MOTIVE, DUTY, AND THE MANAGEMENT OF RESTRICTED CHARITABLE GIFTS

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INTRODUCTION

Restricted charitable gifts present increasingly difficult problems of compliance for the charitable recipient as time passes from the date of the gift. A restricted charitable gift is a contribution of money or property to charity with respect to which the donor specifies certain terms and conditions that govern the administration and application of the gifted assets.[1] In contrast to restrictions that donors may place on gifts for private persons or

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1. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 400 cmt. c (Tentative Draft No. 2, 2009) (noting that for charitable trusts, restricted gifts, and conditional gifts, "a charity may not depart from or alter the terms of a gift without following" certain legal procedures); 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, 701 (2005) (contrasting restricted versus unrestricted gifts to charity). *See generally* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 400 & cmts. a–f (Tentative Draft No. 2, 2009) (discussing charitable trusts and unrestricted, restricted, and conditional gifts); Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 FORDHAM L. REV. 1827, 1838 (2003) (noting that a gift may be deemed to be restricted based upon actions or representations of the charity during the solicitation of the gift); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 403–23 (2005) (discussing the property, trust, and contract regimes sometimes invoked to explain the legal consequences attendant restricted charitable gifts).

uses, the law permits donor restrictions on charitable gifts to govern forever.[2] The reason for this discrepancy is that gifts for charitable purposes must by definition inure to the public good.[3] Society has thus struck a more conciliatory bargain with donors who contribute their property in furtherance of such public purposes.[4] Societal concessions to charitable donors, in other words, permit these donors to exercise a degree of perpetual control over the use of contributed property in ways otherwise foreclosed by law.

As the warm glow that originally accompanied a donor's charitable gift begins to fade with time, however, the circumstances and opportunities for public benefit that framed that gift also inevitably evolve. Over time, the donor's restrictions may prove difficult for the recipient organization's management to implement. Those restrictions might also fall out of line with society's view of acceptable charitable objectives.

A. A Solution and Its Problems

The law provides a mechanism for addressing this seeming impasse. That mechanism exists in the trust doctrine known as cy

2. As to the freedom granted donors in subjecting charitable gifts to enduring restrictions, see, for example, the *Restatement (Third) of Trusts*, explaining the application of the Rule Against Perpetuities to charitable versus noncharitable interests. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d (2003). For a further discussion of dead-hand control over property and the trend toward repeal of the Rule Against Perpetuities in the context of private dynasty trusts, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (2000); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. Rev. 1303, 1342–43 (2003); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

3. Courts and commentators have generally acknowledged that no single enumeration captures the universe of purposes that might qualify as "charitable." *See, e.g.*, Statute of Charitable Uses Act, 1601, 43 & 44 Eliz., c. 4 (Eng.) (enunciating a nonexclusive list of purposes thought to be charitable in nature); Jackson v. Phillips, 96 Mass. (14 Allen) 539, 551–56 (1867) (expounding on the meaning of "charity" and "charitable" gift); Morice v. Bishop of Durham, (1804) 9 Ves. Jun. 399, 404–06, 32 Eng. Rep. 656, 658–59 (Ch.) (applying the Statute of Charitable Uses); RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (echoing the articulation set forth in the preamble to the Statute of Charitable Uses).

4. *See, e.g.*, Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114–15 (1993). Professor Atkinson explains:

> In exchange for perpetual donor control, society gets wealth devoted to recognizably "public" purposes. Wealth that donors would otherwise pass to individuals for "private" purposes is in a sense devoted to the public domain. Thus the restraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial.

Id.

pres. Cy pres doctrine empowers courts to modify or release donor restrictions when compliance with those restrictions becomes sufficiently problematic.[5] Traditionally, when a court deems compliance with the donor's terms to be "impossible, impracticable, or illegal" and also finds the donor's charitable intentions to be more general than specific, the court will "save" the gift by authorizing utilization of the gifted property with some modification of the donor's restrictive mandates.[6]

The risk that such modification might occur is in essence a price the donor must pay should she desire to impose potentially perpetual restrictions on the use of her gifted property.[7] A decidedly pro-donor bias characterizes this bargain, however, because invocation and application of cy pres doctrine turn in large part upon what the court perceives to be the donor's intentions. Discerning donor intent is a fact-specific and subjective inquiry, the boundaries of which often grow exponentially when the alleged cy pres circumstance arises many decades after delivery of the gift.[8] Judging present compliance (or the possibility of compliance) with that intent is similarly prone to subjective judicial machinations. At worst, cy pres doctrine inspires ends-oriented manipulation of the analyses in order to rationalize outcomes.[9] Unfortunately, the

5. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 & cmts. a–f (2003) (setting forth the requirements for and commentary pertaining to the doctrine of cy pres); RESTATEMENT (SECOND) OF TRUSTS § 399 & cmts. a–r (1959) (same).

6. See *infra* Part I for a more detailed exposition of the requirements for invocation of cy pres.

7. *See, e.g.*, Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 357 (1999) ("Under this normative theory, the settlor who establishes a charitable trust is viewed as entering into a contract with the public . . . pursuant to which the trust is given perpetual life in exchange for the public's right to modify the trust terms, both substantive and administrative . . . .").

8. *See, e.g.*, Loring v. Town of Kingsley (*In re* Loring's Estate), 175 P.2d 524, 531 (Cal. 1946) ("The cy pres doctrine has meant many things to many courts and its limits have rarely been defined."); PRINCIPLES OF THE LAW OF NONPROFIT ORGS. ch. 4 introductory note at 4 (Tentative Draft No. 2, 2009) ("The longevity of the typical restriction argues for increased scrutiny—if not skepticism—of assertions of what the donor intended."); Johnson, *supra* note 7, at 383 ("[A]sking an interpreter who is extant in today's society whether [a long-dead donor] had a general or specific intent . . . is largely indeterminate . . . .").

9. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. reporter's memorandum, at xxx (Tentative Draft No. 2, 2009) ("It appears that the courts work backwards from the result they want . . . ."); Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97, 139 (2007) ("All three [cy pres] requirements are fact-specific and, therefore, subject to a measure of manipulation in particular cases."); *see also* Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 285 (Ind. 1945) ("[This court's cy pres decisions] have not been free from contradiction and confusion."); *infra* note 102 (regarding the sometimes questionable judicial invocation of the trust doctrine known as

malleability of cy pres doctrine too often leads to outcomes that fail to predictably serve either donor intentions or society's interest in the accomplishment of purposes beneficial to the public.[10]

As a consequence, donors face uncertainty as to whether and to what extent their specified restrictions will truly be honored and enforced over time. Those charged with managing charitable organizations likewise face uncertainty when a donor's terms become problematic and the organization thus desires to depart from those terms. This uncertainty can inspire charitable management to act unilaterally when restrictions become stale, and perhaps long before such problems arise.[11] Such unilateral actions raise a host of issues, ranging from compliance with managerial fiduciary duties to negative publicity that casts a pall over the entire charitable sector with regard to gift solicitation and stewardship.

Recent treatments of cy pres doctrine, however, have held firmly to the doctrine's trust-law origins.[12] Such reform projects generally tweak past doctrine, with some liberalization, in lieu of providing practical guidance for an era of increasingly corporate charitable governance.[13] A current American Law Institute ("ALI")

equitable deviation where cy pres might otherwise produce a less-favored result).

10. *See, e.g.*, Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41, 46 (1989) ("[T]he general intent requirement is not only unclear but mischievous in its use to prevent the application of cy pres to save the original gift [for application to charitable purposes]."); Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 977 (1988) (opining that the cy pres quest as actually applied does little to further donors' intentions).

11. *See* Atkinson, *supra* note 9, at 143–44. Professor Atkinson identifies what he calls "charitable unilateralism" as a "low road" practical approach to getting around dead-hand donor control. *See id.* at 141–44. "The first step [on this 'low road'] is elegantly simple, if legally bold: JUST DO IT. Charitable trustees . . . would simply make the change they see fit, without bothering to petition the relevant court under the doctrine of cy pres . . . ." *Id.* at 143.

12. *See* UNIF. TRUST CODE § 413 (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). For an overview of recent doctrinal liberalizations, see Marion R. Fremont-Smith, *The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change*, 76 FORDHAM L. REV. 609, 622–28 (2007).

13. "While we do not know how many charities today are trusts and how many are corporations, the percentage of trusts is assumed to be small." Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 CHI.-KENT L. REV. 641, 641 n.1 (2005). Professor Brody goes on to approximate, based on available Internal Revenue Service data pertaining to Internal Revenue Code § 501(c)(3) charitable organizations (excluding churches and private foundations), that roughly 78% of these charitable organizations exist as corporations, 19% as other forms of association, and 2% as charitable trusts. *See id.*; *see also* I.R.C. § 501(c)(3) (2006) (identifying the types of organizations eligible to receive tax-deductible charitable contributions); JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 69 (3d ed. 2006) ("The predominant form of exempt organization in the United States is the nonprofit

project to articulate the first *Principles of the Law of Nonprofit Organizations*, on the other hand, takes a much more corporate-governance-oriented approach to the broader charitable environment.[14] But even the clarity that the ALI project brings to most issues seems less brilliant on matters pertaining to cy pres.[15] The simple reason lies in the inherent difficulties of building on the existing foundation of a flawed cy pres doctrine.

B. A New Perspective

This Article casts off those constraints and provides a more solid analytical foundation for dealing with donor-restricted gifts and the difficulties such gifts cause when static donor directives confront evolving societal needs and charitable objectives. Central to this analysis is a new and fundamentally different way of understanding donor intent when evaluating problematic gift restrictions. That new perspective, in turn, supports this Article's radical recasting of how decision makers should approach service to this foundational donor-intent notion, both in the context of cy pres adjudications and in relation to the restricted-gift management that precedes invocation of that remedial doctrine.

More specifically, Part I of this Article explains current cy pres doctrine and the circumstances to which it applies. That explanation includes a brief exposition of the doctrine's shortcomings, both as observed by scholars over many decades and as affecting the actions of charitable management. Part II then focuses on the role played by charitable management in stewarding donor-restricted gifts. Following this discussion, Part III introduces a new way of evaluating donor intent, the resulting gift restrictions, and the entitlement of both to perpetual adherence.

As explained in Parts IV through VII, this evaluation flows from a meaningfully different conception of donor intent in the context of

corporation."); *id.* at 68 (noting the historically "checkered existence" of the charitable trust in the United States). *See generally id.* at 320–27, 349–53 (explaining charitable organizations as a subset of the larger nonprofit and tax-exempt arena, and also discussing charitable organizations and their available organizational forms in terms of federal tax laws).

14. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. reporter's memorandum, at xxvii–xxix (Tentative Draft No. 2, 2009). For background on this project, see American Law Institute, Current Projects: Principles of the Law of Nonprofit Organizations, http://www.ali.org/index.cfm?fuseaction =projects.proj_ip&projectid=3 (last visited Mar. 27, 2010) ("This project aims to draft legal principles for the nonprofit sector, including principles relating to governance and to the duties of governing boards and individual fiduciaries.").

15. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 (Tentative Draft No. 2, 2009). Much of the clarity provided under the ALI project actually derives from provisions that do not set forth the cy pres doctrine itself. *See, e.g.*, *id.* § 430 ("Compliance with Terms of a Trust or Gift Instrument"); *id.* § 440 ("Effects of the Passage of Time"); *id.* §450 ("Procedures when Circumstances Require Modification of a Trust or Gift Instrument").

restricted charitable gifts and cy pres doctrine. That conception derives in part from the answer to a seemingly simple question: why do donors, generally, impose restrictions on gifts in lieu of simply donating that property outright and without restrictions? Departing from the subjective inquiries underlying traditional cy pres doctrine and proceeding by reference to more objective consequences, four donor motivations in particular rise to the fore. Specifically, donors impose restrictions in order (1) to support the donor's belief in worthy charitable objectives and the causes best suited to accomplishing those objectives; (2) to constrain charitable management from straying from the donor's own view of what are, or how to accomplish, those charitable objectives; (3) to freeze in place the donor's individual notions of appropriate but evolving public policy; and (4) quite simply, to exercise and enjoy a significant power that society has chosen to bestow on donors through the law of charitable gifts.

As Parts IV through VII demonstrate, the noted motivations find their origin in a broad view of the objective consequences of donor restrictions. As a result, the overall approach suggested here provides a more sound analytical structure than current cy pres doctrine on at least three fronts. First, the proposed analysis employs a more predictable framework for ascertaining the donor's preferred charitable purpose when circumstances have allegedly changed. Second, the approach here provides both practical and normative insights on those of the donor's restrictions that can, and should, be honored going forward. Third, in a significant departure from current doctrine, this Article's suggested analytical approach establishes a paradigm by reference to which charitable management should be inclined to act in administering donor-restricted gifts, long before any cy pres circumstance arises.

I. CY PRES DOCTRINE EXPLAINED

Cy pres is the legal doctrine designed to address donor restrictions that have become sufficiently difficult to implement or that allegedly fail to serve society's now-evolved view of an acceptable charitable purpose.[16] Problematic donor restrictions that might give rise to cy pres analysis include, for example, a provision restricting the use of gifted funds to the treatment of a disease that has since been eradicated or an earlier-era scholarship fund that is permeated with the donor's now-decried racial bias. In such circumstances, a court might invoke cy pres to authorize the application of the contributed property to the treatment of another disease or to scholarships unencumbered by discriminatory preferences.[17] If cy pres applies, a court can thus "save" the

16. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 cmts. a, c (2003).
17. *See* Atkinson, *supra* note 4, at 1117–18.

charitable nature of the donor's contribution by directing its application to alternative but more currently achievable charitable uses.

