.[144] As the Rule Against Perpetuities began to be liberalized and reduced or eliminated the "perpetuity benefit," some began to describe as

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140. *See id.* at 697–98; Macey, *supra* note 123, at 306.

141. Macey, *supra* note 123, at 313–15. "Thus, the [*cy pres*] power appears to be a device for permitting judges, through a finding that the settlor had a 'general charitable purpose' when he created the trust, to keep private funds in the public domain, even when the settlor's intent might have been to have the assets revert back to the settlor's estate." *Id.* at 314. "Settlors have no way to avoid the risk that courts might invoke their [*cy pres*] power . . . . But if there were no such doctrine, then settlors would know that if conditions change so as to make their trust impracticable, then the trust would fail. This would encourage settlors to specify how they wish their funds to be allocated in case it becomes impossible to fulfill their initial request . . . . From a public choice perspective, it is interesting to note that the [*cy pres*] doctrine applies only to charitable trusts. Courts do not rewrite trusts that are not for charitable purposes . . . . The special interest beneficiaries of the trust have a clear incentive to press for alterations in the trust that would allow them to retain control over the trust's assets, even after the settlor's original intentions have been frustrated. Repeated litigation, particularly in the absence of opponents with any natural allies on the bench, would lead not to an efficient outcome, but to the [*cy pres*] doctrine, which seems highly inefficient." *Id.* at 314–15.

142. *See, e.g.*, Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 693, 708–12, 715–21 (2005); Katzenstein, *supra* note 133, at 20. Professor Robert Katz suggests that it might be better *not* to try to import trust law principles into the law of nonprofit corporations because "maintaining a diversity of legal forms and default rules for charitable activities reduces [transaction costs] . . . which in turn could increase the volume of charitable activity." *Id.* at 693; *see also id.* at 715–21 (discussing related risks that uninformed donors might choose the wrong business form).

143. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable Donor Standing* (symposium), 41 GA. L. REV. 1183, 1258–73 (2007) (discussing the possibility of developing a positive law of giftracts as a blend of property and contract law).

144. *See, e.g.*, Gary Paper, *supra* note 129, at 8; Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1704–13 (2015) (hereinafter Tait I); Alex M. Johnson Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the* Cy Pres *Doctrine***,** 21 UNIV. HAW. L. REV. 353, 357 (1999); Eason, *supra* note 134, at 125.

additional donor consideration various soft benefits often realized by donors as a result of their charitable gifts.[145] Others complain that wealthy donors benefit more from the charitable deduction than other taxpayers do and also tend to support causes that do not assist the poor and have a lower redistributive effect.[146] Yet, the fact that an individual receives a tax deduction for a gift to a charitable institution for a particular charitable purpose (and that institution is eligible for various tax exemptions because its mission is charitable) hardly justifies (1) recasting a private *donation* as a contract, (2) characterizing the government's lost revenue as consideration justifying judicial interference to allow the donor's funds to be spent differently (whether for a "better" purpose, or for that matter, only for the poor or other governmental charitable priorities), or (3) granting the public (however defined) a voice in *cy pres* proceedings.[147] Even if lost tax revenue attributable to a donor's charitable deduction were to be viewed as consideration for a donation, (1) the public clearly realizes substantial economic benefits from the donation, (2) the tax benefit given the donor presumably reflects fair value for his or her gift, and (3) if the public (through the federal government) is paying too much for donor-restricted gifts, then federal tax policy can be changed, rather than rewriting state law to allow donor restrictions to be overridden to give the public *additional consideration* (including a voice in *cy pres* proceedings) not agreed upon at the time of the original donation.[148]

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145. Tait I, *supra* note 144, at 1712. Professor Tait points out that donors also receive additional, intangible social and psychological benefits as a part of the bargain, such as donor recognition, perhaps special influence within the charitable institution the donor supports, networking opportunities, and the "warm glow" of the giving experience. *Id.* "[T]he [modern] charitable gift economy is an elaborate economy organized around personal favors, social norms, institutional access, public prestige, and elite status . . . . From this perspective, [*cy pres*] reform is based on the idea that donors receive sufficient benefits during their lifetimes such that perpetual adherence to donor intent is neither necessary nor appropriate. That is to say, perpetual adherence to donor intent is no longer the only, or even the primary, benefit that flows to donors." *Id.*

146. *E.g.*, Ray D. Madoff, *What Leona Helmsley Can Teach Us About the Charitable Deduction*, 85 CHI.-KENT L. REV. 957, 964–67 (2010); *see, e.g.*, Rob Reich, *The Failure of Philanthropy*, STANFORD SOC. INNOV. REV. (2005), https://ssir.org/articles/entry/a_failure_of_philanthropy# [https://perma.cc/7J27-YZ28].

147. *See, e.g.*, EVELYN BRODY & JOHN TYLER, HOW PUBLIC IS PRIVATE PHILANTHROPY? *Separating Reality from Myth*, Chapters I and III (2d Ed. The Philanthropy Round Table 2012), https://www.ssrn.com/abstracts=1522662 [https://perma.cc/HDN4-NETM]. As noted by the authors, the Internal Revenue Code is filled with deductions, credits, and subsidies that benefit individuals and businesses to which no special "public" strings are tied. *Id.* at 43–55 "There is no compelling reason to hold foundations and other charities to a different standard with regard to their independence, privacy, and autonomous decision-making and operation. As a legal matter, for foundations and other charities to be treated consistently with other sectors, they should be required to use the funds for charitable, exempt purposes and to document and report the fact that they have done so. The receipt of tax benefits should not entitle government or the public to dictate other aspects of the organizations' activities." *Id.* at 55.

148. *See id.* For example, assume that a donor makes a gift of $1,000,000 to establish an endowment fund and receives a federal income tax deduction of $300,000. The "public" realizes an immediate net charitable "public benefit" of $700,000. Reformers argue that the *public* bears the $300,000 tax cost of the donation. However, what the "public" actually receives is (1) a $700,000 net charitable public benefit

The problem with various *cy pres* reform proposals is that they do not get reformers where they really want to go, which is (1) for donor-restricted assets never to revert to the donor or the donor's estate and (2) for *cy pres* to be transformed into a tool for charitable institutions (on behalf of the "public") to reallocate donor-restricted funds to better purposes when the donor's own charitable purpose no longer adequately serves the public good.[149] However, developing a public good or efficiency standard that is not tied to impossibility has frustrated reformers because, as Professor Goodwin observes, "there is simply no consensus as to the meaning of either term, at least not as they might apply to the charitable sector" (echoing observations made earlier by Professor Rob Atkinson).[150] To develop such a standard, "[*cy*

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plus (2) the equivalent of a government subsidy of $300,000 that is added to the donor's gift in support of his chosen charitable cause, as there is no guarantee that the government would have spent the "lost" tax dollars on government "charitable benefits" as opposed to something else (or simply wasted it). Even if lost tax dollars are viewed as a cost, however, the public will recoup that $300,000 cost over less than six years if the $1,000,000 gift is invested under UPMIFA to grow fast enough to keep pace with inflation, support a 5% payout, and lock in a future inflation-adjusted perpetual stream of future charitable "public benefits." Moreover, congressional committees considering changes to the charitable deduction have a wealth of information available to them to ensure the government (and the "public") gets a good deal. *See, e.g.*, Joint Committee on Taxation, *Present Law and Background Relating to the Federal Tax Treatment of Charitable* Contributions, JCX-4-13, 4 (Feb. 11, 2013). Some scholars point out that a donor gets an immediate deduction when an endowment gift is made even though the present value of the future stream of charitable payments may be lower than the deduction received. *E.g.*, Madoff, *supra* note 146, at 971–72. If Congress wants to reduce or eliminate the charitable deduction for restricted gifts—or to allow greater deductions for gifts that support specific kinds of charitable activities—it can do so. *See, e.g.*, Roger Colinvaux, *Using Tax Law to Discourage Donor-Imposed Restrictions on Charitable Gifts*, 1, 1–2 (2016) https://ncpl.law.nyu.edu/wp-content/uploads/2017/03/Tab-E-Colinvaux-paper.pdf [https://perma.cc/W278-TQRM] (hereinafter Colinvaux I). If the government has fiscal needs and the charitable deduction needs to be reformed or the definition of what activities qualify as charitable narrowed, then Congress should change the Internal Revenue Code to achieve the desired result. *See* Macey, *supra* note 123, at 306, 308. For other discussions of tax policy issues and the charitable deduction, *see, e.g.*, Roger Colinvaux & Harvey P. Dale, *The Charitable Contributions Deduction: Federal Tax Rules*, 338 TAX LAW 331, 358–66 (2015); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. UNIV. L. REV. 505, 511–15 (2010); Roger Colinvaux, *Fixing Philanthropy: A Vision for Charitable Giving and Reform*, 162 TAX NOTES 1007, 1007–09 (2019).

149. *E.g.*, Atkinson I, *supra* note 105, at 1119; Atkinson II, *supra* note 135; Goodwin, *supra* note 114; Eason, *supra* note 134, at 123–28; Eason, *supra* note 132 at 693–97; Rudko, *supra* note 136, at 487–88.

150. Goodwin, *supra* note 114, at 81. "Where restricted gifts are concerned, there is no objective criterion of public good (consistent with liberal norms) by which to distinguish the timely from the anachronistic. In any era, one person's well-considered passion is another's tilting at windmills. The same applies to any endowed project or program over time. It is virtually impossible to provide a principled distinction between the opportune and the quixotic, short of a showing that the mission is simply impossible to achieve." *Id.* at 110–11.

As Professor Atkinson pointed out: "The 'New Dealish' notion of a monolithic public good identifiable by experts is in serious disfavor. As applied to the law of charity, it has been attacked as at best question-begging, and at worst a cloak for unlimited judicial discretion. The notion of public benefit could be narrowed, in the context of charitable organizations, to cover only those activities that reduce the burdens of government. This has occasionally been suggested, but is generally disfavored, for two primary reasons: it would apply rather awkwardly to the case of religious organizations, and it would undermine the pluralism and diversity that are taken to be essential features of the charitable sector.

pres] reformers need a measure of *relative* performance by organizations serving admittedly charitable purposes," and as Professor Goodwin succinctly points out, "in any era, one person's well-considered passion is another's tilting at windmills."[151]

What is not discussed much is the fact that the public, private, and nonprofit sector symbiotic relationship underwent a major change in the late 1960s, a change Professor Kenneth Karst perhaps anticipated in his article cited in UMIFA commentary.[152] President Lyndon Johnson's Great Society and War on Poverty programs signaled the federal government's *abandonment* of its liberal democratic "posture of neutrality with respect to the good"[153] and its leap into a broad-based government charity effort implemented through a wide variety of new social initiatives.[154] Changing the government into a direct provider or financial supporter of diverse

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Moreover, . . . there is a further problem with trying to derive from that theory an intelligible concept of charitable efficiency. The traditional public benefit theory is designed to assess whether the overall purpose of an organization is charitable. It is an absolute test, which focuses primarily on purpose rather than performance. To give content to their notion of efficiency, however, [*cy pr*es] reformers need a measure of *relative* performance by organizations serving admittedly charitable purposes.

. . . .

"[*C*]*y pres*] reformers want the courts to be able to step in not only when the charitable purpose has failed utterly, but also when it is not going sufficiently well, and with modifications that are not necessarily minimal. For that they need a measure of 'well' which, unlike the standard of failure, cannot be directly derived from the notion of public benefit. The public benefit theory claims to give all that 'pure' [*cy pr*es] would require, a definition of 'doing good.' What the reformed [*cy pres*] theory needs, and what the public benefit theory of charity does not purport to give, is a measure of 'doing well at doing good.'" Atkinson I, *supra* note 105, at 1137–39.

151. Goodwin, *supra* note 114, at 114. Of course, trying to narrow the definition of "charitable" activities eligible for special tax treatment special tax treatment likewise would be difficult. *See* Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STET. L. REV. 395, 401 (1997) (hereinafter Atkinson III).

152. *See* Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfilled State Responsibility*, 73 HARV. L. REV. 433, 483 (1960). "In a time of ever-expanding state welfare services, perhaps the very institution of private philanthropy is wasteful. It might be possible to demonstrate that all charitable activities could be absorbed by various levels of government, operated at an overall reduction of cost, and paid for through progressively heavier taxation. Alternatively, government might exercise control over all private charity, directing in detail the employment of all charitable funds but permitting their formal existence as separate entities.

For better or worse (and who can doubt that it is for the better) our society has resisted such all-pervasive state control. We have believed that there are values in private charity which justify some immediate economic waste." *See id.*

153. Goodwin, *supra* note 114, at 112.

154. *See* Barry D. Karl & Stanley N. Katz, *The American Private Philanthropic Foundation and the Public Sphere 1890–1930*, 19 MINERVA 236, 242 (1981); Barry D. Karl, *Philanthropy, Policy Planning, and the Bureaucratization of the Democratic Ideal*, 105 DAEDALUS 129, 137 (1976). President Johnson's programs included (1) more support for the poor and elderly (Medicare, Medicaid, Food Stamps, expanded Social Security, urban redevelopment, and mass transit funding), (2) jobs programs (Job Corps, Peace Corps, VISTA), (3) support for public and bilingual education, (4) environment initiatives (clean air, clean water, auto emission standards), (5) the arts (PBS, NPR, NEA), and other new *governmental* priorities. *Great Society*, WIKIPEDIA, https://en.wikipedia.org/wiki/Great Society (last visited Nov. 15, 2021) [https://perma.cc/9ERX-U2MS]. Later administrations have continued to expand social programs, with little or no interest shown in restoring government "neutrality with respect to the good."

charitable services and social initiatives has had a major impact on society (and indirectly on demands for reform of state charity law) because the same differences in *political ideology* over federal "government charity policy"—i.e., its scope, its priorities, its implementation, and the roles that federal, state and local governments (and the nonprofit sector) play in it—unfortunately now spill over, politicize, and pervade much of the dialogue over whether and how *state* charity law should be reformed so that the nonprofit sector becomes more efficient and more responsive to an ever-changing (but impossible to define) "public interest" or "public good."[155] Ironically, government charity programs, which are not constrained by "dead hand" control from being reformed, suffer from the same efficiency and obsolescence problems as do donor-restricted funds in the nonprofit sector; and yet, there is no urgency or political will to fix government charity problems, perhaps because there is no consensus (and likely never will be) over: (1) how to define and determine what is in the public good; (2) how to make social programs run more smoothly or efficiently, much less take steps to root out fraud and abuse; (3) which social programs are obsolete, wasteful, or are failures, the funding of which can and should be cut, repurposed, or reallocated to new or better programs; or (4) how to pay for, prioritize, and control the escalating cost of government programs and the deficit spending required to sustain them.[156] In sum, the federal government's decision in the

155. *See generally,* C. Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. L.J. 697, 722–24 (2007) (hereinafter Chester III) ("General charitable intent is a very malleable concept that allows the court wide discretion in applying *cy pres* . . . . Accordingly, the court has more leeway to act in the service f a public good, without changing the property interests of individuals . . . . Now that charity is widely accepted as a private alternative to government projects, courts, when presented with an opportunity under the rather loose doctrine of *cy pres*, can choose to save the charitable trust for the public good while still believing that they are carrying out the settlor's basic intent."). I am more politically conservative than most lawyers. While I admire and respect the insight of legal scholars, who give us all a deeper understanding of the law, law professors (and lawyers in general) are predominantly more liberal than society as a whole, and those who share similar political ideologies also tend to reach similar conclusions. *See, e.g.*, Adam Bonica, Adam Chilton, Kyle Rozema, & Maya Sen, *The Legal Academy's Ideological Uniformity*, 1, 1–4, 32–34 (2018) https://scholar.harvard.edu/files/msen/files/law-prof-ideology.pdf [https://perma.cc/D8EL-FH4H]. "The belief that law professors are predominantly liberal not only is based on anecdotal evidence but also has been documented in a number of empirical studies. At least five studies investigate the political ideologies of law professors . . . . Although these studies use different samples and methods for identifying political ideology, all five find that between 75 percent and 86 percent of law professors are liberal." *Id.* at 5. "Political ideology affects legal decision-making. For example, political ideology affects the voting of Supreme Court justices (Segal and Spaeth 2002), influences the voting patterns of heterogeneous circuit court panels (Miles and Sunstein 2006), and even predicts the conclusions that law professors reach in their research (Chilton and Posner 2015). In fact, the relationship between ideology and legal decision-making is thought to be so strong and persistent that it is now widely believed to be one of the most influential factors in legal decisions (see, for example, Martin et al. 2004; Ruger et al. 2004)." *Id.* at 4.

156. It would seem much more efficient (and in the public interest and at national expense) to tackle government charity problems *first* in order to find the best ways to improve their efficiency and responsiveness to changing social needs rather than rewrite trust and property law as an experiment to achieve similar goals in the nonprofit sector.

1960s to abandon its classical liberal democratic principles that gained favor fifty years earlier during the Progressive Era arguably (a) is the major cause for the nonprofit sector's becoming increasingly dominated, in Professor Simon's words, "by market and ballot" rather than by "an individual choice system of decision-making;" (b) has ushered in a more collectivist (and much more politicized) view of the role that nonprofit institutions should play in society that underlies and drives reform efforts;[157] and (c) has fueled the demand for changes in *state law* to limit the "individual choice system of decision-making" that traditionally dominated the nonprofit sector. Professor Evelyn Brody observed that "[a] revenue-hungry sovereign cannot ignore the wealth held in the tax-exempt sector,"[158] and Congress is becoming increasingly revenue-hungry in view of growing demand for further expansion of government-supported social initiatives in furtherance of progressive public policy goals.[159]

Whether I am right or wrong in my interpretation of history, after decades-long calls for *cy pres* reform by academics went virtually unheeded, the ALI and the Commissioners took up the torch (and the pen) and began reshaping the *cy pres* doctrine and promoting other major reforms of trust law that materially dilute the importance of donor intent under the law. [160] This Article does not mean to suggest that either *cy pres* or trust law cannot be improved; however, I am leery when restatements of the law and Uniform Acts *change* the law without thoroughly describing the effects of their reforms, their practical applications and consequences, and their impact on individual property rights.

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157. *See* Erik D'Amato, *How the Battle Against Billionaires Could Reshape American Giving*, INSIDE PHILANTHROPY (Dec. 18, 2019) https://www.insidephilanthropy.com/home/2019/12/18/bujyx9dzdqq0n20jnykkl002nomz4e [https://perma.cc/9GMQ-HZ9F].

158. Evelyn Brody, *Who's Public Parochialism and Paternalism in State Charity Law Enforcement,* 79 IND. L. REV. 937, 971 (2004). Professor Brody noted that in 2004, "Congress was considering a proposal that would prohibit private foundations from counting some of their administrative expenses in the percentage of assets they must distribute to charities each year—motivated in part by the desire to free up more current private funds and reduce the load on overburdened governments." *Id.* at 971–72. More recently, *see, e.g.*, I.R.C. § 4968 (imposing excise tax on net investment income of some colleges and universities); Abby Schultz, *Philanthropists Push for Charitable Giving Reforms*, BARRON'S NEWS (Dec. 23, 2020), https://www.barrons.com/articles/philanthropists-push-for-charitable-giving-reforms-01608757973 [https://perma.cc/4ZFJ-QP8W] (reporting that a group of philanthropists, foundations and estate and gift tax experts are pushing for reforms, including requiring donor advised funds to make distributions and limiting their duration, and to try to incentivize private foundations to pay out at least 7% of their assets rather than 5%, an effort that led to the recently introduced "Accelerating Charitable Efforts Act").