More accurately stated, however, cy pres doctrine has traditionally emphasized honoring and preserving donor intent whether or not it entails continuation of the gift in some charitable form.[18] The desired outcome from a societal perspective—at best a corollary to this concern for donor intent—is the retention of the gifted property in the stream of charitable commerce for application in pursuit of benefits that accrue to the public.[19] Notwithstanding this societal goal, ultimately, perpetuation of the *donor's* intentions guides current doctrine.[20] If narrowly expressed, those donor intentions can defeat the applicability of cy pres and therefore defeat any alternative use of the property in further pursuit of charitable ends.[21]

18. *See* Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 305–10 (1939) (exploring the history of cy pres as an intent-effectuating doctrine); *see also* C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979) (discussing historical aspects of cy pres doctrine as an intent-guided undertaking); 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, 102 (2009) ("At the end of the day, the doctrine of *cy pres* is a saving device and what is saved is donor intent.").

19. *See* RESTATEMENT (THIRD) OF TRUSTS § 67 cmts. a–b (2003).

20. The classic conflict posits on one side a preference for subjecting property to the will of the living, who presumptively will seek to apply that property to its highest, best, and most currently relevant or "efficient" use. On the other side is an argument often couched in terms of individual liberty, or more specifically, respect for an individual's freedom to dictate the terms upon which that individual chooses to part with her property. *See id.* § 29 reporter's notes cmts. f–h (discussing this dead-hand debate and citing various authorities).

21. Absent application of cy pres, the gift will simply fail, and the gifted assets will either revert to the donor's heirs or pass according to such alternative plan as the donor may have specified. Importantly, a donor may specify an alternative gift over to another charitable beneficiary. In that case, the property can remain in service to charitable ends notwithstanding the failure of the donor's original terms. *See, e.g.*, *id.* § 67 cmt. b (discussing the impact of donor specification of alternative beneficiaries); Chester, *supra* note 10, at 44–47 (same). A donor-specified gift over to an alternative charitable beneficiary is actually a very desirable gift structure from both a donor and societal standpoint. From society's standpoint, such instructions leave the property in charitable hands. From the donor's perspective, such a gift indicates that the donor thought beyond her original gift and indicated to future trustees her intentions in the event of changed circumstances, such that her intentions can continue to affect the gift. Benefits accrue to both the donor and society in that naming an alternative charitable beneficiary provides an otherwise-lacking enforcement mechanism for ensuring compliance with donor intent. *See generally* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 96–97 (2008) (proposing an alternative gift-enforcement regime whereby charities are monitored by charities); Eason, *supra* note 1, at 433–36 (discussing gifts over to alternative charitable beneficiaries as an enforcement mechanism). An alternative beneficiary would, among other

A. Doctrinal Requirements

The application of cy pres is therefore far from automatic and turns upon satisfaction of several criteria. As a preliminary matter, the donor must have intended her gift to be both subject to limiting restrictions and in furtherance of purposes that in fact qualify as charitable.[22] These requirements cause few problems today and can be met regardless of whether the gift is made to a charitable trust or corporation.[23] Following these preliminary findings, however, the

advantages, have standing to initiate a cy pres proceeding to force the recipient charity to either comply with the donor's terms or forfeit the gift. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1187, 1191 (2007).

22. Regarding the requirement of donor-imposed limiting restrictions, typically expressed as impressing the gifted assets with a "trust," and the need for the gift to be charitable in nature, see, for example, RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, SECTIONS 411–470, § 431 (3d ed. 2005).

23. *See, e.g.*, Johnson, *supra* note 7, at 371 ("[Courts] typically construe the 'charitable purpose' requirement liberally and . . . [it] rarely has prevented the application of the *cy pres* doctrine."). As to trusts and corporations, cy pres doctrine is often stated in terms of a donor's intent to create a charitable trust. This "trust" reference refers most basically to the donor's wish to impose binding restrictions as opposed to merely stating some precatory desires. *See supra* note 22. A gift given to a charitable corporation and subject to donor-imposed restrictions on the use of the assets is generally deemed to be held "in trust" by the corporation—meaning, at least, that the corporation has a duty to abide by the donor's directives, subject to cy pres modification. *See* UNIF. TRUST CODE § 413 cmt. (amended 2005) ("The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations."); PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 400 reporter's note 4 (Tentative Draft No. 2, 2009) ("The treatment of restricted gifts to corporate charities varies in theory among the states, but not in effect. Regardless of whether the state treats a restricted gift as a charitable trust, the charity has a general duty to adhere to the restriction."); *id.* § 460 cmt. a ("[C]ourts and legislatures have transported these trust-law savings devices to allow for modification of restricted gifts not made in trust."); *id.* § 460 reporter's note 10 ("[C]ourts commonly apply these trust doctrines to restricted gifts made to charitable corporations."); RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) (explaining that a contribution of property to a charitable organization that is restricted to a particular purpose is generally regarded as creating a charitable trust, regardless of whether the recipient organization is organized as a trust or a corporation); RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a (1959) ("[The doctrine of cy pres] is peculiar to charitable trusts and charitable corporations . . . ."); FISHMAN & SCHWARZ, *supra* note 13, at 127 ("If property is given for a particular charitable purpose and the [recipient] corporation dissolves or changes its purposes . . . [t]he more restrictive common law cy pres or deviation [trust] doctrines will apply and the property will pass to a charitable corporation that meets those stricter standards."); MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 438 (2004) ("The doctrine of cy pres [is] applicable . . . in forty-nine states to charitable trusts and to charitable corporations . . . ."); 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 348.1 (4th ed. 1989) (explaining the extent to which trust principles are applicable to charitable corporations). *See generally infra* notes 64–73 and accompanying text (discussing the interaction

exploration of donor intent becomes more exacting and its implications for case outcomes more variable. In this regard, three additional analytical steps affect whether and how the doctrine applies.

1. Frustration

First, cy pres traditionally applies only where it has become "impossible, impracticable, or illegal" to carry out the donor's original charitable purpose.[24] Such a determination depends not only upon the court's understanding of exactly what charitable purpose a given donor intended, but also upon a court's willingness to find that purpose sufficiently frustrated.[25] As to the degree of frustration required, both commentators and the practicing bar have noted "significant" variability in judicial attitudes toward finding that one of these triggering circumstances exists.[26] Many see a

of corporate-governance and charitable-trust law).

24. A traditional statement of the doctrine, offered by the *Restatement (Second) of Trusts*, provides:

> 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 TRUSTS § 399 (1959). More recent articulations of the doctrine have added the impediment of a purpose becoming "wasteful" to the circumstances that justify application of the doctrine, though that criterion had generally been rejected under prior law as too liberal. *See* UNIF. TRUST CODE § 413(a) (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). In part because of that resistance, the "wasteful" criterion remains decidedly more limited (if even accepted at all in a given jurisdiction) than common usage of the term might suggest. The Reporter of the *Restatement (Third) of Trusts* describes "wasteful" as meaning that the funds dedicated to a given purpose far exceed that which is necessary, such that it would be imprudent not to expand the purposes for which the funds can be applied. *See id.* § 67 cmt. c(1) ("The term 'wasteful' is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely 'better use' will suffice."); *cf.* UNIF. TRUST CODE § 413(a) cmt. (amended 2005) (expressing a similar sentiment).

25. *See, e.g.*, Johnson, *supra* note 7, at 372 ("This ['impossible, impracticable, or illegal'] prong requires a fact-specific inquiry, and the courts' refusal to construe this requirement liberally has caused it to become the major impediment to the application of the *cy pres* doctrine . . . ." (footnote call number omitted)); *see also* Chester, *supra* note 18, at 408 ("[U]nder the guise of two of the primary requirements for modification of trusts through cy pres, dead hand control [is] still . . . a reality in the 1970's. [One of these requirements is] that the specific intent of the donor has become impractical or impossible of performance.").

26. *See* Comm. on Charitable Trusts & Founds., Am. Bar Ass'n, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, 392 (1973) ("[T]here continues to be a significant variance in the degree of impossibility or impracticability required."); Nancy A. McLaughlin, *Rethinking*

"prevailing conservative [judicial] mood," suggesting a narrow view toward the application of cy pres to modify gift terms.[27] As one commentator recently noted:

> "[I]llegality" as a criterion of relief . . . is applied almost entirely to defeat restrictions that are discriminatory . . . .
>
> . . . Relief on grounds of "impossibility" is typically granted only where subject funds remain, but the cause to which funds are to be applied has ceased to exist. That is to say, . . . where the social object of the grant has altogether ceased to exist . . . . The criterion of "impracticality" then effectively dissolves into "impossibility," with courts unwilling to exploit the category otherwise."[28]

This narrow judicial approach evokes criticism on two closely related fronts. First, it makes it less likely that the doctrine will be invoked such that modification of the donor's terms can be had. In other words, many commentators object to a narrow judicial construction that allows these triggering criteria to serve a stringent "gatekeeping" function on the availability of cy pres relief.[29] That gatekeeping exists, of course, in order to forestall modification of often-outdated donor terms and thus to preserve donor intent as understood by the court. The second criticism, perhaps better stated as the logical consequence of this protection of donor intent, is that the noted criteria in application place too little emphasis on the "continued social efficacy" of the donor's restrictive terms.[30]

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the Perpetual Nature of Conservation Easements, 29 HARV. ENVTL. L. REV. 421, 466 (2005) (concluding that three decades after the ABA study, "this state of affairs does not appear to have changed"); *see also id.* at 465 ("Decisions regarding whether the charitable purpose of a gift or trust has become 'impossible or impracticable' are based on the particular facts of each case, and no precise definition of the standard exists.").

27. McLaughlin, *supra* note 26, at 467; *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 cmt. a (Tentative Draft No. 2, 2009) (discussing the traditional legal principles governing restricted charitable gifts and noting that "[t]he inherently conservative nature of this legal structure is controversial"); Goodwin, *supra* note 18, at 101 (noting that the "impossibility" and "impracticability" criteria "afford relief only under very limited circumstances"); Johnson, *supra* note 7, at 371 ("Most courts have been unwilling to abandon the rigidly textual approach employed when analyzing the ['impossible, impracticable, or illegal'] prong . . . ."); Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 643–44 (1988) (making the same observation).

28. Goodwin, *supra* note 18, at 101.

29. *See supra* note 25 and accompanying text.

30. Goodwin, *supra* note 18, at 101–02 ("The *cy pres* doctrine harbors no criterion by which to evaluate the continued social efficacy of a nondiscriminatory restricted gift short of a showing that its object has ceased to exist."); *see also* Chester, *supra* note 18, at 408, 419 (indicating that the "impossibility" criterion represents a key deferral to donor intent over societal concerns); Sisson, *supra* note 27, at 648–53 (arguing for more expansive

2. Charitable Intent

Even if a court finds impossibility or one of the other triggering frustrations to exist, cy pres will only apply if the court finds that a second criterion has also been met. That criterion requires the donor to have acted with "general charitable intent" when making the gift.[31] To find such intent, the court must discern that the donor's original intentions were sufficiently broad in nature. Specifically, the donor's intentions must have been broad enough to transcend absolute adherence to the very particular restrictions that the donor placed on the use of the gifted assets now that current circumstances frustrate compliance with those restrictions.[32] A donor, alternatively, possessed a more confining, "specific" intent if she would have preferred that her charitable designs simply terminate if they could no longer be carried out precisely as originally contemplated.[33]

Upon finding general charitable intent, the court will "save" the charitable essence of the gift by relaxing the donor's restrictions. This permits the gifted property to be applied in pursuit of a charitable purpose that in some way reflects the donor's originally restricted purpose.[34] If a court finds that a donor acted with only specific charitable intentions, however, cy pres doctrine will not apply and the gift will fail.

B. Variability and Reform Efforts

Before considering the third aspect of cy pres analysis, a few observations are in order. Specifically, the "impossibility" threshold, the general-intent requirement, and their consequent impact on cy pres analysis and outcomes conspire to impair cy pres doctrine's

applicability of cy pres in cases short of impossibility).

31. *See supra* note 24 (providing a traditional statement of cy pres doctrinal requirements); *see also infra* Part I.B (addressing recent liberalizations of cy pres doctrine, particularly with regard to the general-intent requirement).

32. CHESTER, BOGERT & BOGERT, *supra* note 22, § 436; SCOTT & FRATCHER, *supra* note 23, § 399.

33. Stated differently, courts will attribute general intent to a donor if her mindset at the time of the gift is deemed to be such that, upon confronting the failure of her expressed charitable designs, the donor would have wanted her gifted property to be dedicated to some similar charitable purpose—even if doing so requires a departure from the specifics of her expressed restrictions. *See* SCOTT & FRATCHER, *supra* note 23, § 399.2; *see also* Craft v. Shroyer, 74 N.E.2d 589, 593–94 (Ohio Ct. App. 1947) (discussing the general-intent requirement); Atkinson, *supra* note 4, at 1117–18 (discussing this requirement and what it means in terms of a donor's desired course of action where the original charitable objective fails); Laird, *supra* note 10, at 978 (reducing the inquiry to ascertaining which of two outcomes the donor would have preferred).

34. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 cmt. a (Tentative Draft No. 2, 2009) ("[C]ourts developed mechanisms under charitable-trust law to 'save' the settlor's charitable wishes by modifying the trust in a manner that furthers the settlor's intent.").

ability to provide a truly workable and predictable basis for decision making. The general-intent requirement, in particular, has been roundly criticized by scholars as a "legal fiction"[35] that prevents even "'diligent' judges"[36] from applying cy pres in any consistent or predictable manner.[37] Indeed, even the Reporter of the recent *Restatement (Third) of Trusts* describes the general-intent inquiry as "artificial and speculative."[38] Such criticisms obtain because any inquiry into a given donor's intentions is necessarily subjective and fact-specific.[39] Even courts acknowledge the limited value of precedent—apart, of course, from demonstrating the lack of consistency in outcomes under the doctrine.[40] These observations lead to the basic conclusion that, with respect to inquiries into the scope of a donor's charitable intentions, "courts have no principled basis for the application of the *cy pres* doctrine."[41]

A doctrine as consequential as cy pres can only be left to languish for so long under standards that essentially invite an ex post facto explanation of donor intent in order to support the outcome for which rationalization is sought. That rationalization, of course, is that a given gift either is or is not sufficiently frustrated or that continuation under modified terms was or was not within the

35. Terri R. Reicher, *Assuring Competent Oversight to Hospital Conversion Transactions*, 52 BAYLOR L. REV. 83, 129 (2000).

36. Laird, *supra* note 10, at 977.

37. *See, e.g.*, Loring v. Town of Kingsley (*In re* Loring's Estate), 175 P.2d 524, 531 (Cal. 1946) ("The cy pres doctrine has meant many things to many courts and its limits have rarely been defined."); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281, 285 (Ind. 1945) ("[This court's cy pres decisions] have not been free from contradiction and confusion.").

38. RESTATEMENT (THIRD) OF TRUSTS § 67 reporter's notes cmt. b (2003) ("Much criticism has focused on the artificial and speculative inquiry whether a settlor had a 'general' charitable intent . . . .").

39. *See supra* note 8 and accompanying text; *see also* Atkinson, *supra* note 9, at 139 ("All three [cy pres] requirements are fact-specific and, therefore, subject to a measure of manipulation in particular cases."); Laird, *supra* note 10, at 977 (opining that the general-intent requirement as applied does little to further donor's intentions).

40. *See, e.g.*, Wilson v. First Presbyterian Church, Reidsville, N.C., 284 N.C. 284, 300, 200 S.E.2d 769, 779 (1973) ("[N]o two cases are exactly alike . . . . Consequently, it is not possible to reconcile all of the decisions of the various courts, even where the circumstances are quite similar."); Craft v. Shroyer, 74 N.E.2d 589, 595 (Ohio Ct. App. 1947) ("It will serve no useful purpose to discuss at length the numerous cases . . . in which the cy pres doctrine has been invoked."); *supra* note 37. Demonstrative of the strength of this criticism is Professor Bogert's observation that "[d]irectly opposite results in cases where the facts are similar prove the unsatisfactory nature of the search for the settlor's intent." CHESTER, BOGERT & BOGERT, *supra* note 22, § 436. Courts have acknowledged this reality by noting, for example, that a "line of demarkation [between specific and general intent] is not well defined" and that a "research of authorities does not disclose any particular tests which have been applied." *Craft*, 74 N.E.2d at 593.

41. Johnson, *supra* note 7, at 380.

donor's contemplation. A partial solution for this artifice appears in the recently promulgated *Uniform Trust Code* ("*UTC*") and its fraternal sibling, the *Restatement (Third) of Trusts*. Both efforts to improve cy pres doctrine state that general charitable intent should be presumed.[42] The old rules nevertheless resurface, as that presumption may then be rebutted by evidence of a more specific donor intention.[43] Notwithstanding the rebuttable presumption, moreover, the court must in all instances still decide exactly what purposes a given donor intended before the accomplishment of such purposes can be declared "impossible, impracticable, or illegal."[44] So third-party declarations about the scope of an individual donor's subjective intent still permeate cy pres outcomes, even under the most current attempts to reform the doctrine.

The rebuttable presumption of general charitable intent does represent an improvement in cy pres doctrine, particularly if the revision is readily adopted by the states.[45] But as one commentator recently observed, "[e]ven as the need to free up charitable assets has increased dramatically, reform has moved glacially; in some places, indeed, dead hand control seems to have frozen still more solidly in place."[46] In any event, the proposed revisions fail to

42. *See* UNIF. TRUST CODE § 413 cmt. (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003).

43. *See* UNIF. TRUST CODE § 413 cmt. (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003). The *UTC* goes a step further by expressly rejecting gifts over to noncharitable beneficiaries if more than twenty-one years have elapsed since the date of the gift, unless the gift over is in the form of a reversion to a still-living donor. *See* UNIF. TRUST CODE § 413(b) (amended 2005); *cf.* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 440 (Tentative Draft No. 2, 2009) ("[A]fter the passage of a significant period of time . . . the policy of adhering to the terms in the . . . gift instrument increasingly weakens . . . .").

44. With regard to reform efforts and the adoption of a "wasteful" trigger for cy pres relief, see *supra* note 24.

45. *But cf.* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 reporter's notes 15–16 (Tentative Draft No. 2, 2009) (explaining that "[n]ot all states are so liberal" as to adopt wholeheartedly the *UTC*'s version of the related equitable-deviation doctrine and also noting that some states that have adopted the *UTC* have nonetheless "continued their prior cy pres standard instead of enacting the uniform provision"); John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 730 (2007) (discussing the high-profile dispute between Princeton University and the Robertson family over Princeton's management of a restricted charitable gift from the family and noting that neither of the states whose laws were potentially applicable to that dispute had enacted the *UTC* or affirmatively embraced the cy pres liberalizations found in the *Restatement (Third)*).

46. Atkinson, *supra* note 9, at 101. Professor Atkinson also notes "the disappointing progress of dead hand reform." *Id.* at 106. For a recent judicial decision turning upon the general or specific nature of a donor's intent, see *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, No. M2008-00723-COA-R3-CV, 2009 WL 2047376 (Tenn. Ct. App. July 14, 2009), which involved Fisk University's plan to sell a portion of the art collection donated to the university by Georgia O'Keeffe. The court concluded: "We . . . reverse the trial court's finding that the gifts to the University were motivated by a specific

provide a panacea for all that ails traditional cy pres doctrine in practical application.[47] This is particularly so in light of the increasingly corporate context in which restricted-gift problems arise.[48]

However, this recommended presumption of general charitable intent does suggest an important ideal reflected in the analysis presented below—namely, the appropriateness in cy pres analysis of ascribing to donors, as a class, some broadly conceived charitable inclination underlying any restricted gift. The *UTC* and *Restatement (Third)* position, in other words, provides some support for this Article's argument, which considers the charitable inclinations of donors generally rather than fixating on the very subjective intentions of a given donor. But alas, such foreshadowing requires further explanation, and placing that explanation in the proper context requires that the task at hand be completed first. Thus, the final task here is to appreciate the third element of cy pres analysis.

C. A Third Cy Pres Variable

Once past the "impossibility, impracticability, or illegality" and general-charitable-intent issues, courts confront a third task that effectively keeps open the door to a range of possible outcomes. Specifically, the court must determine an alternative charitable use for the donor's gift that is, under the traditional rubric, "as near as possible" to the use intended by the donor.[49] Reform projects have taken a more liberal stance by permitting the gifted property to be used "in a manner consistent with" or that "reasonably approximates" the donor's charitable intent.[50] In view of the safeguarding of donor intent seen thus far, it is somewhat paradoxical that this ultimate exercise of judicial authority essentially leaves the court with a theoretically guided, but in many

charitable intent instead of a general charitable intent, [and therefore we reverse] the finding that the University cannot establish that it is entitled to *cy pres* relief." *Id.* at *16.

47. *See, e.g.*, Goodwin, *supra* note 18, at 110 ("These attempts at reform notwithstanding, the age-old *cy pres* doctrine remains largely intact, still offering no relief to charities with endowed projects and programs burdened by time and changed circumstances (except where the mission is determined impossible to achieve whatever the efforts of the charity).").

48. *See supra* note 13 and accompanying text; *see also infra* Part II (examining the management of restricted charitable assets by recipient organizations and including a discussion of the interaction between the trust-based cy pres doctrine and modern corporate governance).

49. *See* CHESTER, BOGERT & BOGERT, *supra* note 22, § 431. This idea reflects the origins of the term "cy pres," which is a shortened form of "cy pres comme possible," which translated from Norman French means "as near as possible." *Id.*

50. *See* UNIF. TRUST CODE § 413(a)(3) (amended 2005); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

practical respects free, hand to direct application of the contributed property in any number of divergent ways once cy pres is deemed to apply. The speculative evaluation (or unrebutted presumption) of "general charitable intent" opens the judicial-reformation door to an expansive view of just what that general intent entailed and where its parameters lie, and outcomes proceed from there.[51]

Suppose, for example, that in 1940 a donor devised funds to City Hospital for the establishment and support of a wing to house and care for tuberculosis patients. Tuberculosis patients today almost universally receive outpatient treatment, with hospital stays unnecessary and, indeed, often unavailable. Given the absence of any need for tuberculosis beds in a modern American hospital (i.e., impossibility/impracticability), and given the malleability of the general-charitable-intent inquiry, a court (if so inclined) could easily find this gift subject to modification under the doctrine of cy pres.[52]

But to what modified use? The court would have little difficulty justifying application of the funds to support the operation of a tuberculosis outpatient clinic or perhaps to fund a hospital wing to care for patients of a modern affliction that is similar to 1940s tuberculosis in prevalence, effect, or treatment. If City Hospital lacks a tuberculosis outpatient facility or the ability to treat a modern tuberculosis equivalent, the court could justifiably direct that the funds be transferred to an adjacent community's hospital for the indicated uses, or, harking back to the general-charitable-intent criterion (whether direct or by way of rebuttal), the court could simply declare that the donor specifically intended the funds to be used only in the City Hospital community. The court could then conclude that the gift fails altogether and reverts to the donor's heirs. Better for the charity (City Hospital) petitioning for cy pres relief, the court could just as easily opine that by virtue of her general intent, the donor would have wanted the funds to be applied in support of City Hospital's general operations without regard to the treatment of tuberculosis or any other disease. And who is to say, today, exactly what the donor would have really wanted or which outcomes truly reflect the donor's subjective desires? In any

51. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 cmt. a (Tentative Draft No. 2, 2009) ("In framing cy pres relief, the court, *purporting to determine what the settlor or donor would have wanted*, traditionally departed as minimally as possible from the original instructions . . . ." (emphasis added)); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) ("[S]ettlors' probable preferences are almost inevitably a matter of speculation . . . ."); McLaughlin, *supra* note 26, at 485 ("In formulating a substitute plan, courts consider . . . the same type of evidence the courts examine in determining whether the donor had a general, as opposed to specific, charitable intent.").

52. For discussion of cy pres in the context of gifts for the treatment of tuberculosis, see Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1, 73 n.269 (2005); John F. Kuether, *Significant Probate and Trust Decisions*, 30 REAL PROP. PROB. & TR. J. 645, 693–94 (1996).

event, the range of possible outcomes is quite varied, and in many cases, a singularly principled basis for decision making or predicting outcomes is lacking.

D. Summary

Ultimately, the doctrine of cy pres leaves much to be desired in terms of certainty, consistency, principled decision making, and sufficient regard for the continuing social efficacy of the donor's particular directives. As noted, cy pres is in fact a doctrine that fundamentally "demands a return to the mind of the [donor]."[53] This explains why many courts construe the criteria for invoking the doctrine narrowly so as to make it difficult even to consider upsetting the donor's intent; why a finding of general charitable intent is then required (or must withstand rebuttal) before the doctrine can be applied; and even when these requirements are satisfied, why the ultimate doctrinal objective is to authorize an alternative charitable use that conforms in some way to the donor's often unknowable intentions. Of course, these observations address doctrinal matters. A more comprehensive view of restricted gifts and the potentially pernicious effects of traditional cy pres doctrine, however, requires a more thorough understanding of the problems that restricted charitable gifts often present for charitable organizational management. Part II addresses these issues.

II. MANAGING RESTRICTED CHARITABLE ASSETS

An appeal to cy pres doctrine represents only the final act in the life of a charitable organization's dealings with donor-restricted gifts. In this regard, three stages characterize the life of a restricted charitable gift, and cy pres and its potential modification of donor terms appear last (if at all) in that cycle.[54] The first stage in this restricted-gift life cycle encompasses the negotiation and procurement of the gift. During this "origination" stage, the donor and recipient organization might agree on certain terms and restrictions that will guide the organization's use of the gifted assets.[55] Alternatively, a donor may simply impose such restrictions

53. Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145, 1197 (2003); *see supra* notes 8–10, 18 and accompanying text; *supra* Part I.A.2.

54. *See* Eason, *supra* note 45, at 696–97 (explaining the life cycle of a restricted charitable gift), *quoted in* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 440 reporter's note 1 (Tentative Draft No. 2, 2009). The discussion in this Part draws from and expands upon Eason, *supra* note 45.

55. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. ch. 4 introductory note at 3 (Tentative Draft No. 2, 2009) ("[N]egotiating with a potential major benefactor over restrictions and conditions can be delicate and troubling for charity management and boards . . . ."); *id.* § 430 cmt. b(2) (discussing gift-acceptance policies); *see also* Eason, *supra* note 45, at 707–08 (discussing professional and ethical standards applicable to the negotiation and acceptance

unilaterally—as in the case of a restricted charitable devise set forth in a donor's will.

Where a restricted charitable gift results, the second ("managerial") stage consists of that period during which the recipient organization's management endeavors to employ the gifted assets in furtherance of the organization's charitable mission. This stage could theoretically endure forever, were gift restrictions presciently crafted, circumstances unyieldingly stable, or donors conciliatory by expressly granting discretion to charitable management to deal with inevitable change.[56] As a practical matter, however, charitable management will at some point likely confront (or at least perceive) a need to depart from a given donor's particular gift restrictions. Such a "cy pres circumstance" could signal the third stage in the life of the gift, that period during which a problematic restriction is debated and ultimately modified by a court or upheld such that the recipient organization must forfeit the gifted property due to its inability to adhere to the donor's terms.

Petitioning a court for cy pres relief is a clear option when management faces difficult issues of compliance with a donor's terms. Charitable management, however, faces a dilemma more complicated than simply evaluating the time and expense of seeking judicial relief. The noted unpredictability of cy pres outcomes coupled with the fiduciary duties governing managerial conduct fuel this dilemma and often forestall any formal transition to the cy pres stage in the life of a particular gift.[57] More specifically, management must constantly balance its obligation to efficiently and effectively pursue the organization's charitable mission against restricted-gift terms that may in fact or perception impede that pursuit. The dilemma, then, lies in management's task of determining whether and to what extent a donor's restrictive terms have become problematic in light of this mission, and if so, determining the best way to remedy the problem.