159. Brody, *supra* note 158, at 971–72. Of course, there is also underway a reinvigorated progressive movement similar to that during the Lyndon Johnson administration seeking to expand existing social programs and to establish new ones. Absent additional revenue—by higher taxes or through reforms that enable (or compel) charities to "repurpose" or spend donor-restricted assets to be more responsive to current social priorities—the already exploding federal deficit will only get worse.

160. *See* Atkinson II, *supra* note 135, at 97; Chester III, *supra* note 155, at 706–07, 726–27.

3. UPMIFA's New Remedies

UPMIFA Section 6 replaced UMIFA's odd *judicial* restriction release remedy with two new ones that "derive from the approach taken in the Uniform Trust Code (UTC) for modifying charitable trusts"[161] and are more like trust law's equitable deviation and *cy pres* remedies. Section 6 also changed and expanded UMIFA's *extrajudicial* restriction release remedy and added a second extrajudicial *cy pres* remedy for small trusts.[162] Moreover, unlike the UTC,[163] UPMIFA does not grant the donor standing to seek relief in a *cy pres* proceeding, nor does it require that notice of those proceedings be given to the donor.[164] All of the new statutory remedies differ from their traditional trust law counterparts[165] as well as from those in the UTC; moreover, it is not clear why it was even necessary to create special remedies in UMIFA and UPMIFA rather than simply say that state law trust remedies and procedures will apply to institutional funds.

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161. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006). UPMIFA does not specifically address whether a donor can override or limit the court's power to modify restrictions the donor imposes under a gift instrument that is *not* a trust agreement (or whether the mandatory rules of the UTC are part of the "trust law" intended to apply under UPMIFA). *See* UNIF. TR. CODE §§ 105(b)(3), (b)(4), 404 (UNIF. L. COMM'N 2010).

162. *See* UNIF. TR. CODE § 413(a) (UNIF. L. COMM'N 2010).

163. *See id.* §§ 410(b), 413.

164. "Consistent with the doctrine of [*cy pres*], subsection (c) does not require an institution seeking [*cy pres*] to notify donors." UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 cmt. (c) (UNIF. L. COMM'N 2006). Standing was a topic discussed often by the Drafting Committee. *See* Susan Gary*, Report on NCCUSL Annual Meeting: Date for Fall Drafting Committee Meeting,* UNIF. L. COMM'N (Aug. 22, 2005), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e2422637-7110-18c8-3d9d-07ca9a5c2a3b&forceDialog=0 [https://perma.cc/D2Y8-LFW5] (hereinafter Gary August Memo). For example, a draft of the Act prior to the Commissioners' 2003 Annual Meeting contained a separate section that would have granted the donor standing to enforce donor restrictions. *E.g.*, *Drafting Committee Draft—April 03*, UNIF. L. COMM'N 15 (Apr. 2003), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=64f0f8d7-1e9d-d5cf-4b57-85f6fe29bd60&forceDialog=0 [https://perma.cc/Y6HN-UR6M]. Some Commissioners reviewing drafts of the Act also expressed concern that the Act did not grant donors standing to enforce restrictions when donor funds had been misspent, but the Drafting Committee concluded that UPMIFA "was not the right place to create standing." *See* Gary August Memo*, supra*; Susan Gary, *Fall Drafting Committee Meeting,* UNIF. L. COMM'N (Oct. 25, 2005), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f3ca1513-64ee-e7a2-5a75-16b33a6fbf56&forceDialog=0 [https://perma.cc/U2UV-PHME]. Similarly, the Committee considered whether a donor or the donor's family should be given notice when an institution sought to modify a small fund, with at least one member suggesting that even the attorney general should not be notified, with the Committee deciding to leave in notice to the attorney general and reaching a "consensus that notice beyond the original donor (to family, heirs, etc.) was not necessary or appropriate." Susan Gary, *Discussion topics for the November 14-16 meeting,* UNIF. L. COMM'N 4 (Oct. 20, 2003), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bcfb7381-43ba-b18b-857a-ab2731aae391&forceDialog=0 [https://perma.cc/KPE3-Y4PH].

165. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 cmt. (UNIF. L. COMM'N 2006).

a. New "Equitable Deviation" Remedy

The Commissioners apparently wanted to preserve, to some extent, the traditional distinction between equitable deviation and *cy pres* (with the former applicable to matters of administration and the latter reserved for adjusting charitable trust purposes).[166] UPMIFA Section 6(b) is loosely adapted from the reformed equitable deviation remedy of UTC Section 412:

> The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.[167]

If the modification relates only to the management or investment of an institutional fund, the institution must show only that the restriction has become "impracticable or wasteful" or impairs the fund's administration.[168] The way the statute is written (the Commissioners combined multiple UTC subsections into one), the court can do more than that when modifying a restriction to "*further* the purposes of the fund" because of circumstances not anticipated by the settlor.[169] However, unlike UTC Section 412 from which it was adapted, Section 6(b) does not specifically authorize the court to modify dispositive provisions or to terminate an institutional fund in

166. *See* Susan Gary, *Issues for Discussion (as of Jan. 3, 2006)*, UNIF. L. COMM'N 2 (Jan. 3, 2006), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d7210565-57f5-5564-6150-2cf06f5200c1&forceDialog=0 [https://perma.cc/6EUJ-BYXW] (hereinafter Gary January Memo). "Under the deviation doctrine, a court may modify restrictions on the way an institution manages or administers a fund in a manner that furthers the purposes of the fund. Deviation implements the donor's intent. A donor commonly has a predominating purpose for a gift and, secondarily, an intent that the purpose be carried out in a particular manner. *Deviation does not alter the purpose but rather modifies the means in order to carry out the purpose* . . . . Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations the restriction may impair the management or investment of the fund. Modification of the restriction may permit the institution to carry out the donor's purposes in a more effective manner . . . ." UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 cmt. (b) (UNIF. L. COMM'N 2006) (emphasis added).

167. UNIF. TR. CODE § 412(b) (UNIF. L. COMM'N 2010).

168. *Id.* § 412 cmt. (b). The words "obsolete" and "inappropriate" were removed from the old UMIFA standard in favor of "wasteful." UNIF. MGMT. OF INST. FUNDS ACT § 7(b) (UNIF. L. COMM'N 1972).

169. "Sometimes deviation is needed on account of circumstances unanticipated when the donor created the restriction. In other situations, the restriction may impair the management or investment of the fund." UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(b) (UNIF. L. COMM'N 2006).

furtherance of its purposes,[170] but like the UTC, Section 6(b) only requires any modification that is made to follow the donor's probable intent only "to the extent practicable."[171] Not brought forward into the new statute was the provision in UMIFA prohibiting any change to an endowment fund that causes it to no longer be one.[172]

UPMIFA Section 6(b) is much broader than the doctrine of deviation of the Restatement (Second) of Trusts, which applied only to restrictions relating to the investment or administration of a trust and permitted the trustee to deviate from the terms of a trust only when "compliance is impossible or illegal, or that owing to circumstances *not known to the settlor* and not anticipated by him the trustee's compliance *would defeat or substantially impair the accomplishment of* the purposes of the trust."[173] UTC commentary acknowledges that permitting the modification of a restriction because it would be impracticable or wasteful to comply with it "does not have a direct precedent in the common law."[174] By granting courts much more discretion than before to make changes to the donor's original plan, the new approach shifts the emphasis away from the donor's original intent toward the donor's probable intent and prioritizes the interests of the public as the "beneficiary" of the fund.[175] That is, the doctrine of deviation of the Restatement (Second) allowed a trustee to *deviate* from the settlor's restrictions in order to *accomplish* the donor's original purpose, as opposed to *modifying* the

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170. UNIF. TR. CODE § 412(a), (b) (UNIF. L. COMM'N 2010). UTC Section 412(a) allows the court to modify "the administrative *or dispositive terms* of a trust *or terminate a trust*" due to circumstances unanticipated by the settlor and provides that any modification made, "[t]o the extent practicable," be in accordance with the settlor's probable intention. UNIF. TR. CODE § 412(a) (UNIF. L. COMM'N 2010) (emphasis added). UTC Section 412(b) deals separately with modifications of "administrative terms" of a trust that have become "impracticable or wasteful or impair the trust's administration" and requires distributions upon trust termination to be "consistent with the purposes of the trust." UNIF. TR. CODE § 412(b) (UNIF. L. COMM'N 2010).

171. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(b) (UNIF. L. COMM'N 2006).

172. *See* Susan Gary, *New UMIFA Draft,* UNIF. L. COMM'N (June 3, 2005), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=60463aa5-bcfa-26ca-4eed-7a85ebefa1a7&forceDialog=0 [https://perma.cc/FF8X-K3SC]; Susan Gary, *UMIFA- Annual Meeting Draft*, (June 15, 2005), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cc794486-a573-2c5a-d495-a720251cf392&forceDialog=0 [https://perma.cc/VKP3-4WPX]; UNIF. MGMT. OF INST. FUNDS ACT § 7(c) (UNIF. L. COMM'N 1972).

173. RESTATEMENT (SECOND) OF TRS. § 381 (AM. L. INST. 1959). The court "is attempting to prevent a failure or substantial impediment of the purpose for which the settlor created the trust. It is permitting the trustee to do, not what the settlor intended to permit him to do, but what it thinks the settlor would have intended to permit if he had known or anticipated the circumstances which have happened . . . . *In so doing the court is not interpreting the terms of the trust, but is permitting a deviation from them in order to carry out the purpose of the trust*." SCOTT, *supra* note 3, §167 at 1280 (emphasis added).

174. UNIF. TR. CODE § 412 cmt. 73 (UNIF. L. COMM'N 2010). "Impracticable" is a word used to justify the exercise of *cy pres*, not deviation, but adding it to the equitable deviation remedy may be harmless *so long as* modifications under the statute can affect only the "management or investment" of the fund and not fund expenditures or charitable purposes. *Id.*

175. *Id.* §§ 412, 404 cmt.

settlor's restrictions to "*further* the purposes of the fund."[176] It is certainly much easier for a court to justify intervening to further a fund's purpose than to prevent a restriction from defeating or substantially impairing the accomplishment of the trust's original purpose tied to donor intent.[177]

In sum, rather than extend a traditional trust law remedy to institutional funds,[178] UPMIFA Section 6(b) instead creates a custom statutory remedy that is not equitable deviation but something else—a new remedy based on UTC Section 412 and the Restatement (Third) of Trusts but using wording that does not track either one of them.

b. New Judicial "Cy Pres" *Remedy*

UMIFA's odd judicial release remedy and simple reference to *cy pres* were replaced with a new statutory *cy pres* remedy found in UPMIFA Section 6(c) that reads:

> If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard.[179]

UPMIFA commentary confirms that its *cy pres* standard "comes from UTC § 413."[180] UTC Section 413 commentary indicates that in addition to "dead hand" problems, Section 413 responds to "concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose."[181] The UTC and the Restatement (Third) of Trusts take a new approach to *cy pres*.[182] UTC Section

176. RESTATEMENT (SECOND) OF TRS. § 381 (AM. L. INST. 1959). The court "is attempting to prevent a failure or substantial impediment of the purpose for which the settlor created the trust. It is permitting the trustee to do, not what the settlor intended to permit him to do, but what it thinks the settlor would have intended to permit if he had known or anticipated the circumstances which have happened . . . . *In so doing the court is not interpreting the terms of the trust, but is permitting a deviation from them in order to carry out the purpose of the trust*." SCOTT, *supra* note 3, §167 at 1280 (emphasis added).

177. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 cmt. (b) (UNIF. L. COMM'N 2006). *See* RESTATEMENT (THIRD) OF TRS. § 66 cmt. a (AM. L. INST. 2012) ("The objective of the rule allowing judicial modification (or deviation) . . . [is] not to disregard the intention of a settlor. The objective is to give effect to what the settlor's intent *probably would have been* had the circumstances in question been anticipated." (emphasis added)).

178. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).

179. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) (UNIF. L. COMM'N 2006).

180. *Id.* cmt. (c).

181. UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010).

182. *See id.*; RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2012).

413, like the Restatement (Third) of Trusts, "Updates the circumstances under which [*cy pres*] may be applied by adding 'wasteful' to the usual common law articulation of the doctrine."[183] Restatement (Third) of Trusts Section 67 commentary suggests that the word wasteful is intended to allow only surplus assets of an endowment fund to be used for other charitable purposes of an institution.[184] Neither the UTC nor UPMIFA discusses the intended meaning of wasteful used in their new standards.[185] For example, as one writer observed:

> The 'wastefulness' standard [of the UTC] awaits significant case law. It will be of interest to see whether courts apply an economic or efficiency analysis (e.g., reasoning that a restriction may be modified for wastefulness simply because adherence to it is no longer an economically efficient allocation of limited resources) or apply a more objective analysis grounded in donor intent (e.g., reasoning that a restriction may be modified for wastefulness only if assets have appreciated dramatically since the gift was made and only to the extent the appreciation exceeds the amount that could reasonably be applied for the original purpose).[186]

While UPMIFA's *cy pres* standard may have its roots in UTC Section 413, the Commissioners left half of them behind when transplanting—namely, that part of UTC Section 413 deals with *cy pres'* general charitable intent requirement.[187] UTC Section 413(a) provides: "Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful,

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183. "Section 413 codifies and at the same time modifies the doctrine of [*cy pres*], at least as applied in most States." UNIF. TR. CODE art. 4 general cmt. (UNIF. L. COMM'N 2010). Adding "wasteful" is more than an "update" of the *cy pres* standard, as it expands the court's power to change a donor's dispositive scheme.

184. RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2012). The Restatement (Third) of Trusts Section 67 provides that "to the extent it is or becomes wasteful *to apply all of the [donor's] property to the designated purpose* . . . the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose" *Id.* (emphasis added). *Cy pres* cannot be exercised merely because "it can be demonstrated that the trust funds could be better spent on some other purpose." *Id.* § 67 cmt c. *Surplus funds* can be used for a "different but reasonably similar charitable purpose" when the donor's endowment fund holds assets "not reasonably needed for the original purpose." *Id.* cmt. c(1) (surplus funds). "The term 'wasteful' is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely 'better use' will suffice." *Id.*; *see* Edward C. Halbach, Jr., *Uniform Acts, Restatements and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1902 (2000).

185. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. L. COMM'N 2006). Another commentator recommends limiting "wasteful" to the narrower "surplus funds" approach (more like that implied in the Restatement (Third) of Trusts) in order to protect donor intent. Eric G. Pearson, *Reforming the Reform of the* Cy Pres *Doctrine: A Proposal to Protect Donor Intent*, 90 MARQ. L. REV. 127, 149–50 (2006); *see In re* Est. of *Beryl Buck*, No. 23259 (Cal. Super. Ct., Marin Cty., 1986), (*reprinted in* 21 U.S.F. L. REV. 691, 691 (1987)); Simon, *supra* note 105.

186. John Sare, *Changing Donor-Imposed Restrictions:* Cy Pres *and Equitable Deviation*, N.Y. CMTY. TR. (June 7, 2013) https://www.nycommunitytrust.org/newsroom/professional-notes/changing-donor-imposed-restrictions-cy-pres-and-equitable-deviation/ [https://perma.cc/VK5G-MWZL].

187. UNIF. TR. CODE § 413(a) (UNIF. L. COMM'N 2010).

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."[188] Note that Section 413(a) does not mention general charitable intent at all, and on its face appears to extinguish the donor's reversionary interest.[189] Nor does UTC Section 413(b) limit the impact of subsection (a) on the donor's reversionary interest.[190] Rather, it clarifies and expands Section 413(a) to also invalidate all gifts over to noncharitable beneficiaries under the terms of a trust agreement and thereby override the settlor's different directions in the gift instrument *unless*, at the time the gift over takes effect, (1) the settlor's property "is to revert to the settlor and the settlor is still living" or (2) the charitable trust has been in existence fewer than 21 years.[191]

Yet, UTC commentary suggests that Section 413 "modifies [*cy pres*] by presuming that the settlor had a general charitable intent" and explains: "In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely

188. *Id.*

189. *Id.*; Chester III, *supra* note 155, at 706–07; *see* Chester II, *supra* note 105, at 69–70.

190. *Id.*; Chester III, *supra* note 155, at 707–09; Chester II, *supra* note 105 at 69–70. Professor Chester's views on *cy pres* were considered by the Drafting Committee and his earlier law review article was cited in the commentary under Section 423. *See* David English, *November Meeting,* UNIF. L. COMM'N (Oct. 21, 1999), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=37476a88-8c7e-91a4-1147-ac7804857b6c&forceDialog=0 [https://perma.cc/25F9-2WHQ; UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010).

191. *See id.* § 413(b). UTC Section 413(b) provides: "A *provision in the terms of a charitable trust* that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply [*cy pres*] to modify or terminate the trust *only if, when the provision takes effect*: (1) the trust property *is to revert* to the settlor and the settlor is still living; or (2) fewer than 21 years have elapsed since the date of the trust's creation." *Id.* (emphasis added). The original plan was for the statute to allow only express "gifts over" to charitable organizations "or, *if the provision directs* that the trust property be distributed to a noncharitable beneficiary, less than 30 years have elapsed since the date of the trust's creation." *See* English, *supra* note 190 (concerning Section 408 and UTC 1999 Meeting Act) (emphasis added). Thereafter, the Committee expanded the statute to allow the donor's property to "revert" to the settlor as a gift over (and to shorten the thirty-year period applicable to other individuals to twenty-one years). *Compare* UNIF. TR. CODE § 413(b) (UNIF. L. COMM'N 2010), *with Proposed Revisions of the Uniform Arbitration Act,* UNIF. L. COMM'N (Oct. 1999), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f0d23f0b-66aa-90ba-fd67-3476979a6933&forceDialog=0 [https://perma.cc/6J34-VK2T] *and Unif. Tr. Code*, UNIF. L. COMM'N (Apr. 2001), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ca59dfc8-cdb5-4b71-f485-938b0f664cbc&forceDialog=0 [https://perma.cc/6CY7-VNQE]. It might have been better to use the term "distributed" rather than "revert" to make it clearer that the property passed back to the settlor pursuant to the terms of the gift agreement and not by operation of law. *See generally* Lopez, *supra* note 81, at 1323 (analyzing and criticizing the new *cy pres* approach of the UTC and the ALI).

such purpose may have been expressed by the settlor."[192] The mere fact that courts have chosen to find that donors had general charitable intent *in cases* where no evidence of it existed does not prove that most settlors actually have that intent so as to justify establishing a new *presumption of general charitable intent*.[193] Nor does it make sense under the UTC for settlors to be presumed to have a general charitable intent for certain gifts simply because the *recipients* of those gifts are charitable institutions when the default presumed intent rule traditionally applied to all gifts (and continues to apply elsewhere under the UTC) requires that when a gift or a trust fails, the donor's property reverts to the donor or the donor's estate beneficiaries.[194] This includes trusts for animals and other "purpose" trusts under the UTC.[195]

The ALI adopted a simpler approach in Restatement (Third) of Trusts Section 67, which provides that when the donor's charitable purpose

192. UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010). Yet, the commentary immediately thereafter goes on to say, "Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, *the trust does not fail.* The court instead *must* either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes." *Id.* (emphasis added).

193. *See supra* text accompanying note 121.

194. *See supra* text accompanying note 77; *compare* UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010) *with* UNIF. TR. CODE §§ 408, 409 (UNIF. L. COMM'N 2010).

195. *Id.*; *see* Thomas E. Simmons, *Purpose Trust* Cy Pres, 45 ACTEC L.J. 67, 67–71 (Fall, 2019). For instance, UTC Section 408(c) governing trusts for animals provides, "[e]xcept as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest," thus following the same traditional "default" rule that failed gifts revert to the settlor or the settlor's estate (and why the burden of proving the existence of "general charitable intent" fell on the charitable institution in *cy pres* proceedings). UNIF. TR. CODE § 408(c) (UNIF. L. COMM'N 2010). Consider the following example showing how differently UTC Sections 408 and 413 apply: Assume that a decedent leaves a will providing (1) a $100,000 specific bequest to a trust to care for his three young pet parrots until the last of them dies, with no other instructions, (2) a second specific bequest of $200,000 to the SPCA to establish a perpetual endowment fund so long as it is used to provide care for parrots that are "found sick in the wild or have been abandoned by their owners," and (3) for the rest of his estate to pass "to my son," without naming an alternate residuary beneficiary. Finally, assume that (a) the testator's son predeceases him, leaving no descendants; (b) after twenty-five years the SPCA parrot endowment becomes impossible to carry out or is "wasteful"; and (c) the last of the testator's three parrots dies seventy-five years later, with $10,000 left in "parrot trust." The residuary estate would pass to the testator's intestate heirs as his estate beneficiaries. The $10,000 left in the "parrot trust" likewise would pass to the same intestate heirs (or their successors in interest) under the UTC § 408(c). *See id.* Yet, pursuant to the terms of UTC § 413 (if applied under UPMIFA), the property left to the SPCA *must* remain dedicated to charity because the donor is presumed to have had a general charitable intent, and as a result, the donor's gift *will not fail and will not revert* to the donor's estate and be distributed to his intestate heirs (and *would not be distributed* to any other individual the testator might have designated in his will to receive those assets in the event the SPCA gift failed because the endowment fund lasted more than twenty-one years). *See id.* § 413. Both parrot gifts served a similar purpose—the care of otherwise homeless birds—and are in that sense charitable. Both parrot gifts also had the potential "clogging of title and other administrative problems" associated with the lapse of time—and in fact, that problem was three times worse for the "parrot trust" (seventy-five-year term) than the "public charitable trust" (twenty-five-year viable term). *See id.* § 413 cmt. Yet, Section 408 does not require the unused funds of the parrot trust to remain devoted to similar charitable purposes or invalidate gifts over to individual beneficiaries occurring more than twenty-one years after the testator's death to address administrative problems. *See id.* § 408.

becomes illegal, impossible, or impracticable to achieve or it would be "wasteful to apply all of the property to the designated purpose," the trust will not fail and the court *will* exercise its *cy pres* power.[196] Like UTC Section 413, and unlike Restatement (Second) Section 399, the ALI's reference to a new *presumption* of general charitable intent appears only in the commentary.[197] Interestingly, the Reporter's Notes describe the basic rule of Section 67 as requiring "that any intent of the settlor contrary to the application of [*cy pres*] be manifested in the terms of the trust (*displacing the traditional quest for a settlor's 'general charitable intent'* when the trust terms are—as is usual—silent on the matter)."[198] In sum, it is not clear whether the UTC and the Restatement (Third) of Trusts do establish a new *presumption* of general charitable intent *and* still require a judicial finding of general charitable intent before the court power can exercise its *cy pres* power or whether they simply replace the traditional default rule favoring reversion to the donor (which helped *cy pres* originally gain acceptance by the states as protective of donor intent) with a *new statutory rule no longer tethered to donor intent*.[199] Courts will have to decide whether or not the UTC and Restatement (Third) of Trusts indeed create presumptions of general charitable intent, and if so, whether those presumptions are rebuttable.[200]

Turning back to UPMIFA Section 6(c) itself, that statute reads more like Restatement (Third) of Trusts Section 67 than UTC Section 413 on which it is based.[201] The Commissioners do not explain why they omitted much of

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196. RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2012). Section 67 of the Restatement (Third) of Trusts reads: "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.*

197. *Id.* § 67 cmt. b.

198. *Id.* (emphasis added). "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 Section 4) express a contrary intention." *Id.*

199. *See supra* text accompanying notes 117–26.

200. *See* Paul F. Rothstein, *Demystifying Burdens of Proof and the Effect of Rebuttable Evidentiary Presumptions in Civil and Criminal Trials*, GEO. UNIV. L. CTR. (2017), 1, 16–24 https://poseidon01.ssrn.com/delivery.php?ID=873102088082121006103021088085085071063022072087058011076073015078083011067085099014062000018022024047055080007000030112072111107069090006054114105123082070001006060020071009113123003023003006104068121091089116002067016029068116092091109126064121088&EXT=pdf&INDEX=TRUE [https://perma.cc/GCV6-LAQD]; Edward L. Barrett Jr., *Judicial Supervision of Legislative Classifications - A More Modest Role for Equal Protection*, 1976 BYU L. REV. 89, 122–30 (1976); *Michael H. v. Gerald D.*, 491 U.S. 119, 119–21 (1989). One commentator has characterized the presumption of general charitable intent *under the UTC* as "conclusive," which may be correct (and mean that the statute's presumption really is just a new statutory rule. *See* Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the* Cy Pres *Doctrine*, 31 CARDOZA ARTS & ENT. L.J. 1, 15 (2012). For another critique of the UTC's changes of *cy pres* and the presumption of general charitable intent, *see* Lopez, *supra* note 81, at 1342–47.

201. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (c) (AM. L. INST. 2006).

UTC Section 413 in Section 6(c),[202] do not affirm that Section 6(c) establishes a new presumption of general charitable intent, and do not indicate whether or not proof of the existence of "general charitable intent" is still required before *cy pres* relief can be granted. Rather, in the statute the Commissioners simply describe the grounds and circumstances under which *cy pres* can be exercised, state the remedy, and then confirm in commentary that "Subsection (c) applies the rule of *cy pres* from trust law," without saying *how much* "trust law"[203] the Commissioners intended to import or which version of it. That is, the statute does not indicate whether the court should follow the omitted provisions of UTC Section 413, the Restatement (Third) of Trusts (or its "presumption" of general charitable intent found only in its commentary), or the traditional general charitable intent requirement expressed in the Restatement (Second) of Trusts.[204] Nor does the commentary under UPMIFA Section 6(c) say much about donor intent or illuminate how close the court's new charitable purpose must be to the donor's original purpose in order to be "consistent with the charitable purposes expressed in the gift instrument."[205] In fact, UPMIFA Section 6(c) clearly shifts the focus

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202. *Id.* § 6 cmt. Note that unlike UTC Section 413, UPMIFA Section 6(c) authorizes a court to modify "a restriction on the use of the fund," language used under UMIFA's restriction release remedies. *Id.* The commentary does not explain why the statute retained that phrase. *See id.* Nor is there clarification of what a restriction on "use" means—i.e., "use" in the sense of "consumption" of the fund through distributions or how fund distributions are "used" (purpose). *See id.* Nor is it clear why the Commissioners did not adopt instead the "applied or distributed" terminology of UTC Section 413(a)(3). *Id.*

203. *Id.* § 6 cmt. (c) (emphasis added). Nor did I find discussion of general charitable intent in Drafting Committee materials. The draft commentary accompanying earlier drafts of the Act contained a sentence confirming that the new judicial *cy pres* remedy "is intended to make the case law under [*cy pres*] applicable to institutions covered by UPMIFA and does not limit the doctrine of [*cy pres*]." E.g., *Draft for Approval: Uniform Prudent Management of Institutional Funds Act*, UNIF. L. COMM'N (2006), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=db2e2cfa-f60d-2f77-b417-424abdf337cc&forceDialog=0 [https://perma.cc/HZL6-AUED]. That sentence was appropriately deleted in the final commentary presumably because (1) the general charitable intent requirement was an important factor under prior case law (and was not addressed under UPMIFA), and (2) it is unclear whether and how that case law is relevant under a different standard and reversed presumption.

204. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) (AM. L. INST. 2006). UPMIFA Section 6 comment Subsection (c) contains only a "see also" reference to Restatement (Third) of Trusts Section 67, and that citation follows a sentence confirming that changes "must be made in a manner consistent with the charitable purposes expressed in the gift instrument." *Id.* Nor did I find much discussion in Restatement (Second) of Trusts Section 67 commentary highlighting that the settlor's presumed intent under the law applicable to all gifts had been *reversed solely with respect to certain charitable gifts* and its practical impact on settlors. *See* RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2012). Rather, the commentary simply states that "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 . . . [and] 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 . . . express a contrary intention." *Id.*

205. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) cmt. (UNIF. L. COMM'N 2006). The UTC commentary refers to the existence of a new presumption of general charitable intent, thereby at least suggesting that the donor's "general charitable intent" is still relevant in *cy pres* proceedings. UNIF. TR. CODE § 4 cmt. (UNIF. L. COMM'N 2010); *compare* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) cmt. (UNIF. L. COMM'N 2006) *with* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(d) cmt (UNIF. L. COMM'N 2006) (permitting small institutional funds to be *extrajudicially* modified in order "to balance

away from the donor as a person (and the *donor's actual intent* at the time of the gift) to the *stated, particular charitable purpose* in the gift instrument.[206]

In sum, unless Section 6(c) is interpreted to apply one of the other two new standards (or to adopt the new "presumption" of general charitable intent that both of those invoke only in commentary and not in text), then the "rule of [*cy pres*]" under UPMIFA Section 6(c) could depend on other organizational law that might control (and whether that law applies a particular trust law rule).[207] It could also depend on, in UTC states, whether the guts of UTC Section 413 *left out* of UPMIFA Section 6 should be considered to have been rejected by the Commissioners, including the presumption of general charitable intent found in UTC commentary, or in non-UTC states, whether the state follows the new standard of the Restatement (Third) of Trusts Section 67 or the traditional *cy pres* standard of Restatement (Second) of Trusts Section 399.[208] Note also that, unlike UMIFA's odd but freestanding remedies, UPMIFA Section 6(c) does not address procedural rules to be followed in *cy pres* proceedings brought under the statute other than to confirm that only an institution has standing to seek *cy pres* relief and that donors do not have to be given notice of the proceeding.[209]

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the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent" by (1) prohibiting modification unless it has been in existence more than twenty years "*as a further safeguard for fidelity to donor intent*" and (2) stating that "[a]s under judicial *cy pres*, an institution acting under subsection (d) must change the restriction in a manner that *is in keeping with the intent of the donor* and the purpose of the fund . . . [and] the institution must determine which alternative use for the fund reasonably approximates *the original intent of the donor* . . . [and] cannot divert the fund to an entirely different use" (emphasis added)).

206. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) (UNIF. L. COMM'N 2006). Moreover, if the court's job is to modify the donor's charitable purpose "in a manner consistent with the charitable purposes expressed in the gift instrument," then how is it *consistent* to allow a donor's assets to be redeployed and used for a charitable purpose *not expressed* in the gift instrument when the donor's own specifically described charitable purpose is still viable but simply "wasteful"? *See id.* This conscious move away from donor intent is further illustrated in Section 201(e) of the very recently approved Uniform Fiduciary Income & Principal Act, where the Commissioners *removed both "purpose" and "intent of settlor***"** from the list of factors required to be considered by the trustee when exercising its redefined power of adjust and new unitrust conversion power in Sections 201(d) and 303 of that Act. UNIF. FIDUCIARY INCOME & PRINCIPAL ACT §§ 201(d), 303 (UNIF. L. COMM'N 2018). "Divining or guessing subjective elements like 'purpose' and 'intent' are not a reasonable burden to place on a fiduciary, whereas 'terms of a trust' is defined . . . to be 'the *manifestation* of the settlor's intent' in an objective medium." *Id.* § 201 cmt. (emphasis added).

207. UPMIFA's prefatory note explains that "[f]or matters not governed by UPMIFA, a charitable organization will continue to be governed by rules applicable to charitable trusts, if it is organized as a trust, or rules applicable to nonprofit corporations, if it is organized as a nonprofit corporation."). UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006); *see* UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010) ("The doctrine of [*cy pres*] is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. *This section does not control dispositions made in nontrust form*. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, *which would include this Code*." (emphasis added)).

208. *Id.*

209. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) (UNIF. L. COMM'N 2006).

Finally, prior to reform, courts did not have to pay much attention to what "general charitable intent" meant because it was only necessary to look for it when the donor's particular charitable purpose became illegal, impracticable, or impossible to achieve.[210] So long as the donor's intent was broader than the donor's specific purpose, that was enough.[211] Now that *cy pres* is exercisable when the donor's charitable purpose is only wasteful, and the presumption of general charitable intent has been reversed, defining exactly what a donor's presumed general charitable intent means is much more important because any statute establishing a "default" rule concerning donor intent should reflect what most donors *actually intend*.[212] Should the donor's new presumed general charitable intent mean: "I want my money spent as directed for this particular charitable purpose, but if that becomes impossible or wasteful, then spend it on something better"? If so, does that match what most donors actually intend? Frankly, I suspect most donors, if asked whether they actually have a broader charitable intent beyond accomplishing their specific charitable purpose, would more likely say: "I want my money spent as directed for this particular charitable purpose, but if it ever becomes *impossible* to use my money for this purpose, then use it for a purpose *as close to mine as possible*."[213]

No matter how one interprets UTC Section 413 and UPMIFA Section 6(c), the real purpose of both statutes seems clear—i.e., to ensure that property donated for a particular charitable purpose never reverts to the donor or the donor's successors absent express provisions to the contrary in the gift instrument (with the UTC going even farther and also invalidating as well most "gifts over" to noncharitable beneficiaries).[214] Moreover, *assuming* there is still a presumption of general charitable intent under UPMIFA Section 6(c) and that presumption is "rebuttable,"[215] the Commissioners have taken additional steps to "stack the deck" against the donor because (1) relief under UPMIFA Section 6(c) is tied to the purposes "expressed in the gift instrument" and (2) the statute may limit what evidence can be introduced to

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210. *See* RESTATEMENT (SECOND) OF TRS. § 399 (AM. L. INST. 1959).

211. *Id.*

212. In the comment to UTC Section 413, the Commissioners conclude that when a settlor does not direct otherwise, "In the great majority of cases the settlor would prefer that the property be used for other charitable purposes "rather than revert to him or his estate." UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010); *see* Susan M. Gary, *The Problem with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 1023–24 (2010); Hirsch I, *supra* note 35 at 86–89. (In his interesting article, Professor Hirsch notes that having a different "presumed donor intent" rule for charitable trusts than other trusts is hard to justify.).

213. One commentator suggests that since a donor rarely expresses what he intends to happen when his or her specific charitable purposes no longer can be carried out, a "presumption of specific charitable intent" would be more appropriate. Lopez, *supra* note 81, at 1342–47.

214. *See* UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(c) (UNIF. L. COMM'N 2006).

215. *See* RESTATEMENT (THIRD) OF TRS. § 67 (AM. L. INST. 2012). The Restatement (Third) of Trusts Section 67's presumption may be rebuttable, but only if "the terms of the trust (defined in § 4) express a contrary intention." *Id.*

show that the donor did not have a general charitable intent because the gift instrument is defined to consist of written "*records* . . . under which property is granted to, transferred to, or held by an institution as an institutional fund."[216] Just in case those changes were not enough, the Restatement (Third) of Trusts Section 67 adds:

> The mere fact that the terms of the trust provide that property shall be devoted "forever" to a particular charitable purpose, or that it shall be devoted "only" to that purpose, or that the property is given "upon condition" that it be applied to that purpose, does not necessarily indicate the absence of a more general charitable commitment on part of the settlor. Such language may merely emphasize the intention of the settlor that the property should not be applied to other charitable purposes as long as it is practicable to apply it to the specific purpose. *Thus, such language alone does not sufficiently express an intention that cy pres should not apply* and that the trust is to terminate if it should become illegal, impossible, or impracticable to carry out the particular purpose.[217]

In sum, reasonable persons may disagree whether or not, from a public policy standpoint, donors should be presumed to have a general charitable intent; however, coupling an expansion of *cy pres* grounds with either a *reversal* of the burden of proof of general charitable intent or its elimination as a requirement together, suggests to me that the Commissioners and the ALI were more interested in *declaring* donor intent rather than in *ascertaining*

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216. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(8) (UNIF. L. COMM'N 2006) (emphasis added); *see supra* note 205 and accompanying text. UPMIFA's comment (a) to Section 4 provides: "Section 4 looks to *written* documents as evidence of donor's intent and does not require an institution to rely on oral expressions of intent. By requiring written evidence of intent, the Act protects reliance by the donor and the institution on the written terms of a donative agreement. Informal conversations may be misremembered and may be subject to multiple interpretations. Of course, oral expressions of intent may guide an institution in further carrying out a donor's wishes and in understanding a donor's intent." UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4 cmt. (a) (UNIF. L. COMM'N 2006) (emphasis added). Nor is it clear to me what pre-gift and post-gift records (other than an institutional solicitation) might qualify as ones "under which property is *granted to, transferred to, or held by* an institution" and therefore part of the gift instrument now determinative of the donor's purpose or intent, *especially if post-gift* records "held by" the institution that purport to document or reflect the donor's *earlier original* intent (and susceptible to being inaccurate or misremembered by the donor) can be considered. *See* Mass. Atty Gen., *Modification of Institutional Funds & M. G. L. Ch. 180A § 5(d), Frequently Asked Questions*, (April 11, 2016), https://www.mass.gov/files/documents/2016/08/to/ch180a-faq.pdf [https://perma.cc/ZL3U-5DUS] (Second question on p. 2).