The particular path that management chooses to follow out of (or better yet, around) this dilemma has significant implications for the reality of honoring a donor's intent. The very existence of the dilemma, moreover, poses a normative problem that is exacerbated by the flaws in current cy pres doctrine. After first providing a brief explanation of the fiduciary duties governing management's stewardship of donor-restricted gifts, the discussion in this Part will

of charitable gifts).

56. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450(a) (Tentative Draft No. 2, 2009) (noting that a gift instrument may itself authorize modification).

57. *See, e.g.*, Eason, *supra* note 45, at 730–32 (discussing the *Robertson v. Princeton University* litigation and evaluating why Princeton may have resisted invoking the doctrine of cy pres despite the university's allegations that circumstances had changed since the date of the gift); *see also* Goodwin, *supra* note 18, at 85–86 (echoing these observations about *Robertson*).

turn to the dilemma, its consequences, and considerations that exacerbate both.

A. Fiduciary Duties

The fiduciary duties that bind charitable management prescribe a minimal level of active integrity and competence in managerial conduct and decision making. Those duties include a duty of care and a duty of loyalty.[58] The duty of care relates to the competence displayed by management in carrying out its responsibilities. Commentators variously describe the duty as requiring that management be diligent and attentive, that decisions be informed, and that actions be carried out in good faith and with ordinary prudence.[59] Except in cases of egregious negligence, compliance with these duty-of-care responsibilities typically turns upon matters of process rather than the substantive merits of the actual decisions made.[60] Assume, for example, that a donor contributed funds expressly "to facilitate the construction of a new state-of-the-art athletic arena for Private University." In that case, the duty of care would require, among other things, that management duly investigate facility costs and specifications, compare features at other modern facilities to gauge "state-of-the-art," consider the feasibility of an on-campus versus an off-campus location, and evaluate the number and types of sports teams that might utilize the new facility.

The duty of loyalty, by contrast, requires faithful pursuit of the interests and charitable mission of the organization.[61] Pursuit of the self-interest of the decision maker or other interests external to the organization's charitable objectives would violate the duty.[62] So

58. *See* FISHMAN & SCHWARZ, *supra* note 13, at 149–216. The parameters of the duties of care and loyalty are set forth in PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §§ 300, 310, 315 (Tentative Draft No. 1, 2007). For various standards of conduct as articulated in state statutes and elsewhere, see *id.* § 300 reporter's notes 6–14.

59. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 315 (Tentative Draft No. 1, 2007); FREMONT-SMITH, *supra* note 23, at 199–215.

60. *See, e.g.*, Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 908–13 (2007) (discussing the duty of care in the context of the best-judgment rule and contrasting that to a standard that evaluates the substantive merits of management decisions); *see also* DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 49–59 (1988) (discussing the business-judgment rule).

61. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 310 (Tentative Draft No. 1, 2007); RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

62. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 310 cmt. a (Tentative Draft No. 1, 2007).

> It usually would not make a legal difference whether duties are owed to the charitable purpose (the trust approach) or to the entity itself (the corporate approach). In either case, the charity's board members must carry out that purpose in the exercise of their discretion, subject to any restriction imposed by the settlor or donors. By using the

continuing the previous example, management would violate its duty of loyalty if it were to choose a building site or contractor based upon potential personal gains flowing from the decision. Were an organization to accept a gift of land in order to appease a major donor, knowing that the land is difficult or costly to maintain and ill-suited for the athletic-facility uses to which the donor restricted it, this could also implicate a breach of the managerial duty of loyalty.[63]

Within these parameters, charitable corporate management enjoys a degree of autonomy in decision making that is fairly broad. As in the case of the standards governing conduct of for-profit corporate management, the oft-cited concepts of good faith, diligence, and faithful pursuit of the organization's mission constrain such decision making and provide standards for judging compliance when challenges arise.[64] In the foregoing example, management could decide to build an on-campus facility even though an off-campus site might cost less and offer other advantages. Such a decision might be based upon the perceived (and duly considered) benefits to students or perhaps some notion that the integration into campus of a new facility will enhance campus life or attract more skilled athletic recruits than would a more impersonal off-campus site. So long as management reached this decision after reasonable investigation, unbiased by personal or other extraneous concerns, a court would have little difficulty upholding management's actions were a challenge to arise—and management should feel confident in so proceeding. In short, charitable management is vested with a recognizable degree of discretion in making decisions relevant to the organization's operations and pursuits.

B. The Fuzzy Middle Ground

Where a restricted charitable gift is involved, however, an additional obligation constrains management. This obligation has roots in the long-accepted trust-law principle that a trustee must "administer a trust in a manner faithful to the wishes of the

> phrase "best interests of the charity, in light of its stated purposes," this Section combines the trust and corporate language to declare an affirmative obligation of the fiduciaries to govern for charitable purposes, and not for the benefit of board members, executives, donors, or other private parties.

Id.

63. The donor, for example, may enjoy significant tax benefits or a naming opportunity from the transaction, which the board could be loathe to deny the donor based on a past and expected future of generous giving to the institution. *See generally supra* note 55 (discussing the negotiation and acceptance of charitable gifts as well as applicable professional and ethical standards).

64. For a good discussion of good faith, loyalty, and duty to mission—as well as the problems with such standards—see Sugin, *supra* note 60, at 908–13.

creator."[65] Significantly, the more exacting standards of trust law govern restricted charitable gifts and adherence to this "duty of obedience," regardless of whether the charitable recipient exists as a nonprofit corporation or a straightforward trust.[66] Those trust standards require strict compliance with the donor's terms, without regard to whether ordinary prudence and good faith (duty of care) or a lack of self-interest (duty of loyalty) accompany any failed attempt to comply.[67] If departure from a donor's terms is desired, the organization's management would be compelled to seek judicial approval for modification or release of the restrictions under the trust doctrine of cy pres.[68] Management would be "compelled" both

65. FISHMAN & SCHWARZ, *supra* note 13, at 219 (citing 2A SCOTT & FRATCHER, *supra* note 23, § 164.1 (4th ed. 1987)); *see also* Sugin, *supra* note 60, at 898.

66. *See supra* note 23. "Duty of obedience" as used here signals only an obligation pertaining to gift restrictions that arise other than by virtue of a charitable corporation's organizational charter and bylaws. Under "the most robust version of the duty [of obedience]," by contrast, the board must adhere to the purposes stated in the charitable corporation's original incorporating documents absent circumstances akin to those required to initiate a cy pres action. Katz, *supra* note 1, at 700; *see also* KURTZ, *supra* note 60, at 85. In Kurtz's view, this duty would regard the organization's corporate purposes, as set forth in the organizational charter, as constituting express terms upon which all gifts to the corporation are conditioned. *See id.* at 85–86. Most commentators (including this author) reject the existence of such an expansive duty tied to the mere choice of organizational form. *See* FREMONT-SMITH, *supra* note 23, at 225–26; Sugin, *supra* note 60, at 902 (offering instead a more "abstract" duty of "fidelity"); *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 240 cmt. c (Preliminary Draft No. 4, 2007) (rejecting a separate duty of obedience, "at least as it has been interpreted to prevent a board . . . of a nonprofit corporation from altering corporate purposes prospectively"); FISHMAN & SCHWARZ, *supra* note 13, at 219 (describing the duty of obedience as "somewhat less recognized"); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1406 n.30 (1998). *See generally* Atkinson, *supra* note 21, at 47–54 (discussing the duty of obedience in relation to and as possibly subsumed by or augmenting the duties of care and loyalty).

67. Professor Sugin argues that properly understood, the duty of obedience goes beyond the standards of care and loyalty by imposing a substantive obligation of fidelity to mission, regardless of procedure or any lack of self-interest. *See* Sugin, *supra* note 60, at 908–13.

68. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 & cmt. a (Tentative Draft No. 2, 2009); *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 240 cmt. a (Preliminary Draft No. 4, 2007) ("[T]his Section confines the obligation to seek judicial relief to the trustees of charitable trusts with respect to all restrictions, and to the boards of directors of nonprofit corporations only with respect to restricted charitable gifts (and not to all assets of the corporation) . . . ."). This discussion assumes the absence of some release provision in the gift instrument or a donor release under section 7(a) of the 1972 *Uniform Management of Institutional Funds Act* ("*UMIFA*") or section 6(a) of its 2006 revision, the *Uniform Prudent Management of Institutional Funds Act* ("*UPMIFA*"). For a discussion of *UMIFA* and *UPMIFA*, see Susan N. Gary, *Charities, Endowments, and Donor Intent: The* Uniform Prudent Management of Institutional Funds Act, 41 GA. L. REV. 1277 (2007).

because it lacks autonomy to make such changes on its own accord and because a charity's governing board has a duty to keep gifted funds productive for the benefit of the charitable class served by the organization.[69]

Thus, when charitable management confronts the prospect of deviating from a donor's restrictions, management lacks the autonomy typically associated with "corporate" governance.[70] Such autonomy might otherwise permit management to identify other, more currently relevant purposes or means of operation and then to make a unilateral decision about how best to redeploy the gifted assets in light of those opportunities.[71] Charitable fiduciaries therefore often find themselves in a fuzzy middle ground when it comes to determining whether certain applications of gifted assets fall within the parameters of a donor's restrictions—and thus within the purview of managerial discretion—or whether judicial authorization for such applications might be required.[72]

The net result is that many situations arguably fitting the cy pres mold first give rise to an interesting interplay between the corporate managerial duties of care and loyalty and their attendant discretion on the one hand and the strict trust-law duty of obedience on the other hand. Grounded as it is in trust law, cy pres doctrine exists to resolve problems that arise from duty-of-obedience difficulties. The doctrine does so, however, without due regard for or effect on the duties of care and loyalty in the modern charitable

69. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. a (Tentative Draft No. 2, 2009) ("[I]t is incumbent upon the charity's fiduciaries to ensure that its assets are productively used. . . . Thus, if a term in a trust or a gift instrument cannot be complied with, application of this Section [dealing with modification procedures] is mandatory."); FREMONT-SMITH, *supra* note 23, at 225–26, 439.

70. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 cmt. a (Tentative Draft No. 2, 2009) ("[T]he standards of fiduciary performance for trustees have been conforming to the [more liberal] nonprofit corporate standards, in recognition of the level of discretion needed to govern an operating charity; at the same time, however, the requirements for performance of restrictions on gifts by corporate fiduciaries have been conforming to the [generally stricter standards of] trust law."); Katz, *supra* note 1, at 696 ("As compared to charitable trustees, a charitable corporation's board of directors has more discretion over its charity's mission and assets, except for restricted gifts, which are held in trust.").

71. *See supra* Part II.A (discussing the fiduciary duties ordinarily owed by charitable corporate management and the autonomy ordinarily enjoyed by such management).

72. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. b (Tentative Draft No. 2, 2009); Eason, *supra* note 45, at 708–11 (noting the dilemma of this "fuzzy middle ground"); *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 cmt. a & reporter's notes 1–6 (Tentative Draft No. 2, 2009) (discussing standards for compliance with restricted-gift terms (quoting and drawing from Eason, *supra* note 45, at 705–06, 710–11)); *infra* notes 78, 81 and accompanying text.

corporation.[73] Those duties typically underlie managerial decisions that precede any cy pres action. As a result of this disconnect, charitable management may be tempted to proceed with similar disregard for the strict trust-law concepts on which cy pres doctrine rests.

Management has two general options as to how it proceeds when confronting this fuzzy middle ground. Viewing deference to the dead hand as a sliding scale, management's options essentially lean toward opposite ends of that scale. From management's perspective, the easier but perhaps less satisfactory choice lies at the more donor-deferential end. This choice is characterized by management's construing the donor's restrictions very conservatively in terms of permissible uses of the gifted property and then staying that narrow course unless and until absolute impossibility arises. At that point, judicial guidance would be sought with regard to the proper use of the gifted property. This option involves a great deal of reverence for the duty of obedience, coupled with restraint in pursuing the full scope of managerial discretion potentially available. This option is easier because it suggests little thought beyond a strict-constructionist view of restrictive-gift language, resorts to judicial approval at the first sign of trouble, and raises little risk of having managerial conduct called into question. It is often less satisfactory to charitable management, however, for two reasons.

First, as a normative matter, it elevates the donor's unyielding directive above managerial discretion to pursue an evolving charitable mission in the most effective and efficient manner possible as circumstances change over time. While those who favor a more donor-centric approach might see this as perfectly acceptable, this reality may actually undermine compliance with donor intent.[74] As new managers take over and memory of the donor fades, for example, organizational gratitude may yield to resentment of the inanimate donor restriction, and managerial temptation to disregard the donor's terms may grow.[75]

The second reason that a conservative managerial approach

73. Indeed, the Reporter for the *Principles on the Law of Nonprofit Organizations* comments:

> [T]oo great a focus on the dictates of the donor can infringe on the fiduciaries' ability to govern. The challenge for the law is how to confine the legal significance of settlor or donor intent to those assets that explicitly carry limitations, and how to balance the competing values of benefactor intent and governing-board flexibility in light of the imperatives of current conditions.

PRINCIPLES OF THE LAW OF NONPROFIT ORGS. ch. 4 introductory note at 2 (Tentative Draft No. 2, 2009).

74. *See supra* notes 8, 39 and accompanying text.

75. *See* Atkinson, *supra* note 21, at 91 ("As the donor's death recedes into the past . . . later generations of fiduciaries will feel less beholden to the dimly remembered donor.").

finds less favor is more directly consequential in nature. That reason recalls the previously noted malleability of cy pres criteria and the resulting unpredictability inherent in any judicial resolution based on that doctrine.[76] Charitable management often fears the ultimate destination to which a cy pres course of action may lead. That destination likely includes a binding judicial pronouncement of donor intent and a corresponding mandate as to the permissible uses of the gifted property. Such a pronouncement essentially forecloses any hope of managerial discretion to find flexibility on either count going forward. Even worse, the court might discern a narrow donor intent and then declare that compliance with the donor's terms (as so construed) has become "impossible, impracticable, or illegal." This could potentially remove the property from charitable management's control entirely.[77] So what on first glance appears to be the straight and narrow path for management is in reality a blind curve, and cy pres provides no hint of whether the promised land or sheer cliff lurks around that corner.