217. RESTATEMENT (THIRD) TRS. § 67 cmt. b (AM. L. INST. 2012) (emphasis added). Similar language under Restatement (Second) of Trusts § 399 cmt. b weakened the traditional presumption favoring reversion to the donor or the donor's estate. *See* RESTATEMENT (SECOND) OF TRS. § 399 cmt. b (AM. L. INST. 1959). Modifying and retaining that language in the Restatement (Third) of Trusts thus reinforces the reversed presumption of intent favoring charitable institutions, giving the new *cy pres* a "double dose" of medicine against the "dead hand" donor control disease that ails it! *See id.*; RESTATEMENT (THIRD) TRS. § 67 cmt. (b) (AM. L. INST. 2012).

and promoting it.[218]

c. Constitutional Law Issues for "Cy Pres" *Statutes*

Professor Scott stated in his treatise that "[t]he legislature has the power, of course, by general acts to liberalize the doctrine of *cy pres* applicable to all trusts, whether created before or after the enactment."[219] He also confirmed, however, that "[c]ertainly the legislature has no power to divert the property to another charitable purpose if it is possible to carry out the original purpose,"[220] and when *cy pres* is exercised judicially, "the property should nevertheless be applied only to purposes approximating those of the testator."[221] As discussed above, both the UTC and UPMIFA go beyond those limits by selectively modifying trust and property law rules that define what most donors are presumed to intend in order to apply a different rule only to reversionary interests burdening property held by charitable institutions or in charitable trusts and endowments subject to donor restrictions.[222] No matter one's view of the wisdom of *cy pres* reforms, the statutory *means* chosen to effectuate them—the practical effect of which is to transfer the donor's vested reversionary interest to a charitable institution for no consideration and without notice—appear to violate procedural due process requirements of the U.S. Constitution and perhaps substantive due process requirements as well.[223] Interestingly, the U.S. Supreme Court recently has begun to take

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218. "[L]awmakers rationalize the cy pres doctrine as an intent-effectuating rule of construction. Rules of construction are supposed to operate whenever a testator would wish them to, not (merely) when she happens to be of a socially magnanimous frame of mind. Certainly, no other rule of construction found within the law of wills is held out to the testator as a reward for tailoring her estate plan in a manner lawmakers would prefer." Hirsch I, *supra* note 35, at 88–89. "A scholarly consensus appears to be forming in support of the view that the traditional cy pres doctrine is insufficiently intrusive to avoid obsolescence of charitable bequests and that it ought to be new-modelled, either to permit revision of a purpose in the face of undesirability, rather than literal uselessness, or to render any purpose subject to revision at the trustee's discretion after a set number of years has passed . . . . Such an approach pays insufficient regard to the strong intent a testator may have to accomplish some fixed purpose . . . . But whatever approach is thought best, the point to be emphasized here is that the problem of purpose-obsolescence arises in connection with bequests for social purposes of all sorts, and so the solution chosen, be it orthodox cy pres or some reformed variant of the doctrine, ought to apply across the board, not merely to charitable bequests. Once that is the case, the argument that bequests for noncharitable purposes have to be limited temporally in order to avoid obsolescence loses its analytic force." *Id.* at 89–90 n. 203; *see* Lopez, *supra* note 81, at 1342–47.

219. SCOTT, *supra* note 3*,* § 399.5 n. 7.

220. *Id.* § 399.1 n. 10. at 3093 (citing Section 399.5).

221. *Id.* § 399.1 at 3092–93. He also confirmed that the power of the legislature by special acts to control the administration of trusts already created is limited by the provisions of the federal and state constitutions . . . . It is clear, at any rate, that where it is possible to carry out the purposes of a charitable trust, the legislature cannot direct that trust property be applied to other charitable purposes, nor can it control the administration of a trust." *Id*. § 399.5 at 3131. *See also* RESTATEMENT (SECOND) OF TRS. § 399 cmt. h (AM. L. INST. 1959).

222. *See supra* Section III.B.

223. *See, e.g.*, John G. Stephenson III, *Constitutional Inviolability of Possibilities of Reverter and Rights of Entry in Florida*, 6 UNIV. MIA. L. REV. 162, 162–67 (1952); Robert M. Zuber, *Validity of the*

special interest in *cy pres*[224] and its impact on individual property rights in connection with federal class action settlements in which *cy pres* principles are sometimes applied.[225]

i. Notice and Procedural Due Process Issues

In a traditional *cy pres* proceeding, the court determines (1) whether it is impossible to achieve the settlor's particular charitable purpose and (2) whether the donor had a "general charitable intent," and *each* determination materially impacts the property rights of the donor or the donor's estate beneficiaries.[226] Yet, under UPMIFA Section 6(c): "Consistent with the doctrine of *cy pres*, subsection (c) [of Section 6] does not require an institution seeking *cy pres* relief to notify donors,"[227] without addressing in the statute or in the commentary the impact of those proceedings on the donor's reversionary interest.

The U.S. Supreme Court has held in a long line of cases, beginning with *Mullane v. Central Hanover Bank & Trust Company*:[228] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[229] In *Mullane*, the trustee of a common trust fund filed a claim seeking a discharge from liability for its administration of the fund pursuant to a state statute that required only notice by publication to all trust beneficiaries whose interests would be bound by

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Nebraska Reverter Act, 39 NEB. L. REV. 757, 767–77 (1960); John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312, 318–24 (2003); *see generally* Evans v. Abney, 396 U.S. 435, 437 (1970); Lawrence J. Casazza, Note: *Constitutional Law – Estates – Reversion of the Res of a Charitable Trust Which Failed Because It Necessitated Racially Discriminatory State Action Is Not Violative of the XIVth Amendment Where the Reversion is by Operation of State Law, and Due to the State Court's Refusal to Apply the Doctrine of* Cy Pres, 2 LOY. UNIV. CHI. L.J. 390 (1971); Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 UNIV. PITT. L. REV. 153 (1986).

224 *See, e.g.*, Marek v. Lane, 134 S. Ct. 8, 8–9 (2013) (showing statement of Justice Roberts in connection with denial of petition of writ of certiorari); Frank v. Gaos, 139 S. Ct. 1041, 1046–48 (2019) (Thomas, J., dissenting).

225. *See* Martin H. Redish, Peter Juliana, & Samantha Zyontza, Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 638–41 (2010); Alexandra D. Lahav, *Are Class Actions Unconstitutional?,* 109 MICH. L. REV. 993, 993–99 (2011); Rhonda Wasserman, Cy Pres *in Class Action Settlements*, 88 S. CAL. L. REV. 97, 117–25 (2014); Martin H. Redish, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1130–31, 1138–42 (2020).

226. *See, e.g.*, Evans v. Abney, 396 U.S. 435, 441–43 (1970).

227. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 cmt. (c) (UNIF. L. COMM'N 2006).

228. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U. S. 306 (1950).

229. *Id.* at 314; *see* Tulsa Prof. Serv., Inc. v. Pope, 485 U.S. 478, 484 (1988) (requiring notice by mail to known or "reasonably ascertainable" creditors of a decedent before their claims could be barred under a nonclaim statute in a probate proceeding); Mennonite Bd. of Missions v. Adams*,* 462 U.S. 791, 791–99 (1983) (holding that mortgagee entitled to more than notice by publication before a tax sale).

the discharge. The special guardian and attorney ad litem (appointed to represent all beneficiaries who failed to appear), by a special appearance that was overruled, challenged the sufficiency of the statutory notice. The trial court proceeded to hear the matter and grant a discharge. On appeal, the U.S. Supreme Court reversed, holding that "notice [by publication] of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."[230] Under UPMIFA, absent notice of a *cy pres* proceeding, it seems clear that the donor or the donor's estate beneficiaries will be deprived of "an opportunity to present their objections" and protect their interests in the outcome of that proceeding.[231] Under *Mullane* and its progeny, it seems that notice must be given to the donor or the donor's beneficiaries, at a minimum by mail, or perhaps coupled with citation by publication with the appointment of an attorney/guardian *ad litem* to represent persons who cannot be identified or found.[232] Professor Halbach expressed similar constitutional law concerns about UTC Section 413 in one of his articles.[233]

Assuming that the Restatement (Third) of Trusts and the UTC preserve a presumption of general charitable intent and therefore only increase the charitable institution's "odds" of success in a *cy pres* proceeding, the proceeding still results in a final determination of any *property rights* the donor owned in the institutional fund the donor established.[234] As an aside, I

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230. *Id.* at 318–20. "As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that, within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses." *Id.* at 318.

231. *Id.*

232. "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . . . . It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts." *Id.* at 315. *See, e.g.*, Tulsa Prof. Serv., Inc. v. Pope, 485 U.S. 478, 484 (1988) (requiring notice by mail to known or "reasonably ascertainable" creditors of a decedent before their claims could be barred under a nonclaim statute in a probate proceeding); *Mennonite*, 462 U.S. at 799–800 (holding that a mortgagee is entitled to more than notice by publication before a tax sale).

233. Professor Halback observed that "*[d]espite apparent assumptions of some to the contrary*, it seems clear that the potential takers by reversion or gift over are entitled, as a matter of due process, to notice and participation in *cy pres* or other proceedings that might adversely affect their interests." Edward C. Halbach Jr., *Standing to Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement*, 62 UNIV. MIAMI L. REV. 713, 723, n. 54 (2008) (emphasis added); *see* Rudko, *supra* note 136, at 483–88.

234. In that sense, a *cy pres* proceeding is similar to a "trust construction" suit to determine and effectuate the donor's intent, and the failure to notify the donor or the donor's successors in interest would

also wonder whether the charitable institution's duty of loyalty (since in most cases the *institution* will benefit from a successful *cy pres* determination), duty to act in good faith or duty of disclosure might *obligate* the institution to give notice to the donor or the estate beneficiaries in a *cy pres* proceeding as "beneficiaries" to whom those duties are owed.[235]

ii. Substantive Due Process Issues

There does not appear to be any public use that might justify a taking of a donor's reversionary interest by the state under the circumstances described in UTC Section 413 and UPMIFA Section 6(c).[236] Nor do those statutes provide compensation to the owner for extinguishing the owner's reversionary interest that results from the determinations made and relief granted by the court in a *cy pres* proceeding.[237] Rather, the Commissioners apparently believe that the new statutes are exercises by the state of its police power to regulate property rights in furtherance of a *legitimate state interest*,

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be akin to failing to notify in a trust construction suit a person known or claiming to be a trust remaindermen. *See, e.g.,* Roth v. Jelley, 259 Cal. Rptr. 3d 9, 25–26 (Cal. Ct. App. 2020).

235. Whether the donor should be considered a trust "beneficiary" while the donor's purpose is being carried out might be debated. When the donor's charitable trust purpose has possibly failed, the donor (or the donor's successors) certainly *at that time at least* should be considered "beneficiaries" to whom duties are owed until the court determines whether or not a resulting trust arises. *See* John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 916–19, 934 n. 37 (1984). Moreover, trust beneficiaries "include not only persons intended to have enforceable rights in the trust property . . . *but also those who take legally implied reversionary interests* (that is, 'by resulting trust') and the successors in interest of those who earlier had held beneficial interests under the terms of an express trust or by resulting trust." RESTATEMENT (THIRD) OF TRS., ch. 9 intro. note (AM. L. INST. 2012) (emphasis added); *see* UNIF. TR. CODE § 103(30)(A) (UNIF. L. COMM'N 2010) (a "beneficiary" includes a person who "has a present or future beneficial interest in a trust, vested or contingent."). While only certain disclosure duties are mandatory under the UTC, common law duties still apply under UTC Section 106 (invoking the common law and principles of equity) or are implicit in a trustee's duty of loyalty or duty of good faith under UPMIFA Section 3(b). *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3(b) (UNIF. L. COMM'N 2006)*;* UNIF. TR. CODE § 106 (UNIF. L. COMM'N 2010).

236. *See* UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT §6(c) (UNIF. L. COMM'N 2006). As noted by the United States Supreme Court in *Evans v. Abney*, 396 U.S. 435, 445 (1970), a case upholding the donor's intent rather than require *cy pres* to be exercised to prevent a public park from reverting to the donor's heirs by simply negating a racially discriminatory condition, the United States Supreme Court noted: "Petitioners also contend that since Senator Bacon did not expressly provide for a reverter in the event that the racial restrictions of the trust failed, no one can know with absolute certainty that the Senator would have preferred termination of the park rather than its integration, and the decision of the Georgia court therefore involved a matter of choice. It might be difficult to argue with these assertions if they stood alone, but then petitioners conclude: 'Its (the court's) choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a "guess," an item in "social philosophy," or anything else at all.' . . . What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind."

237. *Id.*

notwithstanding the fact that those statutes apply only to those reversionary interests burdening property held subject to donor restrictions in charitable trusts or by charitable institutions. Their approach effectively prevents or precludes the triggering of donors' reversionary interests, thereby conferring an economic benefit on one *private* party (the charitable institution) *at the sole cost of* another private party (the donor or the donor's successors). That is, the statutes seek to avoid what appears clearly to be a "taking"—i.e., extinguishing the donor's reversionary interest—by modifying a remedy and redefining property law to reverse the longstanding presumption favoring reversion of failed gifts to the donor.[238]

A state's police power, while broad, is not without limits and normally applied to regulate the *use* of property, not its ownership. Originally, a regulatory statute would qualify as a legitimate exercise of police power only if it "relates to the safety, health, morals and general welfare of the public," whereas more recently, a state regulation will pass constitutional muster if it merely "bears any rational relationship to a *legitimate state interest*."[239] Yet, if the Constitution were to permit the state, in the exercise of its police power, to compel a transfer of property from one person to another no matter how remote the "legitimate state interest" might be in that transfer, then "[in] every case some indirect benefit to the public at large will authorize a forced transfer of property from A to B by state intervention."[240] Professor Atkinson briefly addressed this problem in one of his excellent articles in which he speculated about the constitutionality of a statute that might empower the state to condemn a donor's reversionary interest burdening property held for charitable purposes, concluding that would be "a very long stretch."[241] Moreover, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[242]

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238. *See supra* text following note 237.

239. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 108–09 (Harvard University Press, 1985) (emphasis added) (quoting Lochner v. N.Y., 198 U.S. 45, 53 (1905) and Constr. Indus. Ass'n v. City of Petaluna, 522 F.2d 897, 906 (9th Cir. 1975)) (hereinafter Epstein Book).

240. Richard A. Epstein, *Not Deference, but Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 364 (1982) (Professor Epstein's article includes an excellent discussion of the *Texaco, Inc. v. Short* case discussed later in this section.). *See* Armstrong v. United States, 364 U.S. 40 (1960); Texaco, Inc. v. Short, 454 U.S. 516, 538 (1982).

241. Atkinson II, *supra* note 135, at 154–61. Professor Atkinson suggested that the United States Supreme Court would take a dim view of what would amount to be a "naked forced transfer from one private landowner to another" designed to ensure that the charitable organization (and not the reversionary interest owner) captures the vast majority of the proceeds of the condemned property. "I myself am inclined to hope, if not entirely believe, that my . . . scenarios would fail for lack of requisite public use." *Id.* at 157.

242. *Armstrong*, 364 U.S. at 49.

As noted earlier, commentary in the UTC suggests that the new *cy pres* standard is needed to respond to "concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose."[243] First, "clogging of title" problems are relevant mostly to real property, the title to which is not held in trust (as opposed to personal property and intangible personal property more typically held by institutions in donor-restricted endowments); moreover, even when donor restrictions burden land, those restrictions often will require the institution to retain that land and use it for the donor's charitable purpose, not sell it. Second, if dealing with marketability and "administrative problems" associated with reversionary interests were the real "state interest" for the statute, then the state would have regulated and extinguished *all* reversionary interests and not just those burdening property held for charitable purposes. For example, in states where the rule against perpetuities has been repealed, is the "administrative burden" imposed on a charitable institution to keep track of who owns the reversionary interest in an endowment fund any greater than that required of a trustee of a "perpetual" private trust to keep track of the identity of the donor's descendants who are trust beneficiaries? Third, under the statute, the donor will suffer a complete loss when the donor's reversionary interest is extinguished through a *cy pres* proceeding (and the actual benefit to the state, as opposed to the charitable institution, will be only incidental). In addition, as mentioned above, why should the owners of reversionary interests bear 100% of the cost of providing *charitable benefits* to the public, which in fairness should be borne by the public at large through taxation? Fourth, the donor is not the cause of the fractionated title problem the legislature seeks to address, for between the date of the gift and the ripening of the donor's reversionary interest, (1) the donor can do nothing with his or her reversionary interest other than give it away, sell it for a pittance, or wait for the gift to fail; and (2) the only realistic buyer for that reversionary interest is the charitable institution holding all other rights in the property, with the result that the new *cy pres* statutes simply encourage a charitable organization to do nothing and simply wait until it "inherits" the reversionary interest by operation of the new statutes.[244]

While in police power cases, courts typically uphold state statutes and regulations out of deference to legislative determinations of what is a legitimate state interest, courts: (1) apply a "balancing test" to determine if a state's regulation has "gone too far" in damaging the value of an individual's property such that compensation must be paid;[245] and (2) occasionally consider whether a particular statute constitutes an

243. *See* UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010).

244. *See* William F. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L. J. 517, 527–31 (1972).

245. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); Epstein Book, *supra* note 239, at 63–67.

appropriate *means* to address an admittedly legitimate state interest.[246] After all, when a regulatory statute is upheld as constitutional, the property owner receives *no compensation for the diminution in the value of his or her property*, no matter how great the economic loss might be![247] When applying the balancing test to the new *cy pres* statutes, the court should consider the fact that the charitable institution: (1) is not required to compensate the donor for the donor's reversionary interest at the very time that property right might be at its peak market value (when reversion has been triggered because the original charitable purpose has failed), (2) paid nothing for the property when it was donated and accepted the gift subject to the donor's conditions and restrictions, and (3) at any time thereafter could have tried to purchase the donor's reversionary interest and avoided the administrative problems sought to be cured by the new statutes.[248]

The United States Supreme Court case perhaps most on point is *Texaco, Inc. v. Short*,[249] a controversial eminent domain/due process 5-4 decision. In *Texaco v. Short*, the Court upheld an Indiana "dormant minerals" statute as an appropriate exercise of state police power.[250] Under Indiana law, the mineral estate can be severed and exist separate and apart from the surface estate.[251] As a result, severed mineral interests will descend separately from the surface estate and can become fractionated, making it more difficult for mineral producers to identify, locate and obtain mineral leases from all mineral owners, arguably frustrating the state's interest in encouraging the development of its mineral resources.[252] Additionally, surface owners face challenges figuring out how to use the surface for its highest and best use because the development of the surface estate may not be possible without the consent of mineral owners, who have certain surface use rights reasonably needed to explore for and develop the mineral estate.[253] Under Indiana's statute, severed mineral interests that had not been producing, leased, or otherwise "used" for twenty years or more were extinguished, and title to them "reverts" to the surface owner.[254] However, the statute also contained a mechanism enabling a dormant mineral interest owner to protect his or her mineral interests from extinguishment by filing, before the end of the twenty-

246. *See* Epstein Book, *supra* note 239, at 126.
247. *See* Epstein Book, *supra* note 239, at 355.
248. *See* Epstein, *supra* note 240, at 369–72.
249. *See* Texaco, Inc. v. Short, 454 U.S. 516, 539–40 (1982).
250. *Id.* at 516–17.
251. IND. CODE ANN. § 32-23-10-2 (2021).
252. *Short*, 454 U.S. at 523–25; *see* David D. Haddock & Thomas D. Hall, *The Impact of Making Rights Inalienable:* Merrion v. Jicarilla Apache Tribe*,* Texaco v. Short*,* Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, *and* Ridgway v. Ridgway, 2 SUP. CT. ECON. REV. 1, 1–4 (1983), https://www.journals.uchicago.edu/doi/pdf/10.1086/scer.2.1147119 [https://perma.cc/4DUJ-5E7M]; Terrell Fenner, *A Problem Lurking Just Below the Surface: The Need in Texas for Dormant Mineral Legislation*, 2 TEX. A&M L. REV. 501, 501–04 (2015).
253. *Short*, 454 U.S. at 523–25; Fenner, *supra* note 252, at 526.
254. IND. CODE ANN. tit. 32, art. 23, ch. 10 (2021).

year dormancy period, a statement of claim identifying both the land affected and the name and address of the mineral owner, a process apparently required to be repeated every twenty years if the minerals remained dormant.[255]

In the majority opinion written by Justice Stevens,[256] the Court ignored the "taking" issue by analogizing Indiana's statute to state adverse possession and recording statutes, both of which bar *remedies* as opposed to extinguishing property rights.[257] "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[258] The Court also reasoned that "when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same."[259] The mineral owners argued that under *Mullane* they were entitled to notice *before* their mineral interests were extinguished by operation of the statute.[260] The Court dismissed that argument, noting (1) *Mullane* applies only to a judicial proceeding where a final adjudication is made that a mineral interest indeed has been extinguished due to lack of use, not to their extinguishment under a self-executing statute like Indiana's that acts in much the same way as state laws governing the abandonment of property; and (2) dormant mineral owners are charged with notice of the new law affecting their property interests under Indiana's self-executing statute.[261]

The effect of the Indiana statute is clear: it transfers the dormant mineral interest from the mineral owner to the surface owner.[262] As pointed out by Professor Richard A. Epstein, Justice Stevens avoided dealing with the underlying "taking" question by simply (1) redefining abandonment in a way that allowed him to conclude that no taking had occurred (and consequently that the mineral owners were not entitled to compensation) and (2) then treating the statute as regulatory and deferring to the judgment of the legislature on whether or not there was a legitimate state interest supporting

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255. *Id.* The statute also apparently included a 2-year grace period for filing statements of claims by owners of mineral interests that already would be classified as dormant under the statute so that the statute might apply retroactively to mineral interests severed in the past. *See Short*, 454 U.S. at 518.

256. An opinion in which Justices Burger, Blackmun, Rehnquist, and O'Connor joined.

257. *Short*, 454 U.S. at 526–29. The Court noted that earlier cases "often emphasized that the statutory 'extinguishment' properly could be viewed as the withdrawal of a remedy, rather than the destruction of a right." *Id.* at 528. That is, the rightful owner of title to property can lose title as against a *competing claimant* under state laws regulating the rights of those competing claims—i.e., the claims of the legal title owner versus the claims of another person claiming title by open, adverse possession or as a bona fide purchaser under a later purported deed recorded before the actual owner's deed was recorded. *Id.*

258. *Id.* at 526.

259. *Id.* at 528.

260. *Id.* at 534.

261. *Id.* at 531–36.

262. IND. CODE ANN. § 32-23-10-2 (2021).

the state's exercise of its police power.[263] In his dissenting opinion, Justice Brennan focused primarily on the statute's retroactive effect.[264] Justice Brennan expressed his belief that relying on the presumption of notice of the law (and of the statutory options that permitted mineral owners to save their mineral interests from extinguishment) was inadequate to meet the procedural due process requirements of *Mullane*, at least as applied to pre-existing owners of severed mineral rights[265] in light of the passive nature of those property interests.[266] Justice Brennan observed,

> It is difficult to conceive how the State's interest is served by *not* requiring the surface owner to notify the mineral rights owner before taking title to his interest; . . . [nor has there been shown] any affirmative state interest in failing to provide for pre-extinguishment notice . . . [and] a requirement of pre-extinguishment notice by the surface owner would [not] present an

263. *See* Epstein Book, *supra* note 239, at 360–62. Professor Epstein points out that the common meaning of the term "abandonment" involves both a physical act approximating abandonment and an intention not to retain ownership of it. *Id.* In the case of a dormant mineral interest, there is no physical act (such as a transfer by the owner to a new owner or the filing of a document formally abandoning the property); moreover, Justice Stevens essentially treated passive behavior by a mineral owner—i.e., doing nothing—as an intention to abandon his mineral interest as opposed to ignorance of a statute and of the legal consequences of doing nothing. *Id*. "If the state can simply declare that property is abandoned when in fact it is not, then it can by persuasive redefinition evade a constitutional provision designed to limit its power." *Id.* at 361. Analogously, if the state can selectively declare that a donor's presumed intent with respect to certain *charitable gifts* is now the opposite of the rules that apply to *all other gifts* when the donor's true intent is unknown, the state can do the same thing "by persuasive redefinition" of presumed donor intent.

264. *Short*, 454 U.S. at 540–54 (Justices White Marshall and Powell joined in the dissent.).

265. *Id.* "There is no measurable dispute in these cases concerning Indiana's power to control, define, and limit interests in land within its boundaries. Nor is there any question that Indiana has a legitimate interest in encouraging the productive use of land by establishing a registration system to identify the owners of mineral rights. Nor indeed is there any question that extinguishment of a mineral owner's rights may be an appropriate sanction for a failure to register. The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their preexisting property interests without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law." *Id.* at 540. "The justification for that rule [knowledge of the law] is its necessity. As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law. But an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption . . . . [A]n enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." *Id.* at 544.

266. *Id.* at 540–54. "It may be reasonable to expect property owners to maintain sufficient awareness of their property to mark those situations in which the property is physically disturbed with some scrutiny of their duties and obligations under the law. The owners of the incorporeal interests at issue here are hardly in a similar situation. There is no event or circumstance to which they might have turned their powers of observation; nothing has been directly attacked, seized, possessed, used, or depleted. The only 'caretaker' who could have guarded the interest of appellants from the silent actions of the legislature and the surface owner is a caretaker charged with the responsibility of daily surveillance over happenings in the state legislature. In light of 'the affairs of men as they are ordinarily conducted,' a State may not constitutionally attribute to each citizen the foresight, or the continuing duty, to maintain a lobbyist in the state capital in order to guard his property from extinguishment." *Id.* at 548–49.

> untoward economic burden on the surface owner that would impede the purposes of the statute or would otherwise be inconsistent with the statutory framework.[267]

He concluded:

> Given the nature of the scheme established, there is no discernible basis for failing to afford those owners such notice as would make the saving proviso meaningful. As applied to mineral interest owners who were without knowledge of their legal obligations, *and who were not permitted to file a saving statement of claim within some period following the giving of statutory notice by the surface owner*, the statute operates unconstitutionally. In my view, under these circumstances, the provision of no process simply cannot be deemed due process of law.[268]

Said another way, in Justice Brennan's view, the *means* chosen by the state for notifying donors of its new regulatory scheme was insufficient to justify applying the statute retroactively.[269]

As mentioned above, *Texaco v. Short* has been criticized because the U.S. Supreme Court treated the case as one involving the validity of a statute defining what constitutes an abandonment of title by owners of severed minerals under state law rather than one determining whether the Indiana statute resulted either in an unconstitutional taking by the state or a "regulatory taking" necessitating that compensation be paid to the mineral owners under the balancing test of *Pennsylvania Coal Co. v. Mahon*.[270] *Mahon* involved a statute prohibiting subsurface coal mining by the mineral owner because it would cause subsidence under the residence of a surface owner.[271] The Court—with Justice Holmes writing for the majority—held that the state had exceeded its police power under the statute and that compensation must be paid because, in effect, the statute would destroy the value of the company's right to mine coal that it expressly retained in the deed of the surface.[272] The Court held that the "greatest weight is given to the judgment of the legislature"[273] in how best to regulate the property rights of

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267. *Id.* at 552.

268. *Id.* at 554 (emphasis added).

269. *See* Tulsa Prof. Serv., Inc. v. Pope, 485 U. S. 478, 492–94 (1988) (Chief Justice Rehnquist's Dissenting Opinion questioning distinctions drawn in the majority opinion to justify different results); Julia Patterson Forrester Rogers, *Bankruptcy Takings*, 51 FLA. L. REV. 851 (1999).

270. Pa. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922); *see, e.g.,* Joshua Elias Teichman, *Dormant Mineral Acts and* Texaco, Inc. v. Short*: Undermining the Taking Clause*, 32 AM. UNIV. L. REV. 157, 167–72 (1982); Richard A. Epstein, *Pennsylvania Coal v. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 896 (1998); Haddock & Hall, *supra* note 252, at 1–4; William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813–74 (1998).

271. *Mahon*, 260 U.S. at 413.

272. *Id.* at 412.

273. *Id.* at 413.

its citizens for their health, safety, and public interest (e.g., nuisance ordinances), but only *so long as* that regulation does not go too far and result either in the destruction of existing property or contract rights or in a diminution in their value that "reaches a certain magnitude [such that], in most, if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act."[274] Determining whether or not a regulation has gone too far depends on the facts of each case and has subsequently led courts to adopt a "balancing test to weigh the public benefit derived from a government action against the magnitude of property devaluation occasioned by such action."[275] Justice Holmes warned, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[276] Justice Brandeis, who authored the dissenting opinion, argued that no compensable taking had occurred and that the statute constituted a proper exercise of the state's police power to prohibit "a noxious use."[277]

Joshua Elias Teichman, another critic of *Texaco v. Short*, points out that Justice Holmes, in his majority opinion in *Mahon,* failed to mention or distinguish earlier Supreme Court decisions differentiating *an unconstitutional physical "taking" from a proper exercise of police power*, including *Mugler v. Kansas*,[278] a case upholding a Kansas statute prohibiting the manufacture or sale of beer or liquor as within the state's police power. Teichman observes that "Justice Harlan, author of the *Mugler* opinion, wrote that the difference between regulations and takings *was one of kind, not degree*," reasoning that "valid legislation declaring a particular *use* of

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274. *Id.* at 414–15. "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." (citations omitted). "The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Id.* at 415.

275. Teichman, *supra* note 270, at 167; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978).

276. *Mahon*, 260 U.S. at 416. Justice Holmes went on to conclude: "But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* In *Penn Central Transportation Co. v. City of New York*, the United States Supreme Court upheld a historic preservation ordinance that prevented Penn Central from constructing an office tower above a historic landmark building. *Penn Cent. Transp. Co*., 438 U.S. at 153. In his dissenting opinion, Justice Rehnquist repeated Justice Holmes' warning and went on to conclude: "The Court's opinion in this case demonstrates that the danger thus foreseen [by Justice Holmes] has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers." *Id.* at 153–54.

277. *Mahon*, 260 U.S. 393 at 417.

278. Mugler v. Kansas, 123 U.S. 623, 664 (1887).

property injurious to the public can never be construed as a taking because it 'does not disturb the owner in the control or use of his property for lawful purposes.'"[279] That is, "[a]bsent physical appropriation or title divestment, governmental actions affecting land were considered regulatory, even when the action severely impaired the beneficial use or value of the land," and were often likened to nuisance abatement, which traditionally was within the government's power to enforce without paying compensation.[280]

According to Teichman, the *Mahon* decision was "the first time the distinction between regulation and taking became one *of degree*" as opposed to one of kind under earlier case law.[281] "The layering of a diminution-in-value balancing test over the earlier physical appropriation and title divestment theories is the primary source of the present confusion surrounding the distinction between regulations and takings."[282] Courts are so accustomed to applying the *Mahon* "difference-in-degree maxim" (and defining government action as regulatory) that they sometimes overlook or ignore the fact that some statutes, like dormant mineral acts, are not regulatory but confiscatory because they do, in fact, divest a person of title to the person's property.[283] In Teichman's view, *Texaco v. Short* was wrongly decided because, among other reasons, "[c]ontrary to the Supreme Court's assumption in that case, the practical effect of eliminating an existing remedy is not identical to seizing unchallenged title to property" when under the Indiana dormant minerals statute the mineral interest owner had no remedy before title to the mineral interest owner's mineral interest had already been extinguished and transferred to the surface owner by operation of law.[284]

Professors David Haddock and Thomas Hall take a different tack in their analysis and critique of *Texaco v. Short.*[285] They point out that minerals are severed from the surface and left dormant not because there is any plan to use or develop them but because the owner simply wants to hold them as inventory for future development when and if the time comes that it is

279. Teichman, *supra* note 270, at 165 (quoting *Mugler*, 123 U.S. at 664 (emphasis added)).

280. *Id.* at 164–66 (discussing both Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) and *Mugler*, 123 U.S. 623 (1887)). "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants . . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." *Mugler*, 123 U.S. at 664 (quoting Stone v. Mississippi, 101 U.S. 814, 819 (1879). "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." *Id.* at 668–69.

281. Teichman, *supra* note 270, at 167 (emphasis added).

282. *Id.* at 168.

283. *Id.* at 169; *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 414, 440–41 (1982); *see also* Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J. L. & LIBERTY 151, 185–89 (2017).

284. *See* Teichman, *supra* note 270, at 174.

285. Haddock & Hall, *supra* note 252.

economically feasible to do so as a result of changes in market conditions or technological advances.[286] Until then, simply holding the mineral rights is the most efficient use of them.[287] Consequently, statutorily reconsolidating ownership of the mineral and surface estates has virtually no impact on the state's professed "public purpose" of encouraging the development of the state's mineral resources.[288] Moreover, when the property was originally conveyed, the buyer and seller mutually agreed to the transaction terms, including those associated with the seller's severance and retention of the minerals.[289] According to the co-authors, the effect of *Texaco v. Short* was to allow the party who would benefit most from nullifying the original agreement to appropriate all of the investment return the other party hoped to realize under their original bargain.[290] Nor does a decision like *Texaco v. Short* serve to promote more predictability in legal relationships.[291]

It is difficult to predict whether *Texaco v. Short* would be decided differently today (or its novel approach applied to the new *cy pres* statutes) because by redefining a taking as an abandonment and deferring to the wisdom of the legislature, Justice Stevens avoided having to apply to the facts of the case the Court's *Penn Central* regulatory takings test, which itself is a muddled mess (a thorough analysis of which is beyond the scope of this Article).[292] Thus, assuming that there was indeed a legitimate state interest in

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286. *See id.* at 21.

287. Haddock & Hall, *supra* note 252, at 20–23. In fact, reconsolidating ownership of the minerals in the surface owner arguably could *discourage* the development of state mineral resources. When minerals have been severed, exploration is the only way the mineral owner can profit from the mineral owner's ownership; whereas, when a person owns both the surface and mineral estates, that may prefer *not to explore* due to the potential impact that might have on the person's use of the surface.

288. The authors speculate that the real motive behind the statute was to benefit Indiana residents who own the surface estate at the expense of nonresidents who may own severed mineral rights. *Id.* at 21–23; *see* Fenner, *supra* note 252, at 519–24.

289. *See* Haddock & Hall, *supra* note 252, at 31.

290. *Id.* "It comes as no surprise that one party to each agreement executed in the past often will have an incentive to repudiate the agreement. Each party to agreements to be executed in the future has an incentive to make repudiation unlikely. Even though we may be the party who ultimately wants to repudiate, it becomes more costly for us to make a contract now unless we can convince you that our hands will be tied. If we fear that we may be unable fully to live up to our agreement, then we can further agree on an escape clause, with its coincident[al] penalty. Then, repudiation is still voluntary, but we, not the public at large, bear the greater costs imposed on others by our greater flexibility." *Id.* For example, the purchaser of the surface perhaps could have negotiated limits on the mineral owner's retained surface rights.

291. The co-authors point out: "Some may respond that the function of law is not to seek efficient outcomes in each specific case but to seek predictability in legal relationships, to seek a broader form of efficiency even at the expense of inefficient outcomes in particular instances . . . . Can *Short* be seen in any light that makes legal life appear more predictable? State legislatures can strip you of your assets through no previously known failing of your own. Moreover, they need take no care to give warning of that hazard beyond voting favorably on some new statute. This result hardly leads to predictability." *Id.* at 32.

292. *Penn Cent. Transp. Co. v. City of New York,* 438 U.S 104 (1978). Professor Richard Epstein has for decades advocated that the Supreme Court adopt a more principled and libertarian approach to regulatory takings. *See* Epstein Book, *supra* note 239; Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 JOHN MARSHALL L. REV. 593 (2007); Richard A. Epstein, *The Common*

Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law, 30 TOURO L. REV. 265 (2014). While many may disagree with his approach, surely the Court could, if it desired, do something better than what it has done! What is clear, however, is that more progressive voices (and votes) on the Supreme Court have over the last 100 years dominated and used the "flexibility" under *Mahon* to dilute the rights of property owners in regulatory takings. As suggested by one empirical study, "Thus, with the exception of exactions (under *Nollan* and *Dolan*), the Court's support of strong property rights has been largely symbolic, whereas its support of an activist state has been substantial and operationally significant." James Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62, 91 (2016); Daniel A. Farber, Murr v. Wisconsin *and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 116–17 (2017).

"The Supreme Court currently employs three tests to determine whether a regulation should be considered a "taking" of property that requires compensation. First, the Court finds a taking when the government mandates a physical intrusion on private property. Such an intrusion is a taking even if it does not cause any significant harm to the owner, [either in economic terms or as an invasion of privacy] . . . . The second category includes so-called 'total takings,' where the government has eliminated any possible economically beneficial use of the property . . . . The third category covers all remaining cases. This default category is governed by the *Penn Central* test, which examines whether the government regulation unduly interferes with reasonable, investment-backed expectations." Farber, *supra* note 292, at 116–17.

In *Penn Central Transportation Co. v. New York City*, 438 U.S 104, 123–24 (1978), Justice Brennan introduces the test by first quoting from *Armstrong v. United States*, 364 U. S. 40, 49 (1960), "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' [and] this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." The Court went on to state the test as follows:

"In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co.,* 438 U.S. at 124 (citations omitted).

In addition to the (1) economic impact, (2) investment-backed expectations, and (3) the character of the regulation factors, one commentator suggests that there is really a fourth factor in Justice Brennan's *Penn Central* test, commonly known as the "parcel as a whole" concept: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." *Id.* at 130–31; Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 615–24 (2014).

One problem with the *Penn Central* test is that it diverts attention away from the critical issue—whether a statute effects a "taking" of "private property"—and, instead leads courts (1) to defer to legislative determinations that there is the "legitimate state interest" underlying its "regulatory" statute, (2) to focus primarily on the owner and his "investment-backed expectations" and, unless the statute effectively eliminates all possible economically beneficial uses of his property, uphold a regulatory statute and deny the owner compensation for what sometimes is a significant diminution in the value of his property, and (3) rarely to second guess the reasonableness of the means chosen by the legislature for achieving its public purpose. *See* Andrus v. Allard, 444 U.S. 51, 65–68 (1979) (No taking resulted from the application of restrictions on the sale or disposition of eagle feathers acquired prior to the enactment of the Eagle Protection Act as the restrictions did not eliminate all possible economic uses of the property.). As noted by one commentator:

"In *Murr*, the Court squarely confronted tension inherent in the Court's regulatory takings canon. On one hand, the Court has long insisted that state laws define the contours of property rights. On the

other, it also has admonished that state laws that impose particularly harsh burdens on property owners for other than traditional health and safety reasons will be treated as takings for which the regulated property owners are entitled to compensation. These two ideas are not easily reconciled. If state laws define the contours of property rights, it is reasonable to ask why state laws that restructure those contours—restricting or reshaping property rights—ought ever be considered compensable takings. In other words, if states have the power to define what property *is*, why can't they *redefine* what it is without compensating property owners? Conversely, giving states *carte blanche* to regulate away all the value of private property would render the protection provided by the Fifth Amendment's Takings Clause a dead letter." Nicole Stella Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2016–2017 CATO SUP. CT. REV. 131, 132 (2017), https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2017/9/2017-supreme-court-review-4.pdf [https://perma.cc/H5YS-NJ3L].