In contrast to this conservative managerial approach, the other option available to charitable management pays less deference to the dead hand and forestalls (or ignores) the judicial avenue with much more vigor. That option entails management implementing its own more expansive view of the donor's gift restrictions. Perhaps without expressly stating (or even realizing) that it is doing so, management would invoke its perceived discretionary latitude to construe the terms of the gift and the acceptable means by which those terms might be carried out.[78] This favored interpretation would, of course, avoid the aspects of the restrictions that would be problematic were the restrictions more narrowly construed. By so circumventing the problematic potential of a donor's restrictions, management will have avoided any need for judicial authorization for departing from those restrictions and thus will also have avoided

76. *See supra* notes 35–41, 51 and accompanying text.

77. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 470 cmt. d (Tentative Draft No. 2, 2009) (noting how a petition for modification might transform into a suit for breach of the donor's restriction, "possibly resulting in the transfer of the trust or gift to another charity subject to the same . . . restriction"); *supra* note 57 and accompanying text.

78. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 410 reporter's note 1 (Tentative Draft No. 2, 2009) ("The governing board will often have to exercise some level of discretion in implementing donor intent."); *id.* § 470 cmt. b ("[I]n carrying out the . . . terms of a gift . . . for which it is trustee, the charity will often have to exercise its judgment. . . . Courts minimize the risk of vexatious litigation by refusing to second-guess decisions committed to the discretion of the . . . governing board."); *see also id.* § 430 cmt. a (noting that a charity's fiduciaries discharge their duties relating to compliance with donor gift terms if, among other things, "no facts arise that would cause a reasonable fiduciary, acting in good faith, to suspect noncompliance"); *supra* notes 72–73 and accompanying text; *infra* note 81 and accompanying text.

the possibility of an unfavorable judicial mandate.[79]

The availability of this second option suggests that if a charitable organization finds it difficult (or undesirable) to comply with a strict (or perhaps more obvious) construction of a donor's terms and if that organization is reluctant to pursue judicial modification of those restrictions, then the organization might simply unilaterally (re)interpret the gift terms or otherwise disregard them. This is not to suggest that such action would be proper or in many instances even defensible. But if malfeasance states the matter too harshly, the opportunities for eviscerating donor intent somewhere along this managerial path should be apparent. Ultimately, the unpredictability and potential mandate of a cy pres action coupled with lax attorney-general enforcement of compliance with donor terms might easily lead charitable management in this direction.[80] The lure of this course of action is

79. For an earlier explanation of this interpretive circumvention of the problematic aspects of donor restrictions, see Eason, *supra* note 45, at 722–32. That article discusses the issue in the context of the *Robertson v. Princeton University* dispute. Later commentators have also embraced that analysis in the same context. *See, e.g.*, Goodwin, *supra* note 18, at 88–92, 106. Interestingly, Professor Goodwin notes that as a result of the settlement between the parties, the Robertson gift "is to be subject to the same restriction as the original grant to the Robertson Foundation, but going forward Princeton alone will have the discretion and authority to interpret the purpose of the Robertson Fund and to determine the appropriate means to implement its purposes." *Id.* at 96.

80. *See, e.g.*, Goodwin, *supra* note 18, at 79 ("No better inducement to noncompliance could be devised than the law as it currently stands."). Many commentators regard the formal legal enforcement of nonprofit fiduciary duties as lax. *See, e.g.*, FISHMAN & SCHWARZ, *supra* note 13, at 151 (noting that breach-of-duty matters are typically settled quickly with state attorneys general, while the notoriety arising from reports of such breaches "can be devastating"); *id.* at 169 ("The duty of care . . . is quite low, and . . . liability [is] improbable except in the most egregious cases . . . ."); *id.* at 248 (noting that "attorney general oversight [is] more theoretical than deterrent"); Johnson, *supra* note 7, at 388 ("[T]his monitoring mechanism has been deficient because of the attorneys general's lack of interest and funds to monitor and pursue vigorously cases involving [compliance with donor terms]."). Professor Atkinson indicates that well-intentioned management may be led in the direction described in the text by the prospects of lax attorney-general enforcement of the noted fiduciary duties. *See* Atkinson, *supra* note 9, at 143–48. This route might also be accompanied by some negotiation to appease the donor's descendants. *See id.* at 151–53. The possibility of subsequent judicial ratification of the organization's departure from the donor's instructions could further underlie the organization's decision to proceed in this manner. *See id.* at 143–44. Professor Atkinson cautions, however, that absent some confidence in the attorney general's or court's likely view of such action, "the zone of comfort [here] is not only ill-defined, but also small." *Id.* at 144. Less-principled organizational management might ignore all of these perils and simply disregard donor instructions because management seeks to advance its own alternate agenda (without regard to any true need for gift modification). *See id.* at 161–62. Perhaps even less flatteringly, these fiduciaries might seek to "indulge their private vanities or inflate their egos" by acting as they see fit, without regard to

magnified by the imprecise boundaries of managerial prerogative in this context. Consider in this regard the most recent ALI pronouncement on the issue: "It can be difficult . . . to draw the line between good-faith implementation [of gift terms] (committed to the charity's discretion) and either breach or . . . the need for the charity to seek judicial modification (deviation or cy pres)."[81]

C. Summary

So here we find restricted-gift duties grounded in trust law, coupled with the trust-law remedial doctrine known as cy pres. These doctrines clearly revere donor intentions. Ongoing adherence to such intentions under current doctrine, however, ultimately turns upon some divination of the nature and scope of a given donor's subjective desires, with that inquiry often formally undertaken only very late in the life of a restricted gift. In addition to the speculative aura that haunts the various facets of cy pres analysis, cy pres doctrine also does little to guide managerial conduct during the potentially long-lived managerial stage in the life of a donor's restricted gift. Paradoxically, this lack of guidance and the

limitations imposed by others. *Id.* at 161.

81. PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 450 cmt. b (Tentative Draft No. 2, 2009). Prior versions of the *Principles* show the difficulties that the Reporter faced in articulating the nuances of this issue. In a somewhat ambiguous early pronouncement, the Reporter concluded that "[a] charity is considered to comply with a gift restriction if the charity acts in good faith, reasonably construes the terms of the restriction, adheres to all material requirements of the restriction, and seeks relief under [cy pres doctrine] . . . when appropriate." Eason, *supra* note 45, at 724 (quoting PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 425(a) (Preliminary Draft No. 3, 2005)). A later draft limited such broad discretion to implementing (versus construing) donor intent. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 420(a) (Preliminary Draft No. 4, 2007). The most recent draft approves of action where "the charity reasonably implements all material requirements of the term, or, when appropriate, seeks judicial instruction . . . or modification." PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 (Tentative Draft No. 2, 2009). Ambiguities nonetheless remain due to the inherent complexity of the issue and the difficulty of distinguishing acts of "construction" from those of "implementation." *See, e.g.*, *id.* § 450 cmt. a ("The charity generally has discretion, consistent with fiduciary duties, in deciding when to invoke this Section [dealing with modification procedures]."); *id.* § 450 cmt. b ("Some of the disputes between donors and charities . . . could be viewed as cases where the charity . . . might have been wise to get court approval of their desired use of the . . . gift, which approval often would have been granted as a reasonable construction of the settlor's or donor's intent."); PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 240 cmt. b, illus. 4 (Preliminary Draft No. 4, 2007) ("A court should approve the change even though the restriction is not impossible to honor, because the board has determined in good faith that the restriction is administrative rather than the donor's charitable purpose. Applying cy pres instead of deviation could mean the difference between deferring to a reasonable determination by the charity fiduciaries and adhering to the wishes of [the donor] unless it becomes impossible or impracticable (or wasteful) to do so . . . ."); *see also supra* note 78.

malleable employment of donor intent to justify unpredictable cy pres outcomes can easily lead charitable management down a path that threatens the very intent cy pres purports to guard.

As an unwelcome complement to these issues, we find a necessary but uncertain degree of permissible managerial discretion that further complicates the tasks of donors, charitable organizations, and courts. To echo the words of another recent commentator in support of the proposal which follows, what is needed is

> a procedural framework that allows a charity to attenuate the perpetual force of restrictive language in the face of societal change. This framework must operate to discipline the charity in its decision-making processes. Because donor-imposed restrictions guarantee the diversity of the charitable sector, a liberty to interpret restrictive language under certain circumstances should not operate as a license to apply funds with little or no regard for the donor's charge.[82]

Parts III through VII develop precisely such a framework.

III. THE CENTRAL QUESTION, RECONCEIVED

Why do donors impose restrictions on their gifts in lieu of simply donating that property outright and without restrictions? For any individual donor and gift, the specific answers may be varied and perhaps unknowable, and the identity of the inquisitor and the reason for asking may color the proffered answer. We could, of course, concede the entire debate to those who advocate for more emphasis on the most efficient current use of gifted property. We could similarly disregard donor intent altogether when restrictions become problematic or perhaps after some stated period of time has passed since the date of the gift. Indeed, recent treatment of cy pres doctrine evidences some movement in this direction.[83] But casting out donor intent altogether oversimplifies and assumes too much in light of the enduring nature of this dead-hand versus charitable-efficiency debate, and particularly in light of the historical relevance of donor intent when cy pres circumstances rise to the fore.[84]

This Article posits that both charitable-efficiency and donor-intent concerns can be better served by a new approach to evaluating donor intent. This Part thus presents a unique conception of how "donor intent" should be understood and utilized when restricted-gift terms become problematic. The analysis proposed here changes the basic dynamic underlying current cy pres doctrine. This new proposal pursues predictability—or at least a

82. Goodwin, *supra* note 18, at 81.

83. *See supra* note 43.

84. Regarding the debate over charitable efficiency, see *infra* notes 87–88 and accompanying text.

rational framework for decision making—by supplanting many of the subjective elements of cy pres analysis and restricted-gift management with a more broadly conceived view of donor intent. That view, in turn, suggests a more structured analysis that should actually serve to guide the actions of charitable management long before cy pres is otherwise implicated.

Specifically, the phenomenon of restricted giving can be better understood and dealt with by asking a more generic question before concerns over a given individual donor or her particular restrictions obscure other considerations. The question is this: why do some donors impose restrictions on gifts in lieu of simply donating that property outright and without restrictions? Four broadly applicable and categorical motivations are worthy of further analysis: donors impose restrictions on their gifts in order (1) to support the donor's belief in worthy charitable objectives and the causes best suited to accomplishing those objectives; (2) to constrain charitable management from straying from the donor's own view of what are, or how to accomplish, those charitable objectives; (3) to freeze in place the donor's individual notions of appropriate but evolving public policy; and (4) quite simply, to exercise and enjoy a significant power that society has chosen to bestow on donors through the law of charitable gifts. As will be demonstrated, these four categorical answers illuminate the extent to which, why, and by what means donor restrictions deserve ongoing respect when circumstances render strict adherence to those restrictions problematic.

Importantly, this focus on donors' restrictive motivations does not require some mystical insight into a given donor's mindset or some presumed ability to discern the subjective intentions of every donor. In evaluating and categorizing donor motivations, the broader perspective adopted here instead focuses on the objective outcomes or consequences that a restriction might force on the recipient charity (or society in general) and groups those restrictions accordingly.[85] Any restriction forces or precludes certain actions with regard to the gifted property and the charity's future conduct in utilizing that property, and donors know this. The donor

85. For a recent example of a court casting an individual donor's intentions in terms of that donor's motivation, see *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, wherein the court noted:

> It is apparent from Alfred Stieglitz's will, the 1948 Petition Georgia O'Keeffe filed in the surrogate's court, and Ms. O'Keeffe's letters to [the charitable recipient's president] that followed, that the charitable intent motivating the gifts of the Stieglitz Collection and Ms. O'Keeffe's four pieces to the University was to make the Collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the general study of art.

Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 WL 2047376, at *14 (Tenn. Ct. App. July 14, 2009). *See generally supra* note 46 (discussing the Fisk University dispute).

motivations underlying the imposition of such restrictions, in turn, can be explained, evaluated, categorized, and dealt with by reference to the particular constraints imposed. In light of this more objectively focused undertaking, consideration of a given donor's particular restrictions can then be addressed in a more consistent and predictable manner.

Such evaluation and categorization thus suggests a new analysis to be employed where gift restrictions are in issue, as explained in Parts IV through VII. That analysis avoids the inherent cy pres weakness that results from obsessing over the idiosyncratic and often unknowable particulars of a given donor's intentions, yet it still maintains a healthy respect for donors generally. Equally important, the analysis proposed here provides a structure and rationale that—in contrast to current doctrine—should positively influence managerial conduct on matters pertaining to honoring donor intent long before gift restrictions become problematic. The first step in this analysis requires an appreciation of donors' charitable motivations, as discussed next.

IV. PROMOTING CHARITABLE OBJECTIVES

As a class, donors impose restrictions on gifts as a means to promote some particular belief in worthy charitable pursuits. At the very least, donors hinge their particular beliefs on some chosen charitable pursuit and reap benefits accordingly.[86] These observations support the argument that when gift restrictions become problematic, attention should focus first and foremost on the "charitable pursuit" in lieu of the "particular belief" emphasized in traditional cy pres analysis.[87] We should never lose sight of the overriding reason the gift qualifies as charitable to begin with, striving first to see the charitable forest notwithstanding the donor's particular and restrictive trees. In one sense, this simply represents another endorsement of the rationale underlying the trend to liberalize cy pres, a trend based on a belief that changing societal needs should take precedence over the stale dictates of the dead

86. As noted *supra* notes 1–4 and accompanying text, the ability to impose restrictions that govern into perpetuity is included among those benefits. *See generally* Karen J. Sneddon, Comment, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189 (2001) (discussing the Rule Against Accumulations, the Rule Against Perpetuities, and perpetual trusts).

87. Indeed, this positive understanding is consistent with the trend toward liberalizing cy pres, which is based on the belief that more emphasis should be placed on the societal benefit as opposed to dead-hand controls. *See supra* Part I.B. This theme appears consistently in commentary on cy pres doctrine, including the works of Professors Atkinson, Chester, Johnson, and others, as well as in the commentary to the *UTC* and *Restatement (Third)* reform projects. *See* sources cited *supra* notes 4–5, 7–12.

hand.[88]

On a deeper level, however, donor intent so characterized suggests an alternative analytical approach that courts and recipient organizations should follow when dealing with donor restrictions. That approach provides a logical and workable framework for placing charitable concerns on a more balanced footing with donor gift restrictions, while maintaining due regard for both. As to balance and workability, recall that two problems inherent in any current version of cy pres doctrine are the overwhelming force that subjective donor intent ultimately commands and the general lack of guidance provided to courts or charities charged with honoring that intent.[89] The analysis presented in this Part, in contrast, provides guidance and rationale by offering a more objective, structural framework for identifying those charitable concerns that are central to a donor's gift. The suggested framework also provides a coherent method for discerning those aspects of the donor's directives that deserve the greatest deference when restrictions become problematic. Note that although the analysis derives from a categorical understanding of donor restrictions generally, the suggested approach incorporates a guided concern for the individual donor.

A. Identifying Core Charitable Concerns

When difficulties arise with a particular gift restriction, the analytical focus should never lose sight of the public benefits that qualified the donor's gift as charitable in the first instance. Under current doctrine, however, once a charitable purpose is found, attention shifts dramatically to donor intent.[90] The proposal here recognizes the donor's restrictive nuances, but with an up-front acknowledgement that those nuances fall first when charitable purposes are threatened.[91] Does this suggest that donor intent should be treated cavalierly or unapologetically subordinated to current needs, as charitable-efficiency proponents might assert?[92]

88. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 67 cmts. a–b (2003) (discussing the modern rationale underlying cy pres doctrine and the policy concern for inefficient use of charitable assets).

89. *See supra* Part I.B.

90. *See supra* Part I.A.

91. Cut the diseased trees, in other words, to save the forest. This argument finds support in the *UTC* and *Restatement (Third)* position that a donor's charitable intent should generally be presumed. *See supra* note 42 and accompanying text; *supra* text following note 48. The statement here, however, reflects not just a rebuttable presumption, but rather an absolute—that some charitable purpose exists and should guide cy pres decision making as an unyielding analytical principle.

92. *See supra* notes 87–88 and accompanying text (discussing the charitable-efficiency argument). As for proponents of that view, see, for example, Sisson, *supra* note 27, at 651–52 (arguing for inclusion of "inexpedience" or "inefficiency" as grounds for invocation of cy pres).

No. Rather, this approach emphasizes appreciating donor intent as something inseparably linked to and derived from the requirement that (by definition) any charitable gift—restricted or not—must in some way serve a charitable purpose.

In this regard, it is axiomatic that "charity" suggests a benefit to the public or to some segment thereof that is broad or important enough that society as a whole can be said to benefit from service to that class of beneficiaries.[93] Consistent with this fundamental premise, identifying the donor's charitable purpose should focus always on the likely beneficiaries to be served by the donor's expressed charitable vision.[94] The difficulty, of course, lies in finding some consistent and substantively meaningful way to approach this task that informs cy pres decision making when aspects of that donor vision become clouded. Here, a simple analogy provides both analytical structure and a deeper understanding of the suggested characterization of donor intent.

Consider the concept of "charity" as resembling a funnel, with the broadest conceptions of purpose and societal benefit occupying the mouth of that funnel. The mouth is lined with such notions as "education," "religion," "health care," "relief of poverty," etc.[95] A donor places her gift into the charitable stream or funnel, and then through tailored restrictions she can direct her funds further down the mouth of the funnel to serve an ever-narrowing class of beneficiaries.[96] The progression from a gift "for education," "to X

93. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (describing the parameters of "charitable trust purposes"); *id.* § 28 cmt. a ("The common element of charitable purposes is that they are designed to accomplish objects that are beneficial to the community—i.e., to the public or indefinite members thereof—without also serving what amount to private trust purposes . . . ."); *id.* § 28 cmts. a(1)–a(2), c, e (providing further explanation of charitable purposes); *supra* note 3 and accompanying text (discussing the definition of "charitable").

94. The beneficiary class may be as broad as the public at large, or it may be some indefinite segment of the public. Even a gift "to promote health care," "to prevent cruelty to animals," or "to promote national security" would qualify as charitable, even though the donor has failed to specify a specific "for whom" or otherwise name a particular institution or means to pursue the donor's objective. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. *l* (2003) (discussing broadly worded charitable gifts that are semantically directed toward purposes generally regarded as charitable but that lack specification of any particular beneficiary class). Such broad statements, of course, leave much to the discretion of the charitable recipient, are much less likely to become frustrated, due to the breadth and generality of wording, and therefore are much less likely to be subject to cy pres analysis in the first instance. The most likely judicial involvement would come in naming a charitable recipient when the donor has otherwise failed to specify one.

95. *See supra* notes 3, 93 (discussing the general categories that define the broad boundaries of charity).

96. So long as the charitable flow is not so restricted that it ceases entirely, the donor's gift will qualify as charitable and thus be accorded all the benefits of a charitable contribution, including potentially perpetual recognition of the donor's restrictive mandate. *See* RESTATEMENT (THIRD) OF TRUSTS § 28

University," narrowed to "for scholarships," then "for graduate students," "studying law," and finally "drawn from a pool of minority candidates" exemplifies both the noted progression and a narrowing that does not unduly constrain the charitable flow.

The broader insight lies in recognizing that when evaluating donor restrictions, decision makers should more deliberately acknowledge the donor's chosen path for her "charity" to follow as it flows down the ever-narrowing funnel. This acknowledgement should include an express explanation of the broadly conceived public benefit that might accrue from the donor's gift, such as the promotion of education or the relief of poverty. That explanation should then detail, by reference to the beneficiary class served at each stage, the winnowing process by which the donor narrowed her charity via her restrictions.[97] Proceeding in this manner promotes a more reasoned articulation of both the donor's charitable vision and precisely when (and why) the charitable flow becomes cut off by "impossibility" or some other cy pres circumstance tied specifically to the donor's restrictions. This process would reveal, for example, the point at which the donor's restricted gift no longer serves the identified class, or the point at which the class (or service thereto) becomes narrowed beyond that required to find benefit to the greater public good.

Once this point of blockage is reached, the decision maker should undertake the final step in this structured analysis, which entails reversing course from the point of charitable frustration and retracing the decision maker's analytical steps back toward the identified broader charitable purpose. The decision maker should follow the already-illuminated donor path back *up* the now-broadening funnel until reaching the point at which a viable charitable class can once again be served. The path to reconciliation pursues what should be the core of any gift deemed "charitable" by discarding the donor's blocking restrictions until a charitable purpose can once again be served. This represents the point, or (to move away from the funnel analogy) the still-valid charitable purpose, that the donor's gift should prospectively support. Donor restrictions that do not impede that charitable purpose or flow would be preserved; those blocking restrictions that prevent its accomplishment would fall.[98]

Far from ignoring an individual donor's intentions, the proposed

reporter's notes cmt. a (2003) (explaining that benefits may be provided to a class too narrow to qualify an otherwise charitable directive as falling within the legal bounds of charitable purposes).

97. As alluded to *supra* note 94, the more broadly the donor states her charitable purpose, the easier this analytical task becomes.

98. In essence, the overriding goal is to gradually liberalize the impact of the donor's terms until some serviceable charitable class not only can be discerned but also can be served through the resulting utilization of the donor's gift.

analysis actually preserves donor intent in two specific ways. First, the donor's gift will continue to support the donor's chosen genre of charitable purposes—recall that an express identification of that genre (for example, education, religion, etc.) served as the starting point for the analysis here. Second, those of the donor's restrictions that do not otherwise prevent service to such purposes will continue to define the more narrow scope of "charity" for which the donor's gift may be employed going forward. Thus, a donor gift "to provide rehabilitative assistance to members of the U.S. National Guard injured in combat during the Iraq military campaign begun after the September 11, 2001, attacks" could be modified to provide rehabilitative assistance to Guard members who receive such injuries during the related conflicts in Pakistan or Afghanistan. Such modification might be called for, for example, in the fortunate event that all such survivors of the Iraq conflict were fully rehabilitated and no more Guard members were (or were to be) present in Iraq.

Because the proposed analysis appreciates the donor's gift as fundamentally dedicated to charitable purposes, the traditional cy pres caveat that a donor may have preferred that her gift fail becomes moot. Such charitable purposes thus begin the analysis and remain always visible, relevant, and in some way attainable.[99] To the extent that the donor sought more through the exercise of dead-hand control, the donor simply asked for too much. To the extent that the donor lacked any broader charitable aspirations beyond the narrowest implementation of her restrictions, the donor simply gave too little to demand such absolute and perpetual deference to her now-stale mandates.

Contrast the approach inherent in current cy pres analysis. Under that approach, after first determining that the gift is in some way charitable, any view of broader charitable notions falls by the wayside. Such charitable notions specifically fall prey to a "bottom-up" view of the donor's intentions.[100] Current cy pres analysis, in other words, quickly discards "charity" in favor of looking up the funnel from its narrow bottom. This view reveres the donor's

99. And if the donor specified an alternative charitable beneficiary, such specification simply indicates the donor's preferred path back up the charitable funnel should a blockage arise. In other words, when the donor's restrictions become problematic and an alternative charitable beneficiary is named, decision makers should acknowledge the donor's preferred method to restart the charitable flow. This assumes, of course, that the named alternative beneficiary would be capable of carrying out the donor's terms without any modification whereas the current beneficiary would not. If the donor specified an alternative taker that is not a charitable organization, this would contradict the notion of the donor having placed her property into the charitable funnel in the first instance and would thus be ignored as beyond the bargain pursuant to which society granted perpetual influence to the donor. *See supra* note 91 and accompanying text.

100. *See, e.g.*, *supra* notes 18–21 and accompanying text.

restrictions as a point of blockage that should only be forced toward broader charitable notions in compelling circumstances, and then only if the donor can be said to have favored that outcome. Even though the donor's gift must serve charitable purposes in order to enjoy the benefit of perpetual restrictions, the bottom-up view under current cy pres analysis allows the donor to demarcate a point of blockage to broader charitable ends, beyond which decision makers may not look.

B. A Comparison of Analyses and Outcomes

Consider in this regard a more exacting analysis of the example introduced earlier concerning the 1940 gift to establish and support a hospital wing for the treatment of tuberculosis patients.[101] Given that today such patients almost exclusively need only outpatient treatment, the question becomes whether the gift should be modified to support the general operations of the hospital, should be modified to fund a tuberculosis outpatient clinic (either within or independent of the hospital and community), or should perhaps lapse altogether. Compare, in particular, the rationales for these outcomes, first under current cy pres doctrine and then under the analysis proposed here.

Under current cy pres doctrine, a decision maker could easily justify any of these outcomes by reasoning backwards from the desired result.[102] If the decision maker prefers keeping the money within the hospital, for example, she need simply conclude that the donor possessed an unrebutted "general intent" at least to that extent, such that leaving the funds in the hands of the hospital

101. *See supra* text accompanying and following note 52.

102. *See supra* note 9 and accompanying text (discussing ends-oriented manipulation of cy pres analysis). Courts may also engage in such manipulation by invoking a trust-modification doctrine known as equitable deviation when cy pres is otherwise unavailable or might produce a contrary result. *See, e.g.*, Johnson, *supra* note 7, at 375, 380. Professor Johnson observes that "courts consider the results generated by the application of each doctrine before determining which doctrine to apply (courts tend to peek at the outcome before deciding whether to apply *cy pres* or equitable deviation)." *Id.* at 380. Debating the merits of the alleged distinction between cy pres and equitable deviation is beyond the scope of this Article, which in any event addresses subordinate purposes (typically considered the domain of equitable deviation) in Part VII. Note, however, that the alleged distinction has been criticized by multiple commentators as specious and lacking any principled basis. *See, e.g.*, Eason, *supra* note 1, at 436–39 & n.263 (discussing the alleged distinction and related critical commentary). Yet all three recent reform projects retain the distinction between the doctrines. *See* UNIF. TRUST CODE §§ 412–13 (amended 2005); PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 (Tentative Draft No. 2, 2009); RESTATEMENT (THIRD) OF TRUSTS §§ 66–67 (2003). The offered policy justification for retaining this "often-blurry distinction" lies in the relatively less-demanding requirements for invoking equitable deviation to modify "administrative" donor terms. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 cmts. a–b & reporter's notes 1–9 (Tentative Draft No. 2, 2009).

comports in some proximate way to the donor's stated intentions. If, alternatively, the decision maker prefers continued service to tuberculosis patients, the decision maker need only conclude that the donor cared more about the tuberculosis patient than she did about the place of treatment (that is, the hospital). The funds would then necessarily be applied to supporting an outpatient facility and not the general operations of the hospital. If the decision maker instead prefers to have the gift lapse since it cannot be utilized exactly as specified by the donor, the decision maker can simply assert that given the specificity of the gift, the donor lacked general intent or, under liberalized doctrine, that her general intent lay elsewhere or that the specificity set forth in the donor's terms rebutted any presumption of general charitable intent. Since each case is said to be fact-specific, current doctrine allows for any of these outcomes, with little basis for predicting or refuting any one result.

Now consider the same scenario under the analysis proposed in this Article. The donor would in the first instance be regarded as placing her gift in service to charity, with health care being the broad conception that demarcates the mouth of the funnel. That charitable purpose would define the analytical starting point, as the donor restricts the path of her charitable outpouring by narrowing the class served through her gift restrictions. Tracing that path toward the donor's most narrowly described purpose, markers would appear along the way for persons suffering from disease and then for those in need of health care in the community expected to be served by the donor's chosen provider.[103] As the donor's narrowing path reaches the class of persons suffering from tuberculosis within the donor's chosen community, the funnel analogy fulfills its promise by identifying both the problem and the solution.