For example, in *Murr v. Wisconsin*, the Supreme Court addressed how its *Penn Central* "parcel as a whole" concept should be applied in defining the private *property* to be subjected to its three-step regulatory "takings" analysis: "What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, '[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" Murr v. Wisconsin, 137 S. Ct. 1933, 1943–44 (2017) (quoting from Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U S. 470, 497 (1987) and its quote from Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1992 (1967). In Justice Kennedy's majority opinion, the Court upheld a state statute that essentially "redefined" two separately platted lots as a single building site as soon as those two lots came under common ownership, concluding that a multi-factor approach (rather than a strict property law approach) should be followed in defining the owner's "property" when applying the *Penn Central* test: "[C]ourts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition." *Id.* at 1945. The Court also recognized, however, that: "States do not have the unfettered authority to 'shape and define property rights and reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations" *Id.* at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001)). "By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations." *Id.*

Murr was a controversial 5–3 decision, written by Justice Kennedy, and in which Justices Breyer, Ginsburg, Kagan, and Sotomayor joined; Chief Justice Roberts authored the dissenting opinion, joined by Justices Alito and Thomas, with Justice Thomas adding a short supplementary dissenting opinion. *See id.* at 1933. Significantly, Justice Gorsuch did not participate because the Court heard the case on March 20, 2017, shortly before he was confirmed by the Senate on April 7, 2017, after a filibuster. *See Neil Gorsuch*, BALLOTPEDIA, https://ballotpedia.org/Neil_Gorsuch (last visited Oct. 27, 2021) [https://perma.cc/J8CH-5VWY]. In his dissenting opinion, Chief Justice Roberts argued: "Where the majority goes astray, however, is in concluding that the definition of the 'private property' at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) 'the physical characteristics of the land,' (2) 'the prospective value of the regulated land,' (3) the 'reasonable expectations' of the owner, and (4) 'background customs and the whole of our legal tradition.' Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of 'private property'—adopted solely 'for purposes of th[e] takings inquiry,' undermines that protection." *Murr*, 133 S. Ct. at 1939 (citations omitted).

The following excerpts from an article by one commentator summarize some of the problems with the Supreme Court's regulatory takings jurisprudence: "Regulatory takings differ from physical takings in some ways that, if ignored, would expand protection from regulation to the point where the public good would suffer . . . . The logic of function equivalence provides a compelling reason for recognizing regulatory takings, for economic regulation can ruin the value of a person's property . . . . Yet government

regulating dormant, fractionated mineral title in order to promote the development of state mineral resources, was transferring title of the minerals to the surface owner the appropriate *means* to address the problem, or did the state's remedy "go too far"?[293] For example, Indiana arguably could have accomplished its goal of promoting the development of state mineral resources in a less drastic way, such as by allowing dormant minerals to be leased through a receiver's lease procedure commonly used in Texas when

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must be able to regulate land use to promote important public health, welfare, and safety interests in response to changing social and natural conditions. Under our social contract, property owners have long accepted some diminution in value, some interference with economic expectations, and some inconvenience. The differences between regulatory and physical takings attest to why the regulatory takings doctrine must remain limited in scope. Those differences arise because the functional equivalence logic first used to extend takings protection to regulatory settings does not fit perfectly. Without an appreciation for that logical context, regulatory takings analysis becomes unmoored from its history—a history that helps to keep the analysis grounded and the implications of the differences in check. In contrast to physical takings, regulatory takings settings generally do not involve an affirmative use but rather promotion of a legitimate public purpose through limitations on use. *Once courts were willing to find a regulatory taking from a legal restriction without worrying about public use, it was only a matter of time before the meaning of public use became synonymous with public purpose*. A regulatory taking also requires substantial or total interference with a property right. Inconvenience or minor interference is not enough to find a regulatory taking because otherwise government could not improve the public condition. Even a minor but permanent physical invasion, however, is a per se physical taking no matter how important the public interest . . . . In the regulatory takings context, the key question would be to ask whether there is a realistic possibility that a regulation is functionally equivalent to a physical taking—raising the same types of risks and dangers posed by physical takings and speaking to the core purposes of the eminent domain clause. These core dangers include the risk of majoritarian exploitation or manipulation of property (for example, to lower the value of the property before condemnation), the risk of favoritism (indicating the absence of reciprocity of advantage or any evening out of the benefits and burdens of economic life), and more generally the realistic possibility of outrage over an unfair distribution of regulatory burdens imposed on a property owner. The point is that regulatory takings analysis needs to be tied to the same core concepts, risks, and dangers as physical takings. Otherwise, the corollary concept of regulatory takings will become much more expansive and unwieldy than the original defining concept of physical takings." Lydia L. Butler, *Murr v. Wisconsin and the Inherent Limits of Regulatory Takings*, 47 FLA. ST. UNIV. L. REV. 99, 138–42 (2019) (emphasis added).

The Court has not provided even general guidance to judges, litigants, or scholars on how to weigh the various factors in making *Penn Central* test determinations. Eagle, *supra* note 292, at 644–45. Among the myriad of other articles of interest are: Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*. 96 YALE L.J. 943 (1987); Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Margaret Jane Radin *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles: Part I, A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political* Process, 95 COLUM. L. REV. 782 (1995); Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359 (1997); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813 (1998); Maureen E. Brady, *Penn Central Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 UNIV. PA. L. REV. ONLINE 53 (2017); Farber, *supra* note 292, at 151–53 (2018); Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 NOTRE DAME L. REV. 1421 (2021).

293. *See* Teichman *supra* note 270, at 187–88.

owners cannot be found.[294] Or, if today a state legislature were to determine that a "legitimate state interest" would be served by enabling landowners to use the surface of their land at its highest and best use, then would extinguishing dormant mineral interests be the appropriate remedy, or should the state be obligated instead to adopt a procedure that might enable the surface owner to designate drill sites on his or her land that protect the mineral owner's right to develop the mineral estate (through directional drilling, for example) in order to free up development rights of the surface owner?[295] Yet, the U. S. Supreme Court generally pays little attention to the reasonableness of a state's regulatory scheme, choosing instead as in *Texaco v. Short* to simply defer to the wisdom of the state legislature concerning not only whether a legitimate state interest exists but also whether the design of the state's regulatory scheme "goes too far" (or imposes a disproportionate burden on an individual property owner) to achieve the state's goals.[296] Keep in mind that under *Mahon* and the *Penn Central* test, a property owner suffering a 100% loss of economic value must be compensated for a "taking," but when the property owner suffers only a 95% diminution in value, he or she might receive nothing.[297] By continuing to "defer" to the wisdom of state legislatures on both issues, the Supreme Court pays only lip service to *Penn Central*'s "character of the governmental action" factor and enables states to go "too far" and "overregulate."

Unlike in *Texaco v. Short*, where there was at least a colorable claim of a legitimate state interest in regulating dormant mineral interests, the Commissioners' suggestion that their new *cy pres* statute addresses "clogging of title" and "administrative problems" is feeble at best.[298] Moreover, if it is unfair for the state to seek to condemn, for nominal consideration, a donor's reversionary interest in property donated to the state for a specific public use, then one would think that extinguishing a reversionary interest by statute or regulation in order to benefit a charitable organization (or the "public" it serves) likewise would be unfair under *Armstrong* and the balancing test of

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294. *See* Robert E. Wetsel & Laura M. Leese, *Gone Missing: Mineral Receiverships Redux*, ST. BAR TEX. ADVANCED OIL, GAS & ENERGY RES. L. 1, 8, 19 (2018), https://www.wetsel-carmichael.com/wp-content/uploads/sites/1200651/2019/12/2018-09-20-Article-10.pdf [https://perma.cc/6EC2-G3FA].

295. *See generally* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (Accommodation doctrine requires the owners of the mineral and surface estates to exercise their respective rights with due regard for the other's rights.); Lyle v. Midway Solar LLC, 618 S.W. 2d 857 (Tex.—App. El Paso 2020, pet. filed).

296. "Our findings suggest that any sort of ad hoc balancing test is rarely used, at least in cases challenging regulatory actions. Instead, courts almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that Penn Central-type regulatory actions do not amount to takings." Krier & Sterk, *supra* note 292, at 62; *see* Epstein, *supra* note 240, at 369–71.

297. *See* discussion of *Penn Central* test, *supra* note 296; Lucas v. S.C. Coastal Council, 505 U. S. 1003, 1064 n. 8 (1992); Andrus v. Allard, 444 U.S. 51, 51 (1979); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*," 45 STAN. L. REV. 1369, 1373–76 (1993).

298. *See supra* notes 242–44 and accompanying text.

Mahon and *Penn Central*.[299] Two Texas Supreme Court condemnation cases are worth mentioning on this point.[300] In the leading case *Leeco Gas and Oil Company v. County of Nueces*,[301] Nueces County was the grantee in a deed of property from Leeco for so long as the property was used as a park. The county sought to condemn Leeco's reversionary interest for nominal consideration (when the land was then worth between $3,000,000 and $5,000,000) in anticipation of the future possibility that it might convert the land to another use in violation of the condition (real estate development).[302] The commissioners awarded Leeco $10,000; Leeco appealed that award to the county court at law, which, after trial, awarded Leeco only $10 in nominal damages; and the court of appeals affirmed the lower court's award.[303] While the Texas Supreme Court acknowledged that in a condemnation proceeding, the value of a reversionary interest often is quite small, it also recognized that *Leeco* was different in that the county was not condemning a "remote" possibility of reverter but was attempting to remove the burden of the restriction for a nominal consideration.[304] The Texas Supreme Court reversed:

> To allow a governmental entity, as grantee in a gift deed, to condemn the grantor's reversionary interest by paying only nominal damages would have a negative impact on gifts of real property to charities and governmental entities. It would discourage these types of gifts in the future. This is not in the best interests of the citizens of this State.
>
> We hold that when a governmental entity is the grantee in a gift deed in which the grantor retains a reversionary interest, if that same governmental entity condemns the reversionary interest, it must pay as compensation the amount by which the value of the unrestricted fee exceeds the value of the restricted fee.[305]

Of course, in a traditional *cy pres* proceeding, the value of the reversionary interest will be close, if not equal, to the full value of the property since the condition triggering the reversion—the failure of the donor's particular charitable purpose—has already occurred. In a concurring opinion in *Leeco*, Justice Campbell, joined by Justices Robertson and

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299. *See* Armstrong v. United States, 346 U.S. 15, 40 (1960); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

300. *See infra* notes 329, 337.

301. Leeco Gas & Oil Co. v. County of Nueces, 736 S.W.2d 629, 629 (Tex. 1987).

302. *Id.* at 630.

303. *Id.*

304. *Id.* at 630–31. While the method for valuing the possibility of reverter was no different than in other condemnation proceedings, under the particular facts of the case, its value would not be nominal because of the likelihood that the county would violate the restriction sooner rather than later. *See* Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Market Value*, 1989 BYU L. REV. 789, 801–02 (1989).

305. *Leeco*, 736 S.W.2d at 631.

Kilgarlin, added:

> In future cases, however, I would hold that if a political subdivision has accepted a gift by deed that grants a fee simple determinable interest, initiation of condemnation proceedings by the grantee on the reversionary interest is a renunciation of the gift. Condemnation is an act inconsistent with the granted, authorized use and will cause the granted estate to terminate and revert to the grantor in fee simple absolute.[306]

In the *El Dorado Land Company* case,[307] El Dorado sold land to the City of McKinney "subject to the requirement and restriction that the property shall be used only as a Community Park," retaining an option to buy the property back at the lesser of the sale price or its fair market value.[308] Ten years later, the city built a public library on the part of the land without offering to sell the land back to El Dorado. El Dorado brought an inverse condemnation suit, and the lower court dismissed the suit on the ground that El Dorado's interest in the land was not a sufficient property interest to support an inverse condemnation claim. The Texas Supreme Court reversed and remanded the case to the trial court for it to determine whether the building of the library violated the restriction and, if so, the extent of the taking.[309]

iii. Risks Associated with Changes in the Standard

Assume that UPMIFA Section 6 is construed not to extinguish a donor's reversionary interest automatically, as in *Texaco v. Short*, and instead only to loosen the *cy pres* standard and incorporate the UTC's/Restatement (Third) of Trusts' new presumption that the donor had general charitable intent. It is still quite possible that the new presumption of general charitable intent could be viewed as a conclusive one and effectively a substantive change in state property law (selectively applied only to certain reversionary interests

306. *Id.* at 632. The Texas Attorney General reached a similar conclusion concerning the binding effect of a right of reverter in an opinion requested by Texas State Technical College in which it essentially asked, in anticipation of the possibility of disposing of a building subject to donor restrictions on its use, whether the right of reverter would be binding on the State or whether "the sovereign property rights of an agency of the State of Texas result in Fee Simple ownership of the property." Tex. Att'y Gen. Op. No. KP-0209 (2018) at 2. Depending on the opinion it received, the College planned to "either disregard the right of reverter and sell the property, sell the property subject to the right of reverter, or return the property" to the original owner. *Id.*

307. El Dorado Land Co. L.P. v. City of McKinney, 395 S.W.3d 798 (Tex. 2013).

308. *Id.* at 799.

309. *Id.* at 804. The court followed *Leeco* but noted that the former was a condemnation case initiated by the county, whereas this case was an inverse condemnation case. Critical to its acceptance of the case and its decision was the court's determination that the nature of the interest owned by El Dorado was a reversionary interest in the land. *See id.* at 803.

through a special remedy).[310] That is, might not courts reasonably decide that the new *cy pres* remedy is either (1) an unconstitutional attempt to regulate reversionary interests that has gone too far because it results in a regulatory taking for which compensation is required under *Mahon*, as suggested above, or (2) an unconstitutional taking because it is unsupported by a legitimate state interest and merely a pretense of facilitating a transfer of property from one private party to another?[311] Lending support to the latter view is decades of academic discussion over "how best to ring the 'death knell'" of the general charitable intent requirement,[312] supported by extensive commentary in the UTC and Restatement (Third) Reporter's Notes under Restatement (Third) of Trusts Section 67 supporting the new, loosened *cy pres* remedies, but little discussion of the practical consequences of the new standard. As importantly, the Commissioners chose to fix with a sledgehammer the clogging of title and administrative problems justifying legislative action by (1) modifying the law governing a donor's "presumed intent" solely as applied to charitable gifts and not all gifts and (2) shifting the burden of proof in *cy pres* proceedings from charitable institutions to the donor or his heirs. As a result, the new statutes effectively transfer the donor's reversionary interest to the charitable institution for no consideration in lieu of leaving in place the traditional presumption favoring reversion to the donor and inconvenience the charitable institution (as owner of all other interests in the property) by requiring it to keep up with who owns that reversionary interest

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310. *See, e.g.*, Rothstein, *supra* note 200, at 16–18, 20–24. "Conclusive presumptions are not evidentiary presumptions at all, but are irrebuttable dictates that actually change the substantive law. As such, they are largely beyond the scope of this paper . . . . [P]resumptions may be predominantly expressions of rational probabilistic factual connections (perhaps based on common sense, experience, logic, studies, statistics, etc.); or of extrinsic social policy concerning which way it is desirable to 'tilt' the case to achieve certain social objectives, or some combination of both. Notions of judicial and litigant efficiency or economy, or of facilitating the determination of a controversy, as well as the parties' relative ease of obtaining proof, may also play a role . . . . If the proof of fact A is such that a peremptory ruling establishing it is in order, then if the presumption is mandatory, a peremptory ruling would have to issue establishing fact B (absent evidence of non-B). It is as though reasonable people could not differ as to whether fact B exists. If the presumption is permissive, a peremptory ruling establishing fact A would mean the jury must be allowed to find fact B, but also must be allowed to find against fact B. It is as though reasonable minds can differ on whether fact B exists, and we cannot say they must agree the one way or the other." *Id.*

311. *See* Fenner, *supra* note 252, at 219 ("The primary aim of The Proposed [Dormant Texas Minerals] Act is to efficiently reduce fractionalization by removing unknown and absentee owners with minimal collateral damage to owners that can be found without needlessly destabilizing the mineral interests of known owners. This is accomplished through broad use allowances, balanced by short abandonment times, aggressive burden shifts to the mineral owner, countered with easy rebuttals by the mineral owners, and several other contrasting provisions designed to ensure quick elimination of absentee owners while offering ample protection for known owners.").

312. Marion R. Fremont-Smith, *Holding the Tension: History and Policy*, HAUSER CTR. NONPROFIT ORGS. HARV. UNIV. 1, 40 (2005), https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/2005/Conf2005_FremontSmith-FINAL.pdf [https://perma.cc/T43A-GJ9L] (hereinafter Fremont-Smith Paper); *see* Myles McGregor-Cowndes, Conference Proceedings, *Grasping the Nettle: Respecting Donor Intent and Avoiding the Dead Hand*, NAT'L CTR. ON PHILANTHROPY & L. 1, 6 (2005), https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/2005/Conf2005_Lowndes_Final.pdf [https://perma.cc/XU4J-E3UK].

and either buy it or live with the consequences of having accepted the original gift burdened by the donor's conditions and restrictions. In sum, there is far less evidence suggesting that *cy pres* reforms were motivated by a legitimate state interest rather than by a desire to achieve a specific result—i.e., in the "public interest" to stack the deck so that charitable institutions never lose a *cy pres* proceeding absent a donor's express, written direction to the contrary in the gift instrument (and even despite contrary directions by the donor under UTC Section 413's invalidation of most gifts over to individual beneficiaries)![313] As was true in the *Texaco v. Short* case, the new statutes simply enable the party that stands to benefit from nullifying the restrictions in the original gift instrument to appropriate all of the benefits the donor or the donor's estate beneficiaries stood to realize under the donor's original bargain.[314]

While there was a resurgence in the Court's view that private property rights perhaps deserve constitutional protection closer to fundamental rights and that might temper the increasingly strong deference given to state laws in police power cases, there is still strong resistance to doing so except in extraordinary circumstances.[315] For example, in *Kelo v. New London*,[316] a

313. *See supra* notes 191–95 and accompanying text.

314. *See, e.g.,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). In that case, the Florida Supreme Court upheld as constitutional a state statute that provided that *income earned* by investing funds paid into the registry of a Florida court belonged to the county and did not result in a taking because (1) while the principal amount of the fund—the original proceeds from the sale of assets of an insolvent corporation, less an administrative fee charged by the county clerk—clearly was the property of the corporation to which the receiver for its creditors was entitled, and (2) absent the statute the clerk had no duty to invest the funds and thus the original funds held by the clerk were temporarily "public money" until withdrawn (and thus their earnings belonged to the county and no private property was "taken"). The U.S. Supreme Court reversed, noting that the general rule is that income from funds interpleaded and deposited with the court belongs to the owner of the fund. *Id.* at 162. "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. *Id.* The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. *Id.* The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry. To put it another way: a State, by *ipse dixit* [dogmatic and unproven statement], may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." *Id.* at 164; *see also* Armstrong v. United States, 346 U.S. 15, 40 (1960) (A taking resulted when the valid materialmen's liens of subcontractors under state law became worthless because no longer unenforceable under sovereign immunity after the federal government took possession and ownership of partially completed ship hulls and removed them from the state.).

315. *See* David A. Thomas, *Is the Right to Private Property a Fundamental or an Economic Right?*, SSRN (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1189668 [https://perma.cc/Y5A9-KB8F]; James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 1–6 (2002); James S. Burling, *Novel Takings Theories: Testing the Boundaries of Property Rights Claims*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 39, 41–48 (2015).

316. Kelo v. City of New London, 545 U.S. 469 (2005). A number of states, in response to *Kelo*, have chosen to restrict state takings like those considered in *Kelo* in order to provide property owners more protection. *See, e.g.,* TEX. GOV'T CODE ANN., ch. 2007.

controversial eminent domain case in which the Court upheld the right of a city to condemn private property in order to facilitate its transfer to a private party to redevelop a distressed area of the city, Justice Stevens observed early in his majority opinion:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case,[317]

pointing out that the takings under consideration would be made pursuant to a "carefully considered development plan."

Justice Stevens noted: "The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[318] After citing and discussing *Hawaii Housing Auth. v. Midkiff*[319] and other authorities, Justice Stevens concluded that notwithstanding the fact that "the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate," the city had the constitutional authority to condemn.[320] As noted by Justice O'Connor, the author of the *Midkiff* opinion upon which the majority relied and author of the dissent in *Kelo*:

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317. *Kelo*, 545 U.S. at 489–90.

318. *Id.* at 480.

319. In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), the Court upheld a Hawaiian statute aimed at (1) breaking up the concentrated private ownership of land in the hands of few owners dating back to the original Polynesian immigrants who originally settled Hawaii and (2) addressing complaints of those landowners who, if compelled to sell, would incur significant federal income tax liability. *Midkiff*, 467 U.S. at 233. Under the statute, once a certain number of tenants renting small residential lots in a development sought permission to acquire their lots, the Housing Authority could condemn all or part of the developed tract and then transfer the lots to the tenants. *See id.* The Supreme Court reversed the Ninth Circuit's conclusion that the statute violated the Fifth Amendment's "public use" requirement as "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.* at 235 (citing the Midkiff v. Tom, 702 F.2d 788, 798 (1983)). The Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 230 (citation omitted). "[W]e have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted . . . to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 241–42; s*ee* Berman v. Parker, 348 U.S. 26 (1954).

320. *Kelo*, 545 U.S. at 489.

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded, i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public in the process[; t]o reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings for public use is to wash out any distinction between private and public use of property, and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment.[321]

Similarly, in *Murr v. Wisconsin*,[322] another controversial case, the Supreme Court upheld a state statute that essentially redefined two separately platted lots as a single building site as soon as those two lots came under common ownership, concluding that a multi-factor approach (rather than a strict property law approach) should be followed in defining the owner's property in applying the Court's regulatory takings jurisprudence.[323] What is ironic about both *Kelo* and *Murr* is what happened *after* each of those cases was decided. Following *Kelo*, the "carefully considered development plan" justifying the taking never came about, and many states adopted legislation restricting state eminent domain powers for the purpose of economic redevelopment in response to the decision.[324] And after *Murr*, "State legislators [in Wisconsin] responded to the Murr decision by passing the Wisconsin Homeowners' Bill of Rights, giving the Murrs the right—after a more than fifteen-year legal fight—to dispose of their property as they see

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321. *Id.* at 475. "Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. *Midkiff*, 467 U.S. at 245." In distinguishing *Mitkiff* and other cases, Justice O'Connor stressed that in those other cases "a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use." *Id.* at 500. In *Kelo*, the property taken were "well-maintained homes" for purposes of commercial redevelopment to complement a proposed new facility by Pfizer, not to remove "blight" harmful to the community. *Id.*

322. Murr v. Wisconsin, 133 S. Ct. 1933, 1941–45 (2017).

323. *See supra* note 294 and accompanying text (discussing the case and the Court's regulatory takings posture). Justice Roberts argued in his dissenting opinion in Murr that if regulations can redefine the "property" under state law for "taking" purposes [by treating two separately platted lots as one building site], then "the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property." *Murr*, 137 S.Ct. at 1955. "[T]he Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of 'private property'—adopted solely 'for purposes of th[e] takings inquiry,' (reference omitted) undermines that protection." *Id.* at 1950; *see* Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 UNIV. PA. L. REV. ONLINE 53 (2017).

324. *See Murr*, 133 S. Ct. at 1941–45; *Kelo*, 545 U.S. at 478.

fit."[325]

On the other hand, in the recent *Stop the Beach Renourishment* judicial takings case, a complicated case involving the private property rights of owners of beachfront property under Florida law and the impact on those rights when the state fills seaward submerged lands, the Court reminded us that "if a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property."[326]

Controversial cases like *Texaco*, *Kelo,* and *Murr* are just a few examples of why the Supreme Court's increasing "deference" to state legislatures in "takings" cases continues to result in decisions more favorable to government regulation and detrimental to property owners and causes the Court's regulatory takings jurisprudence under the Supreme Court's *Penn Central* test and "parcel as a whole" concept to remain a "muddled mess" and fail to address in any meaningful way the weight to be given to each of the three *Penn Central* factors in their decisions (much less how to "balance" them).[327]

iv. Retroactivity

UPMIFA "applies retroactively to institutional funds created before and prospectively to institutional funds created after the effective date of the statute,"[328] and some commentators have questioned whether the reformed *cy pres* standard can be so applied.[329] Retroactivity was an issue under UPMIFA but considered only in connection with Section 4's new endowment spending rule, with the Commissioners concluding that the new rule was simply a "rule of construction" and thus had no constitutional law implications because it only clarified the donor's intended meaning of the word "income" in endowment agreements when assets of the fund are invested for total return

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325. David J. Wenthold, *Murr v. Wisconsin: The Badger State's Take on Regulatory Takings*, 102 MARQ. L. REV. 261, 306 (2018).

326. Stop Beach Renourishment, Inc. v. Fla. Dep't Env't Protection, 560 U.S. 702, 715 (2010). *See supra* note 314 and accompanying text (discussing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*).

327. *See supra* notes 294, 300 and accompanying text. State legislatures continue to adopt Uniform Acts based on new Restatements of the Law containing hundreds of pages of text and commentary that often deal with a broad area of the law, and that include significant changes in longstanding common law rules (in many cases without realizing and thoroughly understanding those changes). Moreover, as the legal profession has gradually become more like a legal business, lawyers who volunteer to review Uniform Acts on behalf of the State Bar often cannot afford to spend the time required to educate themselves or the state legislature concerning those acts. Perhaps it is time for the United States Supreme Court to start paying closer attention to the legitimacy of the state interest underlying a particular state law (and the statutory means chosen to effectuate it) rather than always deferring to the "wisdom" of state legislatures to the detriment of property owners.

328. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006).

329. *See, e.g.,* John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312, 338–40 (2003); Jan G. Laitos, *Legislative Retroactivity,* 52 WASH. UNIV. J. URB. & CONTEMP. L. 81, 95 (1997); JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 1–6 (1953), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1027&context=michigan_legal_studies [https://perma.cc/FG69-HULT].

under the prudent investor standard.[330] I doubt that same argument would be persuasive in analyzing the new "presumption of general charitable intent," which does not clarify the meaning of a term used by the donor in a gift instrument in order to *implement* the donor's intent but instead *reverses* the law's default *determination* of a donor's presumed intent at the time of a gift in order to apply a different rule only to charitable gifts in *cy pres* proceedings.[331] Moreover, the *Mullane* procedural due process issues remain a problem because neither the donor nor the donor's beneficiaries are required to be given notice of *cy pres* proceedings under UPMIFA Section 6.[332] Recall that Justice Brennan argued against retroactive application of the Indiana dormant minerals statute in his dissenting opinion in *Texaco v. Short*, asserting that owners of passive, non-possessory interests in real property should not be charged with notice of changes in the law that extinguish their property rights and must be given reasonable notice prior to the extinguishment of their property by operation of state law.[333] Moreover, unlike in *Texaco v. Short*, Section 6 provides no statutory filing procedure that might enable a donor to protect his or her reversionary interest from extinguishment that might allow the owner's "remedy" to be barred by his or her own "inaction" at issue in *Texaco*.[334]

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330. "A constructional rule resolves an ambiguity, in this case, because donors use words like endowment or income without specific directions regarding the intended meaning. Changing a statutory constructional rule does not change the underlying intent, and instead changes the way an ambiguity is resolved, in an attempt to increase the likelihood of giving effect to the intent of most donors . . . . [Consequently] it does not violate either donor intent or the Constitution." UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4 cmt. (c) (UNIF. L. COMM'N 2006). "[T]he purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law . . . . [R]ules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction." *Id.* Thus, the fact that a donor did not express the donor's intentions does not mean that the donor did not rely on the rule of law that defined the donor's presumed intent. *See id.*

331. *Id.* "[T]he purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law. By definition, however, rules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction . . . . [R]ules of construction apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction." *Id.* The donor did not have to "spell out" the donor's intentions in the gift agreement because pre-existing law had already defined them. The fact that a donor did not express his or her intentions does not mean that the donor did not rely on the rule of law that *defined* the donor's presumed intent. Moreover, it is likely that a donor without knowledge of the law would expect that the same rule would apply to all failed gifts and, like intestacy statutes, would reflect what most donors would want whenever any gift failed.

332. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. L. COMM'N 2006).

333. *See supra* notes 264–66 and accompanying text (comparing how alert a passive mineral owner should be to a change in state law regulating dormant severed mineral rights that potentially could become valuable at any time as against an owner of a sleeping reversionary interest that has value only when it becomes impossible to use for a specific purpose is like comparing a person in a coma for twenty years to Rip Van Winkle).

334. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. L. COMM'N 2006).

d. Extrajudicial "Cy Pres" *Remedy for Small Trusts*

UPMIFA Section 6(d) added an *extrajudicial cy pres remedy*:

> If an institution determines that a restriction contained in a gift instrument on the management, investment, *or purpose* of an institutional fund is unlawful, impracticable, impossible to achieve, or *wasteful,* the institution, [60 days] after notification to the [attorney general], may *release or modify* the restriction, in whole or in part, if:
>
> (1) the institutional fund subject to the restriction has a total value of less than [$25,000];
>
> (2) more than [20] years have elapsed since the fund was established; and
>
> (3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.[335]

This new remedy applies to institutional funds that are too small to warrant incurring the cost of a court proceeding,[336] with the size of a fund considered to be small varying from state to state.[337] In most cases, the institution likely will suggest that it is "consistent with the charitable purposes expressed in the gift instrument" for the fund either to be merged with another similar fund or simply spent for the donor's expressed purpose.[338] Only the attorney general is required to be given notice, although as a practical matter, because so little money is involved, the attorney general will have little incentive to thoroughly investigate and consider (much less resist) whatever relief the charity seeks.[339]

I certainly understand how this new remedy will be practical and useful for charitable institutions. Yet, some might argue that an extraordinary remedy like *cy pres*, despite its cost, should remain solely in the hands of the judiciary. More importantly, the statute provides little protection for donor intent, nor does it consider the role the charity might have played in causing the fund to become small. For example, assume that in 2008 a young widow established a $25,000 perpetual endowment fund at her church in memory of

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335. *Id.* § 6 (d) (emphasis added).

336. "The rationale is that under some circumstances a restriction may no longer make sense but the cost of a judicial cy pres proceeding will be too great to warrant a change in the restriction. The Drafting Committee discussed at length the parameters for allowing an institution to apply cy pres without court supervision. The Committee drafted subsection (d) to balance the needs of an institution to serve its charitable purposes efficiently with the policy of enforcing donor intent. The Committee concluded that an institutional fund with a value of $25,000 or less is sufficiently small that the cost of a judicial proceeding will be out of proportion to its protective purpose." *Id.* § 6 cmt. (d).

337. *See, e.g.*, NY NOT PROF. CORP. § 555(d)(1)(A) (2021) (New York defines an institutional fund as small if it is worth less than $100,000.).

338. *See* Martha Coakley, *Modification of Institutional Funds & M.G.L. Ch. 180A § 5(d) Frequently Asked Questions*, COMMONWEALTH MASS. OFF. ATT'Y GEN., 1, 4 https://www.mass.gov/files/documents/2016/08/to/ch180a-faq.pdf (last visited Oct. 21, 2021) [https://perma.cc/BN4F-KFA3].

339. *See id.*

her husband to fund an annual scholarship at the church school. Assume twenty years later the fund is worth $24,000. Should the church be able to modify the fund or spend it because the fund is now too small, especially when UPMIFA suggests that a perpetual endowment fund, if prudently managed, should grow fast enough to keep pace with inflation?[340] Nor does the statute require the institution to ensure that the widow's husband is appropriately remembered as the widow originally desired, or even require that notice be given to the widow or her beneficiaries of the charity's *cy pres* plan. According to the commentary, "an institution's concern for donor relations would serve as a sufficient incentive for notifying donors when donors can be located."[341]

It would seem that notice issues ought to be of even more importance for "small" funds than for larger ones.[342] A widow having a reversionary interest in a small endowment fund established in memory of her husband is *less likely* to have had a general charitable intent (and have a better chance of prevailing in a *cy pres* proceeding) because her gift might have been a one-time donation for a specific purpose. If the institution had asked the widow to include in the gift instrument what UPMIFA Section 6(d) provides, she might have chosen either to make the gift elsewhere or to keep the money and honor her husband in some other way. Thus, when a donor-restricted fund has become such a nuisance to the charitable institution that it is not worth going to court to fix it, then arguably an *extrajudicial remedy* instead should permit the institution, with the attorney general's approval, either: (1) to arrange for the fund to be transferred to another institution willing to accept it and abide by its terms and restrictions or (2) to release all claims to the fund and return the money to the donor or the donor's beneficiaries. Efficiency and waste are important considerations to charitable institutions, but donor intentions also deserve respect, and returning the money to the donor or the donor's estate beneficiaries might be even more efficient, as well as "the right thing to do."

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340. Moreover, the statute might allow an institution wanting to modify a fund larger than $25,000 to gradually "spend down" the fund by using a little higher (but not presumptively imprudent) spending rule and "kill it" when it drops below the $25,000 threshold either as a result of spending or market fluctuations.

341. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 7 cmt. If the donor cannot be located, the institution has not done a very good "donor relations" job. "Locating a donor who contributed to the fund more than twenty years earlier may be difficult and expensive." *Compare id. with* NY NOT PROF. CORP. § 555(d)(4) (Notice to the donor, if available, is required.). One commentator recently argued that "two key costs of euthanizing small charities [or small funds]: depleting democracy in philanthropy and shrinking diversity in charitable focus." *See* Alyssa A. DiRusso, *Euthanizing Small Charitie: The Threat of Small Trust Termination Statutes*, 45 CUMB. L. REV. 473, 475 (2015); *see also* Chester I, *supra* note 105, at 418–19 (commenting on Robert W. Gettleman & David R. Hodgmen, *Judicial Construction of Charitable Bequests: Theory vs. Practice*, 53 CHI.-KENT L. REV. 659 (1977)).

342. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 7 cmt. (UNIF. L. COMM'N 2006).

e. Modification with Donor Consent

The Commissioners indicate that UPMIFA Section 6(a) "restates the rule from UMIFA allowing the release of a restriction with donor consent."[343] If you compare UPMIFA Section 6(a) against UMIFA Section 7(a), however, you will find that the new statute materially expands the old one by (1) permitting an institution, with donor consent, not only to release but also to modify a restriction and (2) changing the kinds of restrictions that can be modified or released from those relating to the "use or investment" of a fund to those concerning the "management, investment, *or purpose*" of a fund.[344] UPMIFA Section 6(a) reads as follows:

> If the donor consents in a record, an institution may *release or modify*, in whole or in part, a restriction contained in a gift instrument on the management, investment, *or purpose* of an institutional fund. A release or modification may not allow a fund to be used for a purpose *other than a charitable purpose of the institution*.[345]

Below is the only commentary on this new, expanded remedy:

> Subsection (a). Donor Release. Subsection (a) permits the release of a restriction if the donor consents. A release with donor consent cannot change the charitable beneficiary of the fund. Although the donor has the power to consent to a release of a *restriction*, this section does not create a power in the donor that will cause a federal tax problem for the donor. The gift to the institution is a completed gift for tax purposes, the property cannot be diverted from the charitable beneficiary, and the donor cannot redirect the property to another use by the charity. The donor has no retained interest in the fund.[346]

The new statute has problems. First, it allows the "purpose" of an institutional fund to be *modified* extrajudicially by an institution with donor consent, without explaining why purpose was substituted for the word "use" in the new statute.[347] Second, unlike UPMIFA's other new remedies, Section 6(a) contains virtually no restrictions on what changes the institution can make or how often those changes can be made.[348] Third, Section 6(a) contains no limit on the size of the institutional fund that can be modified or establish a minimum time period that the fund must have been in existence before its

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343. *Id.* § 6 cmt. A paragraph in the commentary dealing only with § 6(a) likewise refers only to a release of restrictions. *See id.*

344. *See id.* § 6(a).

345. *Id.* (emphasis added).

346. *Id.* § 6 cmt (a) (emphasis added).

347. *Compare id.* § 6(a) *with* UNIF. MGMT. OF INST. FUNDS ACT § 7(a) (UNIF. L. COMM'N 1972).

348. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(a) (UNIF. L. COMM'N 2006).

purpose can be changed.[349] Fourth, Section 6(a) does not even require that the Attorney General be notified to represent the public interest in the modification, notwithstanding the fact that a modification of purpose can materially change which members of the public benefit from the fund.[350] For example, an institution holding an endowment fund for a church, with the donor's consent, could modify the fund's purpose from supporting the church's food pantry to subsidizing part of the cost of beautifying church grounds.[351] Even the UTC does not permit the purpose of a charitable trust to be modified in this way,[352] and the statute could invite the donor of an irrevocable endowment to suggest a change in purpose (and "consent" to that change when the institution accommodates) somewhat like a donor-advised fund.

Finally, this new remedy poses special problems for endowment funds involving affiliated institutions and the donor/donee issues discussed earlier in this Article.[353] Unlike the other remedies under Section 6 that tie relief to donor intent or the purposes of the institutional fund, Section 6(a) provides that the "release or modification [by the institution] may not allow a fund to be used for a purpose other than a charitable purpose of the institution."[354] Consider the example considered earlier in this Article: A church (donor) establishes an endowment fund at the foundation (supporting organization) to provide tuition assistance at its school, and the school and the foundation are both institutions controlled by the church.[355] If the foundation wants to modify extrajudicially the purpose of the endowment fund, which one of the three institutions involved will be *the* institution whose purposes must include the new purpose of the fund?

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349. *Id.*

350. *Compare id. with id.* §§ 6(b), (c), (d).

351. *See* Gary January Memo, *supra* note 166. Draft commentary was prepared for a proposed UPMIFA Section 8 (a section that would have granted standing to donors to enforce their gift instruments). Section 8 was not adopted, but the draft commentary illustrates the uncertainty caused by adding the word "purpose" to the extrajudicial remedy in Section 163.007(a): "The right to maintain a proceeding under this section [by the donor to enforce his restrictions] 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." *Id.* Yet, there seems to be no concern about allowing the institution to make a major change in the charitable *purpose* of an endowment fund under Section 6 so long as the donor consents to the change.

352. UNIF. TR. CODE § 411 (UNIF. L. COMM'N 2010). Moreover, assume that an individual establishes an endowment at a foundation controlled by a church and the endowment agreement also benefits not only the church but also institutions unaffiliated with the church. Surely it is not intended for the donor, with the consent of the institution managing the fund, to modify the gift agreement with the donor's consent in order to increase the portion of the fund from which the church benefits!

353. *See supra* discussion Part III.

354. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (a) (UNIF. L. COMM'N 2006) (emphasis added).

355. *See supra* Section III.A.2.a.