At this point along the donor's path, the charitable blockage becomes readily apparent. In this example, that blockage lies in the donor's attempt to confine her charity even more narrowly so as to encompass only those tuberculosis patients requiring *hospital* care—a class now eviscerated by scientific advances such that service to this group yields too little public benefit to be deemed "charitable." Since nonhospitalized tuberculosis patients remain a viable charitable class notwithstanding modern medical advances, the solution easily resolves into the outpatient-clinic alternative. The solution is found by simply turning upward, toward the broad

103. Stated differently, logic dictates that the class of persons suffering from a specific disease (tuberculosis) and residing within a hospital's community would constitute a narrower charitable class than would, for example, persons residing within the community generally, or persons receiving all types of health care from that hospital, or persons wherever located and suffering from disease generally. Each of the latter groups would constitute a larger charitable class than would those residing within that community and suffering from tuberculosis.

charitable purpose first identified, and proceeding up again past the blockage to the point where service to that charitable purpose and a corresponding charitable class still endure. Since the original path to narrowing the donor's broader charitable purpose clearly touched on community, the funds should presumptively be directed to treatment in the community served by the donor's chosen institution, and to treatment provided by that institution if possible.

This last observation suggests an aspect of the proposed analysis that should be expressly stated: the proffered analysis prefers a donor's chosen charitable class over the institution originally identified as affiliated with that class. This represents an improvement over, or is at least justified relative to, existing doctrine on several fronts. First, "charity" is defined by reference to the public benefit derived from service to some purpose that necessarily implicates a charitable class of persons, however broadly conceived.[104] Institutions likewise receive favorable tax and common-law status as "charities" by virtue of the quantitatively indefinite yet qualitatively identifiable classes of persons they serve.[105] So when a donor specifies a charitable class by reference to its institutional affiliation—for example, tuberculosis patients at Community Hospital—one or the other must fall when conflict arises. Another choice would be always to prefer the institution (and donors, of course, can make such preferences clear in their gift terms, thus obviating the need for this step in the analysis). But since the donor in this example specifically chose to constrain the institution's discretion when it comes to utilizing the donor's gift in service of the institution's various activities, such an outcome suggests an unnecessary broadening of donor charitable inclinations.[106]

Second, the proposed analysis stops far short of disenfranchising the donor's chosen institution. As suggested above, in each case a donor's chosen institution would be afforded the first opportunity to continue serving the donor's chosen and currently serviceable charitable beneficiaries, as identified under the proposed analysis.[107] Absent very specific donor instructions favoring some

104. *See supra* notes 93–94 and accompanying text.

105. "Orphans" or "the aged" or "students," for example—each is a class broad enough to warrant status as a charitable class but nonetheless narrow enough to identify with some precision those intended to be served.

106. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 460 cmt. e (Tentative Draft No. 2, 2009) (noting that this determination "depends on the intent of the donor"); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) (discussing modified charitable purposes involving gifts to institutions).

107. Contrast the result if the institution were to receive primary consideration. In that case, using the tuberculosis-hospital-patient example, a preference for the hospital would vest in the hospital's board virtually unlimited discretion to use the donor's gift as the board saw fit, while leaving tuberculosis sufferers without a viable treatment alternative. Such an outcome would seem to contradict the donor's stated inclusion of tuberculosis victims.

other institution going forward, the hospital in the earlier example may choose whether to pursue the outpatient-treatment possibility or whether to allow that opportunity to pass to an organization better suited to meet that need. In this way, charity (via service to a publicly beneficial class), charitable efficiency (via the original institution's choice on whether and how to proceed in serving that class), and donor intent (via adherence to class identification and any stated alternative institutions) are all promoted in a meaningful way. Coupled with the predictability fostered by the structured analysis presented above, the same can hardly be said of outcomes under any current version of cy pres doctrine.[108]

C. Summary

By reconceptualizing donor intent as necessarily motivated by a belief in charitable pursuits and then tailored to some particular donor vision, the proposed analytical framework finds traction. That analytical model provides a structure for ascertaining those charitable considerations that are at once both central to the donor's concern and still relevant in an evolved charitable environment. This is accomplished through a more objectively reasoned approach to (1) identifying the broader charitable purposes served by the donor's vision, (2) tracing the donor's path to her particular charitable vision via the larger charitable universe and then narrowing the charitable classes served, (3) articulating when and why there might be a need to depart from the donor's precise terms due to problematic narrowing of the "charitable" aspect of the gift, and (4) ascertaining the modified charitable purpose to be prospectively served by the donor's gift by retracing the donor's restrictive path to reach the point at which the charitable "flow" resumes.

The proffered approach serves both donor intent and broader societal objectives, with guidance and in ways not captured by either traditional or more liberalized cy pres doctrine. It does so by highlighting the ultimate need to ascertain a benefited segment of the public as falling within the realm of the donor's contemplation, rather than by emphasizing some need to ascertain the nuanced particulars of a given donor's subjective intentions as a finite limit on service to the public good. Not directly addressed above, however, are the promised analytical benefits of providing guidance to and affecting charitable management prior to confronting a cy pres conflict. Those benefits and the analysis that leads in that direction are discussed in Part V.

108. As noted earlier, current doctrine promotes ad hoc decision making in such cases, paying lip service to rules of construction when convenient but otherwise doing little to promote consistency in analysis or predictability in outcomes. *See supra* notes 35–41 and accompanying text.

V. RESTRAINING MANAGEMENT

The alternative analysis proposed in Part IV retains the traditional remedial focus of cy pres and serves to provide resolution where gift terms become problematic. In significant contrast to current doctrine, however, the analysis as further developed in this Part places deliberate emphasis on the critical role that management plays in overseeing the implementation of charitable-gift restrictions.[109] That managerial role is significant in terms of both potential duration and responsibility for carrying out the donor's stated intentions. The analysis below therefore aims to impose a practical and concrete influence on managerial conduct toward donor restrictions, an influence that should be felt long before "impossibility, impracticability, or illegality" appear on the immediate horizon. This is accomplished in great part by giving express relevance to such prior conduct when cy pres relief ultimately becomes an issue. The discussion that follows pursues this course by giving voice to the logical implications of a second motivating force behind donor-imposed gift restrictions.

A. Donor Wariness

The second donor motivation lies in the fact that many donors simply do not trust charitable management to live up to its promises over time. This wariness might arise from fear of either managerial malfeasance or managerial incompetence. The suspicion might also grow directly from the perpetual nature of the control that the donor seeks to impose through her restrictions, namely, the simple reality that over time, compliance with the donor's perpetual restrictions will fall upon a future management that is unfamiliar with and unknown to the donor.[110] In any event, the overriding donor worry is that charitable management might somehow fail to pursue the donor's charitable objectives adequately, absent the additional guidance (or constraints) imposed via the donor's restriction. The objective consequence of donor restrictions at issue here, then, is the check that such restrictions provide on management's discretionary use of gifted property.

To some this might seem obvious—indeed, one of the goals of this Article is to take the unstated obvious and craft it into an expressly stated and workable analytical tool. Despite the obviousness of this donor concern, however, both the traditionally donor-centric and the more liberalized cy pres doctrine actually have little practical effect on managerial decisions regarding adherence to

109. In doing so, the discussion builds on the structured approach introduced through the funnel analogy in Part IV.A.

110. *See supra* note 75 and accompanying text (touching on such donor concerns). For a range of techniques that donors might use to exert control over a charitable gift, see PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 420 reporter's note 8 (Tentative Draft No. 2, 2009).

donor gift restrictions, at least until such time as the "impossibility, impracticability, or illegality" triggers are squarely in play.[111] This overlooks an ongoing variety of managerial decisions and gift interpretations that will govern the implementation of the very donor intent cy pres claims to guard. Given the often lengthy period of time between receipt of a restricted gift and the emergence of a cy pres circumstance, a doctrine so conceived seems tremendously wanting.

B. A Measure of Skepticism

Ultimately, acknowledging this donor motivation and managerial role suggests a new analytical tack. Specifically, when a cy pres circumstance arises, all alleged conflicts between the donor's design and management's view of achievable (and desirable) charitable objectives should be viewed first as an assertion of potentially overreaching managerial prerogative and thus viewed skeptically. After all, any cy pres challenge (or defensive invocation of the doctrine) to some extent reflects an implicit attempt by management to liberalize the donor's stated restrictions to management's own prospective advantage.[112] This in turn supports a presumption against applying cy pres to reform a gift at management's request or otherwise allowing cy pres to justify management's departure from a donor's stated terms.

Presumptions, of course, can be conclusive or rebuttable, and the suggestion here is for a rebuttable one. The requirements for rebutting that presumption should be strict but achievable and should ultimately promote the ideals of both donor intent and charitable efficiency during the potentially protracted period of managerial stewardship of the gift. The suggested analysis—and in particular, the requirements for rebutting the suggested presumption—should therefore influence managerial conduct toward these two ideals. In service to this end, management should be deemed to have rebutted the noted skepticism only upon a showing of meritorious conduct in administering the gift prior to the cy pres proceeding at hand. Under the analysis proposed here, management can overcome this skepticism and prevail in a cy pres proceeding (or in asserting cy pres as a defense to claims of mismanagement) by presenting favorable evidence on three specific issues:

111. Even if a cy pres challenge is brought and reform of the gift terms had, following such modification the doctrine again falls by the wayside—the managerial stage in the gift's life cycle once again becoming paramount—until such time as further judicial redress is sought. This assumes, of course, that the original cy pres proceeding resolves in some way that does not altogether remove the donor's gifted property from service to charity—an outcome that would seem to be contrary to the concept of donor intent developed in Part IV.A.

112. *See* Atkinson, *supra* note 9, at 107 ("The benefits of this loosening [of restrictions] would redound . . . to [charitable fiduciaries'] own organizations.").

> (1) Management must show that it has undertaken pursuit of modification of the gift's terms in good faith, as evidenced by management's past compliance with its fiduciary duties in stewarding both the implicated gift and any other restricted gifts under management's control.
>
> (2) Management must identify some active conflict between the donor's restrictions and service to a currently acceptable charitable purpose and class.
>
> (3) Management must then either relinquish the gift or demonstrate its ability to honor those of the donor's restrictions that do not unreasonably conflict with current charitable circumstances by presenting a reasonable plan for prospectively serving a currently viable charitable class within the purview of the donor's broader charitable designs.

As will be seen below, focusing on these three issues incorporates current charitable concerns, managerial prerogative, and donor intent into cy pres outcomes while fostering managerial compliance with donor intent long before a cy pres circumstance arises. The first issue warrants the most explanation here. The other two elements build on and complement the analysis suggested in Part IV. Taken together, the analytical approach revealed after consideration of the factors below provides a predictable and quite workable model for addressing the various concerns that inevitably arise when donors impose restrictions on their gifts to charity.

C. Good Faith and Stewardship

Managerial efforts to escape the strictures of a gift restriction, or management's defense against a charge that it has improperly deviated from such a restriction, will always be tainted by some element of managerial self-interest. After all, what management prefers restricted gifts over contributions to an organization's general fund? So with regard to the presumption that management's position should be viewed as an assertion of potentially overreaching managerial prerogative, good faith as employed here states an ideal in counterpoint to that skepticism.

The more specific and objective thrust of the analysis lies in an examination of managerial conduct over the life of the gift up to the time when modification is sought. The incorporation of managerial conduct in arriving at a managerially favored cy pres outcome provides an incentive for attentiveness to the gift's terms at all times before the gift becomes problematic. Ultimately, if management has been a good steward of the gift and attempted to honor the donor's express terms in accordance with management's recognized fiduciary duties, the consequences for management are positive. The analytical pendulum moves one step closer to rebutting the presumption of skepticism and thus one step closer to authorizing management's preferred modification of the donor's gift

terms.

What types of evidence would management present in this regard? Consistent with sound ethical practices governing gift solicitations, management should begin by showing that the recipient organization was fully capable of complying with the donor's gift terms at the time the organization accepted the gift.[113] On the question of adherence to its duty of care, management could show that procedures were in place at all times to monitor and ensure compliance with the terms of the restricted gift.[114] General notions of good faith play a role here, as management would strengthen its case by demonstrating that such procedures were in place for the recipient organization's entire basket of restricted gifts. Stated negatively, were a lack of internal controls to result in the misuse of restricted-gift funds, the organization's management might fairly be regarded as having failed to meet its duty of care by virtue of its insufficient procedures and lack of attention to this concern.[115]

Similarly, were an organization to accept property limited to uses tangential to its mission or terminally difficult or costly to maintain, this would implicate a breach of the managerial duty of loyalty.[116] The same conclusion might also follow were the organization to accept property burdened with terms that permit the donor's continued use or exploitation of the property in some

113. *See supra* note 55 and accompanying text. For gifts that prove problematic from the outset, management would hope to show that the donor crafted her restrictions independently or otherwise in disregard of the organization's input. This would be the case, for example, when a donor devises property to a university under her will and, unbeknownst to the university, directs that her funds be used for the education of white students only. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 cmts. a, b(3) (Tentative Draft No. 2, 2009).

114. See the recommended procedures for monitoring compliance with donor gift terms set forth in PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 reporter's note 16 (Tentative Draft No. 2, 2009). The Reporter of the *Principles* opines:

> The charity's fiduciaries generally discharge their duties with respect to gifts . . . if the charity board ensures that the charity adopts reasonable procedures to monitor and verify compliance on a regular basis; the charity retains for a reasonable length of time sufficient records to document compliance; and no facts arise that would cause a reasonable fiduciary, acting in good faith, to suspect noncompliance.