Logically, because the beneficiary or donee of the fund is the school, one would think the new purpose must continue to benefit the school.[356] Does that mean that the foundation (with the church's consent) can or should modify the gift instrument to allow all of the assets of the fund to be distributed to the school to build a new playground? Building a new playground certainly would be a charitable purpose of the school, but should the church and the foundation be able to do extrajudicially under Section 6(a) something that a *court cannot do* under equitable deviation (where modifications must be "in accordance with the donor's probable intent") or under *cy pres* (where modifications must be made "in a manner consistent with the charitable purposes expressed in the gift instrument")? Perhaps the better interpretation of the statute is that the foundation should be considered *the* institution whose purposes are relevant under the statute, for in that way, its governing board might be hesitant to modify restrictions extrajudicially (at the request of either the church or the school) in view of the foundation's own mission (managing endowment funds) and its duty to abide by the terms of each gift instrument.

Similarly, if, in our example, the church operated its school *directly* rather than through a separate nonprofit corporation, then only two institutions are impacted by the gift agreement—i.e., the church and the foundation.[357] The church would not be the best choice as *the* institution under the statute for the reasons discussed above, and treating the foundation as *the* institution puts the foundation and its board in a similar position vis-à-vis its obligations to the school and the original charitable purpose of the fund expressed in the gift instrument.

IV. CONCLUSION

The Commissioners made great strides in UPMIFA in modernizing rules governing the management, administration, and expenditure of endowment funds, and the new definitions expand and clarify the scope of UPMIFA. The statute and commentary certainly could be improved to specifically confirm how UPMIFA operates when more than one institution (and especially institutions under common control or otherwise affiliated) are donors, beneficiaries, or managers under gift instruments.[358]

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356. *See generally* Brody, *supra* note 143, at 1219 (confirming that UPMIFA now "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*").

357. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. L. COMM'N 2006).

358. *See* discussion *supra* Sections III(A), (B)(3)(e). The Commissioners might also consider making other improvements to the Act, such as changing the presumed imprudent spending rule into a 3%–5% net spending rule applicable only to long-term and perpetual trusts and allow the more general "prudent" spending rule apply to shorter-term institutional funds. *See* UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 4 (UNIF. L. COMM'N 2006).

However, I believe it was unnecessary and a mistake for the Commissioners to draft special new remedies to apply to institutional funds under UPMIFA. Trust laws and remedies (and rules of procedure) vary from state to state, and I believe a far better approach—and one that would have achieved uniformity at least within each state—would have been for Section 6 simply to have directed that each state's trust law remedies of equitable deviation and *cy pres* would apply to institutional funds under the Act. That would have been consistent with UPMIFA's goal "that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation, or some other entity" *as well as* the desire of charity law reformers for "coherence in the law of charity."[359] There certainly was no compelling reason to *mandate* that reforms of trust remedies made in the UTC and Restatement (Third) of Trusts be incorporated into UPMIFA and apply nationwide, much less adopt a third version of those remedies.

The charity law reform movement has a long way to go before it is finished. For example, after I submitted this Article for publication, the ALI released its Restatement of the Law, Charitable Nonprofit Organizations, of which Professors Marion Fremont-Smith was among the Reporters.[360] I have not yet read or considered the impact the new Restatement might have under UPMIFA. What is clear, however, is that reformers will continue to advocate for the liberalization of *cy pres* until courts are "able to step in not only when the charitable purpose has failed utterly, but also when it is not going sufficiently well, and with modifications that are not necessarily minimal," notwithstanding donor intent.[361] Interestingly, in her introductory paper

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359. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, prefatory note (UNIF. L. COMM'N 2006); Fremont-Smith Paper, *supra* note 312, at 41.

360. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGS. (AM. L. INST. 2021).

361. Atkinson I, *supra* note 105, at 1138–39. In a later, excellent article Professor Atkinson made a frank observation about the path charity law reform has taken:

"In their more traditional mode, reformist scholars scrutinize legal doctrine or practice through their chosen analytic lens, then recommend that the legal landscape be reshaped to conform to their normative blueprints. Typically, perhaps a bit smugly, we academics leave matters there; at most, we suggest that either legislatures or appellate courts do the recommended reshaping by writing our recommendations into law.

. . . .

Could it be the case that loosening dead hand control has failed because it is a bad idea? Perhaps. But the reasons for the disappointing progress of dead hand reform may have little to do with weaknesses in the substantive case for reform, and much to do with structural problems in achieving reform on this particular point through the traditional means of legislation or high-profile, precedent-setting adjudication.

On the legislative side, dead hand control presents classic problems: lack of salience and attendant collective action paradoxes . . . . Compared to more basic, bread-and-butter issues, dead hand control is predictably placed, again and again, on the back burner—if not on the bottom shelf.

. . . Courts may be doubly indisposed toward radical, as opposed to incremental, change here. Sweeping reversal of the existing doctrine of dead hand control may be unappealing to judges of both the 'activist' and the 'strict constructionist' stripe. In general, all judges are under increased scrutiny for 'making,' as opposed to applying, law . . . . Incremental change, through modest expansion of these orthodox judicial powers, gives courts more control than does my more radical, abolitionist alternative.

presented at a 2005 conference on "Respecting Donor Intent and Avoiding the Dead Hand," Professor Marion Fremont-Smith posed the following questions on that topic:

> (1) How [would be] best to ring the death knell on that aspect of the 'dead hand' that requires a demonstration of general charitable intent before charitable gifts can be modified?
> (2) Are 'illegality, impossibility, impracticability, and wastefulness' the appropriate prerequisites for application of cy pres or will we more nearly meet society's need by using the standard now applied for deviation, namely that a change will 'further the accomplishments of the broad purposes' of the trust or gift?
> (3) Should there be time limits set for application of cy pres or deviation—e.g. limited or no application of cy pres or deviation during the first 21 years of a trust or restricted gift and liberal application of the doctrines thereafter?
> (4) How close do we need to get to original intent and can we do this without requiring the courts to undertake the time-consuming and often unrewarding exercise of looking to [a] donor's 'actual' intent?
> (5) Should there ever be rights of reversion or should all gifts to charity remain forever in the public domain?
> (6) Should we permit fiduciaries of charitable corporations [to have] virtually unlimited power to exercise cy pres for other than restricted funds by giving them unfettered power to amend the charitable purposes of their organization? If not, what are proper limits?
> (7) Should we continue to permit donors of charitable trusts the right to reserve broad powers to change the nature or purposes of their gifts, the methods by which they will be administered or their ability to sue to enforce the terms of their gifts?
> (8) Is application of cy pres a proper judicial function or should it be the province of an administrative body such as the English Charity Commission?
> (9) How can we improve enforcement of the duties of charitable fiduciaries, particularly, in the context of this meeting, the duty to keep charitable purposes relevant to current and future—not past—needs of society?
> (10) Must we continue to grapple with two Uniform Laws (UMIFA and UTC), one ALI Restatement (Trusts) and one ALI Principles (Nonprofit Law), and at least one Model Act (ABA Nonprofit Corporations) or would it be possible to inculcate an appreciation of the value of coherence in the law of charity?[362]

In her paper, Professor Fremont-Smith also gave a very brief summary of how she would answer those questions that reveals the direction *reforms* of

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Thus, conservative courts are likely to give no relief, lest they transgress their commitment to apply, not make, the law. Activist courts, on the other hand, may well be disinclined to change law in a way that reduces the very scope of their activism. Incremental reform, then, may be an over-determined, not just a predictable, outcome." Atkinson II, *supra* note 135, at 106–08.

362. Fremont-Smith Paper, *supra* note 312, at 40–41 (numbering and punctuation added).

state law have been moving with assistance from the ALI and the Commissioners.[363]

Fast forward about ten years, and read Professor Gary's superb 2018 article (a precursor of which served as her introductory paper at another NCPL conference).[364] You will find that scholars continue to debate the same questions, with a plethora of proposals for more reforms (both old and new) and theoretical justifications for doing so.[365] Quoting from a 1939 article, Professor Gary succinctly states the problem that remains unanswered: "The issue, then, seems to be whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court [in *cy pres* proceedings]."[366] "This issue continues to lie at the heart of the question of *who should control charitable gifts*," a subject that now mirrors political debate over the limits of the power of government to regulate our lives and, in the case of *cy pres*, limit a person's freedom to own, use, enjoy and dispose of the person's property as the person thinks best.[367]

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363. "Thus, I believe that the tensions between donor intent and the public interest are best resolved by coming down on the side of the public interest. We need to dispense not only with the general charitable intent requirement, but with any need to look to a donor's wishes beyond those stated in the gift instrument, and in framing alternative purposes or forms of administration, the only appropriate degree of proximity is to the broad purposes of the original gift. I believe we should drop the distinctions between cy pres and deviation and adopt a single set of rules for their application. Further in this vein, I have long argued that there should be a single law of charity, so that I must object to a framework that perpetuates distinctions between trusts and corporations, whether in regard to changes of purposes and administration, or any other matter such as liability of fiduciaries.

As to what we might call 'the other side,' namely the rights of donors, we should do away with reverter; gifts to charity should be irrevocable. Donors should not be given any power to modify their gifts—this should be a matter for the charity, the courts and the attorney general and, where there is a default gift, the alternate taker. Finally, we should not attempt to solve the serious shortcomings in our enforcement systems by turning it over to donors whose interest will not necessarily—or even ordinarily—be the same as those of the public. We do need to find ways to encourage the states to institute or increase enforcement of charity law and hopefully some new ideas for that will come from our deliberations. However, expanding the ability of individuals to bring suit, whether donors or members of the general public, but primarily donors or their successors, will only increase the cost of operating charities, and unduly burden the courts, without providing any assurance that the outcome of these suits bill benefit other than those who prevail." *Id.* at 41–42; *see Conference Proceedings,* NAT'L CTR. PHILANTHROPY & L., https://ncpl.law.nyu.edu/conference-proceedings/ (last visited Nov. 17, 2021) [https://perma.cc/SCT4-JDLG].

364. Gary, *supra* note 106; Gary Paper, *supra* note 129.

365. Gary, *supra* note 106; Gary Paper, *supra* note 129. Among them are (1) further loosening the *cy pres* standard by either redefining "impracticable," adding yet more grounds justifying its exercise such as "inexpedient," and permitting the "public interest" in the fund to be considered as a factor in *cy pres* proceedings, Gary, *supra* note 106 at 604–05; (2) imposing a statutory time limit beyond which donor restrictions need longer must be strictly followed, *id.* at 600–04; (3) shifting control over updating donor purposes from the courts to the charitable institutions administering endowment funds, *id.* at 605–07; (4) requiring the "public interest" to be considered as much or more than donor intent in *cy pr*es proceedings, *see id*. at 607–08; and (5) of course, doing whatever is necessary to eliminate whatever vestiges remain of *cy pres'*s "general charitable intent" requirement (and the reversionary interests of donors in charitable gifts).

366. Gary, *supra* note 106, at 608 (quoting *A Revaluation of* Cy Pres, *supra* note 105, at 321).

367. *Id.* (emphasis added). At the beginning of her article Professor Gary observes, "[o]ne can argue that either the donor or the charity, or both, represent the public interest in the way they direct the use of

The discussion also continues over other charity law reform subjects, such as (a) changing tax policy and its slant favoring wealthy taxpayers in order to increase its redistributive effect and to be more equitable to individuals who cannot benefit from itemizing deductions,[368] (b) improving the accountability of charitable institutions by granting donors standing to enforce gift instruments and expanding governmental supervision, enforcement and regulation of charitable institutions,[369] and (c) reexamining, and perhaps redefining and reducing, the breadth of activities currently considered to be charitable.[370]

In sum, the Commissioners jumped the gun in order to implement "top-down," ad hoc reforms[371] of *cy pres* and longstanding trust and property

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the charitable assets, but sometimes 'the public' holds views about social good that differ from the views of the donor and the charity. If the public should have a voice, the obvious question is how can that voice be exercised." *Id.* at 567. In addition to having the Attorney General speak for it, the "public" already has significant power to express its views and impact how charitable resources are allocated and spent. First, the "public" can and does target its own charitable contributions to activities and causes it views as most deserving and, if it chooses, can establish endowment funds of its own to ensure that its preferred charitable priorities receive future support. Second, if there are new or more worthy charitable causes, or "better" ways to meet social needs, the public (or charitable institutions) ought to be able to "sell the mission" instead of diverting donor-restricted assets from the donor's chosen, still viable, but less popular mission (perhaps established as a result of a solicitation from the charitable institution). Third, the public can seek government funding (grants and contracts) and use political means to influence public policy and tax policy in order to incentivize or subsidize particular kinds of charitable, environmental, or other activities it believes to be in the "public good."

368. *See, e.g.,* Colinvaux I, *supra* note 148, at 1–2; John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption for Charities*, SSRN (Nov. 17, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350493 [https://perma.cc/Y64E-FAC4]; Rob Reich, *A Failure of Philanthropy*, STAN. SOC. INNOV. REV., 1, 27–28 (Winter 2005), https://canvas.brown.edu/courses/831655/files/30477968 [https://perma.cc/R6YC-5MFQ]; Brian D. Galle, Roger Colinvaux & C. Eugene Steuerle, *Evaluating the Charitable Deduction and Proposed Reforms*, URBAN INST. TAX POL'Y CTR (June 2012), https://www.urban.org/sites/default/files/publication/25491/412586-Evaluating-the-Charitable-Deduction-and-Proposed-Reforms.PDF [https://perma.cc/N8DQ-3EC2]; Fleischer, *supra* note 148; *Tax Policy and Charitable Giving Results*, Lilly Family School of Philosophy 1, 6, 32 (May 2017), https://scholarworks.iupui.edu/bitstream/handle/1805/12599/tax-policy170518.pdf [https://perma.cc/H95A-APQN].

369. *See e.g.,* Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1134–35 (2019); Fremont-Smith, *supra* note 118 at 41; Karst, *supra* note 166, at 476–83; Terri L. Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J. L. & PUB. POL'Y 1, 3–9 (2009); Brody, *supra* note 143; Halbach, *supra* note 184, at 1902; James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Sector: A Need for New Legal Approaches*, 76 FORDHAM L. REV. 567 (2007). "The cat is out of the bag: Donors are fast discovering what was once a well-kept secret in the philanthropic sector-that a gift to public charity donated for a specific purpose and restricted to that purpose is often used by the charity for its general operations or applied to other uses not intended by the donor." Goodwin, *supra*, at 1093.

370. *See, e.g., Conference Proceedings*, NAT'L CTR. PHILANTHROPY & L., https://ncpl.law.nyu.edu/conference-proceedings/ (last visited Oct. 21, 2021) [https://perma.cc/L52V-WEGJ] (showing the following papers presented: In 2009, "Elasticity of the Boundaries: What Is (And What Isn't) Charitable?"; in 2015, "Shades of Virtue: Measuring the Comparative Worthiness of Charities"). Politics aside, there is little discussion of trying to address similar problems that plague the public sector, much less developing a plan to compel Congress to exercise fiscal responsibility over "charitable expenditures" government social programs and tax policy.

371. *See supra* text accompanying note 35.

law principles despite the unwillingness of courts or state legislators to do so on their own accord and before the Commissioners, the ALI, or reformers had (1) developed and described a clear, comprehensive, consensus vision of exactly what charity law should look like *after* it is reformed; (2) definitively addressed how much trust law will or will not apply to charitable institutions that are not trusts (and why); (3) clearly explained the comprehensive reform plan, the public policy reasons behind it, and its practical consequences and impact on individual property rights; or (4) even agreed on all of the changes needed to fix *cy pres* and other trust remedies. That leads me to wonder, particularly under UPMIFA, whether state legislatures really are in a position to make informed decisions concerning the wisdom of *cy pres* reforms made under various Uniform Acts that even today have not been uniformly accepted by the states.[372] This is particularly true under UPMIFA where those reforms were tucked into a statute focused on the management and investment of institutional funds and are at best only tangential to UPMIFA's main purpose.

I also remain apprehensive about giving *the judiciary* significantly more power than before to change a donor's charitable purpose as a means to respond to issues of obsolescence or dead hand control rather than leave that burden (1) on the charitable institution and the donor to address at the time the donation is made or (2) on the charitable institution to tackle later through negotiations with the donor or the donor's estate beneficiaries. Donors may insist on imposing unduly burdensome restrictions on their gifts, but charitable institutions likewise are not helpless victims of donor "dead hand" control and without any ability to deal with "clogging of title and other administrative problems."

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372. *See, e.g.*, Thomas P. Gallanis. *The Dark Side of Trust* Law, 45 ACTEC L.J. 31 (2019); Charles A. Redd, *Flexibility vs. Certainty—Has the Pendulum Swung Too Far?,* TRS. & ESTS. 6, 7–8 (Mar. 2015); Maloney & Rounds, Jr., *supra* note 26. Moreover, other Restatements and Uniform Acts have come along that may add to the confusion. *See supra* text accompanying note 206 (concerning the removal of "purpose" and "intent of settlor" from the list of factors required to be considered UFIPA's new power to adjust and unitrust conversion statutes (but which remain, *at least for now*, key factors under UPIA Section 2(a) prudent investor standard)). In addition, and consistent with that new approach, UFIPA Section 104 provides that the law of the *place of administration* applies rather than treat the definition of income as a matter of *construction* governed by the law of the domicile as under prior law. *See* UNIF. FIDUCIARY INC. & PRIN. ACT, prefatory note; *see* Christina D'Eramo Evans, *Uniform Fiduciary Income and Principal Act Under Study for Adoption in Ohio*, 30 PROB. L.J. OHIO 217 (2020). Similarly, the ALI has endorsed a new "Rule Against Perpetuities" as well as reforms to simplify, modify and rewrite property law in ways that appear to affect reversionary interests in a *cy pres* context by reclassifying those reversionary interests as "contingent" rather than "vested" and consequently subject to the Rule Against Perpetuities. *See* Lawrence W. Waggoner, *What's in the Third and Final Volume of the New Restatement of Property that Estate Planners Should Know About*, 38 ACTEC L.J. 23, 30–32, 42–46 (2012); D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3 (2009); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014); Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 233–34 (2011); Hirsch II, *supra* note 35, at 2238–53 (2011).

What is clear is that the donor had a specific charitable purpose for making his or her original gift and loosening the *cy pres* standard makes it easier for courts to allow the donor's property to be used for a different purpose. In most cases, there is no evidence of what the donor actually would have wanted to happen if the donor's charitable plan were to fail or became obsolete because either the donor (intentionally or inadvertently) failed to address the issue in the gift instrument or the donor's advisors and the charitable institution neglected to ask the donor. Consequently, when the need for *cy pres* arises, either the charitable institution (through *cy pres*) or the donor or the donor's estate (through reversion) stands to receive a windfall at the expense of the other. Was it really necessary to rewrite longstanding trust and property law principles to create an exception to those rules, applicable only to certain charitable gifts, in order to *guarantee victory* for charitable institutions in *cy pres* proceedings, when under prior law institutions usually prevailed anyway because courts tended to find that a donor had general charitable intent despite no actual evidence of it? Was there a compelling need to loosen the *cy pres* standard either to enable courts to tinker with the donor's original purpose in ways likely either to prevent the donor's gift from failing in the future or to open the door to judicial repurposing of donor-restricted assets before the donor's gift has failed, in order to allow charitable organizations to use them better elsewhere, rather than as directed by the donor of the gift?

The reform train has left the station and is gaining speed. That may be a good thing, but I am not yet convinced of it; nor am I ready to climb aboard.