Id. § 430 cmt. a; *see also id.* § 430 cmt. b(1) ("Needless to say, a charity with more complete records will find it easier to defend a charge that it breached a trust, condition, or restriction, but the absence of records does not of itself constitute a breach."). *See generally supra* notes 59–60 and accompanying text (explaining the duty of care).

115. In that case, the remaining evidentiary hurdles to be overcome in rebutting the presumption under this managerially skeptical component of cy pres analysis would be heightened.

116. *See supra* notes 61–63 and accompanying text (explaining the duty of loyalty).

manner that subordinates the organization's interests. The duty of loyalty would be breached in either case because such actions disserve the faithful pursuit of the organization's charitable mission.[117] Management could avoid such outcomes by implementing proper conflict-of-interest policies, gift-acceptance policies, periodic reviews considering the matching of donor restrictions with stated (and current) organizational goals, and similar governance reviews and controls. The analysis suggested here thus promotes consideration of concerns relevant to advocates of charitable efficiency as well as those advocating for a more mission-oriented duty of managerial obedience or fidelity in adhering to donor-imposed restrictions.[118]

Perhaps more significantly for donors, management would have to demonstrate compliance with its duty of obedience over the life of the donor's gift.[119] This should entail not only compliance with policies and procedures like those suggested above in connection with the duties of care and loyalty, but also some evidence that management's interpretation and implementation of the gift terms have been both reasonable and consistent.[120] The proposed analysis brings this important aspect of managerial conduct directly into the gift-modification analysis by making such conduct relevant to rebutting the presumed skepticism. In direct contrast to the current incentive toward managerial sleight of hand fostered under cy pres doctrine, the analysis here ensures that management will benefit from adhering to the straight-and-narrow "high road" when actively managing donor restrictions.[121] This is because, under the proposed analysis, the common-sense plausibility of management's treatment of donor terms will affect judicial skepticism (or the lack thereof) when modification of those terms is at issue.

Reference to the "reasonableness" of management's interpretation and implementation of donor terms may inject some level of variability back into the analysis. That standard, however, is both familiar and more objective in general application than is current doctrine's claim to probe the absolutes of an individual donor's subjective intent.[122] Reasonableness in this regard would

117. The likelihood of such a breach would be heightened if the donor also held a fiduciary management position that allowed her to influence the organization's acceptance of the gift terms.

118. *See supra* note 67 and accompanying text (discussing obedience and fidelity); *supra* notes 87–88, 92 and accompanying text (discussing charitable efficiency).

119. *See generally supra* notes 65–72 and accompanying text (explaining the duty of obedience).

120. With regard to "reasonableness," see *infra* note 122 and accompanying text.

121. *See supra* notes 11, 70–81 and accompanying text (discussing the managerial "high road" and "low road"—to use Professor Atkinson's language—to addressing problematic donor gift restrictions).

122. With regard to "reasonableness" and similar standards implicated in

consider both the donor's intentions as expressly articulated in her gift terms and an analytical appreciation of those restrictions in light of the four donor motivations explained in this Article.[123] Ultimately, the reasonableness criterion suggests some deference to an organization whose management has otherwise acted in accordance with its fiduciary duties concerning the gift. This would be particularly so in cases where the donor's literal expression of her intent lacks the clarity that might otherwise foreclose any need for interpretation in the first instance.[124]

this restricted-gift/cy pres context, see, for example, PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 cmt. a (Tentative Draft No. 2, 2009) (noting that charitable fiduciaries meet their obligations with respect to restricted gifts if, among other things, "no facts arise that would cause a reasonable fiduciary, acting in good faith, to suspect noncompliance"); *id.* § 450 cmt. b ("Some of the disputes between donors and charities . . . could be viewed as cases where the charity . . . might have been wise to get court approval of their desired use of the . . . gift, which approval often would have been granted as a reasonable construction of the settlor's or donor's intent."). *See also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 240 cmt. b, illus. 4 (Preliminary Draft No. 4, 2007) ("Applying cy pres instead of [equitable] deviation could mean the difference between deferring to a reasonable determination by the charity fiduciaries and adhering to the wishes of [the donor] unless it becomes impossible or impracticable (or wasteful) to do so . . . ."); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) ("[T]he substitute . . . purpose need not be the *nearest possible* but one reasonably similar . . . to the settlor's designated purpose . . . ."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.3, at 556 (5th ed. 1998) (concluding that a "rational donor . . . may . . . be presumed to accept implicitly a rule permitting modification of the terms of [his gift] in the event that an unforeseen change frustrates his original intention"); Atkinson, *supra* note 9, at 126 ("[I]t seems that the balance to be struck [when courts consider whether to release donor restrictions on private trusts] is not the one that a reasonable person would strike, having weighed the benefits of change . . . against the cost of the change in terms of frustrating the settlor's material purpose . . . . Rather, the balance seems to be that which the settlor would have struck . . . . Here again, the test is thus subjective, rather than objective . . . ."); *infra* notes 126, 133 and accompanying text.

123. Those four motivations are set forth together in Part III and explained in detail in Parts IV–VII.

124. This approach addresses one problem likely inherent in any attempt to address donor gift restrictions that have in some way become frustrated. Consider the National Guard example set forth *supra* text following note 98. That example contemplated a donor gift "to provide rehabilitative assistance to members of the U.S. National Guard injured in combat during the Iraq military campaign begun after the September 11, 2001, attacks." If at some time in the future there are no National Guard troops recovering from injuries suffered in Iraq (or any related campaign in Pakistan or Afganistan, as contemplated in the original example), some choice must be made between future service to injured troops regardless of military-branch affiliation, service to National Guard troops injured in service beyond the Iraq conflict and related conflicts, or some other purpose. The donor has referenced both injured military personnel as well as National Guard members injured in a particular military campaign—and someone must decide which takes precedence now that the donor's original expression and more logical extensions thereof have been exhausted. The proposed analysis places that matter, in the first instance, in the hands of

D. Conflict Between Restrictions and Service to Charity

In order to rebut the presumption against liberalizing a donor's gift restrictions, management should also be required to identify some active conflict between the donor's restrictions and current charitable circumstances. Management must be able to explain that conflict in some manner that goes beyond the bare argument that (in management's opinion) the donor's property could be put to better use. Management's task here essentially draws on the structured analytical framework presented through the funnel analogy in Part IV. The addition here lies in the idea that management should be given the first opportunity to frame this analysis as part of its burden of rebutting the presumption of skepticism toward management.

Management would accomplish this task by first identifying the broad purpose underlying the characterization of the donor's gift as charitable. Management would then trace the donor's restrictive narrowing of the charitable class served and identify that point of blockage where the donor's restrictions now unacceptably restrain service to a currently accepted charitable purpose and class. Granting management the first opportunity to frame this analysis should prove significant so long as management is otherwise successful in rebutting the presumption of skepticism.[125] The ability to frame the analysis would allow management to define the point of conflict and to suggest management's favored resolution. So long as management's proposed analytical structure logically identifies a real problem with the donor's restrictions and identifies a currently serviceable charitable class with reasoned explanation, management's ideas should prevail.[126] Indeed, the analytical approach outlined in this Article prefers deference to management's perspective on the cy pres circumstance, provided that management establishes the merits of such deference by successfully rebutting the presumption against it.

This approach gives management an incentive to proceed in good faith and to be reasonable in its offer. The presumption-rebutting posture of management's arguments requires

charitable management. Because the donor chose to limit her gift to National Guard members although members of other branches of the military might have been similarly injured and helped, the construction benefiting National Guard members seems more appropriate. That would, however, be management's argument to make and then defend, not only by reference to various objective factors (like whether the donor made the gift to a National Guard organization or an organization assisting all soldiers), but also by reference to management's prior conduct in stewarding the gift—a relevant factor affecting judicial skepticism of management's view of the matter.

125. This prerogative should also help mitigate the class-over-institution preference discussed *supra* text accompanying notes 104–08.

126. *See infra* note 133 (discussing "the 'reasonableness' of a plan to serve charitable purposes going forward").

management to convince the decision maker to abandon her skepticism. Poorly reasoned or self-serving explanations for abandoning donor restrictions would only harm management's case. Further inspiring management toward good sense and reason is the fact that management is in essence selling a basket of goods in this rebuttal process.[127] That basket of goods—which must be accepted for management's desired gift modification to receive judicial approval—includes the prudence of management's past conduct, the reality of a current conflict, and the feasibility of management's suggested resolution, which is discussed next.

E. Prospective Service to a Currently Viable Charitable Class

The final step in rebutting the presumption against liberalizing a donor's gift restrictions remains true to a recurrent theme. That theme emphasizes identifying and serving the charitable purpose and class preferred by the donor but still falling within currently accepted boundaries of "charity."[128] In view of these goals, management must next demonstrate its ability to serve the charitable class so identified.[129] Management can meet this burden by presenting a reasonable plan for prospectively utilizing the donor's gift in service to that class.[130] Consistent with the analysis thus far presented, that plan must honor those aspects of the donor's expressed intentions that remain viable in light of current charitable circumstances.[131]

From a judicial perspective, requiring that management's proposed plan be "reasonable" allows limited judicial leeway to

127. *Cf.* Atkinson, *supra* note 9, at 107 ("[S]uits that seek, not the relaxing of particular restrictions, but general removal or relaxation of dead hand control . . . may incur the risk of overreaching. Seeking the whole loaf . . . in other words, may diminish [the] charity's chance of getting a half-loaf . . . .").

128. *See supra* Part IV.A.

129. Again, the charitable class may center on a charitable purpose intended to benefit the relevant community or the public at large. *See supra* notes 93–94 and accompanying text.

130. *See generally supra* notes 122–24, 126 and accompanying text (discussing the "reasonableness" standard as applied to management's past actions and proposed plan).

131. With regard to honoring those aspects of the donor's expressed intentions that remain viable, see *supra* text accompanying note 98. If retaining the gift proves inconsistent with organizational goals in light of changed circumstances and the evolved charitable class to be served, management has the option of relinquishing the gift to another organization better suited to such service, as explained *supra* text accompanying notes 107–08. If the donor has specified an alternative charitable organization, that organization would then be preferred, but it should be subject to the same requirement of submitting a reasonable plan. Absent a named alternative charitable beneficiary and assuming that the analysis resulting in identification of a currently serviceable charitable class was diligently and intelligently pursued, finding a replacement charitable organization should be a simple matter of procedure, given the prize of future possession of the donor's gift.

reject clearly outmoded charitable plans that serve only to preserve a donor's gift in a given organization's hands—like continuing to treat tuberculosis patients in-hospital for no better reason than to allow the hospital to retain the gift. Inclusion of a reasonableness standard would also allow courts to reject self-serving plans that seek to broaden managerial discretion beyond service to a charitable class identified pursuant to the structured analysis explained in Part IV.[132] Precedent exists, moreover, for invoking such a reasonableness standard in the context of evaluating whether a given path adequately serves identified charitable objectives.[133] Ultimately, if there is any merit to a reasonableness criterion in any area of law, then whether the parameters of a management-proposed plan "reasonably" serve the identified charitable class, in light of current circumstances, should be determinable with some positive degree of consistency in rationale.

F. Summary

Taken together, the requirements of managerial adherence to fiduciary duties, a management-presented plan for employing a donor's modified gift in service to an identified charitable class, and the ability of management to frame the analysis provide benefits not present under current cy pres doctrine. Charitable management, for example, has less incentive to surreptitiously circumvent the donor's stated intentions without judicial authorization.[134] The incentives here, in fact, push strongly toward above-board, prudent conduct in stewarding donor gifts in light of the presumptions that must be rebutted if management's views are to be respected. Moreover, the more management's plan honors those other aspects of the donor's expressed intentions that remain viable in light of current charitable circumstances and the identified class, the more

132. To the extent management would ignore donor restrictions simply because they are inconvenient or clearly suggest forfeiture of the gift, the analysis here can only expose such motives if challenged—otherwise, a monitoring and penalty regime going beyond either current doctrine or this proposal would be required.

133. Regarding the "reasonableness" of a plan to serve charitable purposes going forward, see, for example, the articulation of the "impracticable" standard found in current cy pres doctrine. The *Restatement (Third)*'s comments explain that "[t]he doctrine of cy pres may . . . be applied, even though it is *possible* to carry out the particular purpose of the [donor], if to do so would not accomplish the [donor's] charitable objective, or would not do so in a reasonable way." RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. c (2003). For an argument that "impracticability" as so articulated is too little employed in current cy pres analysis in favor of absolute impossibility, see *supra* notes 26–30 and accompanying text. *See also supra* notes 122–24 and accompanying text (discussing the utilization of "reasonableness" in restricted-gift analysis).

134. *See supra* Part II.B (explaining the current managerial incentive to expansively interpret the terms of a donor's gift when a strict interpretation would hinder a desired course of action).

management's plan will garner respect from the decision maker. Appreciating those "other" aspects of a donor's stated restrictions, however, requires consideration of two final donor motivations for imposing restrictions on charitable gifts, which will be explained in Parts VI and VII.

VI. (APOLITICAL) CONSERVATISM: FREEZING PUBLIC POLICY

Race, gender, and similar limitations that sometimes accompany a charitable gift exemplify a third motivation underlying donor-imposed restrictions. For an individual donor, such restrictions may derive from subjective reasons either benign or invidious. These types of restrictions, however, have an objective consequence that lends itself to categorization consistent with the framework proposed here. Donors impose these types of charitable-gift restrictions in order to freeze in time the donors' own views of appropriate public policy. Restrictions so motivated tend to prevent the recipient charity from employing the gifted assets in a manner that conforms to evolving notions of acceptable service to the public good. As discussed below, such restrictions deserve little respect when they come to present conflicts with current, fundamental public-policy objectives.[135]

A. A Senator's Racial Viewpoint

U.S. Senator Augustus Bacon's bequest to the City of Macon, Georgia, provides a classic example of a restriction fitting this observation.[136] Senator Bacon devised land to the City

> to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate."[137]

Senator Bacon could not have more clearly demonstrated an

135. For a discussion of racial restrictions in the context of charitable gifts, see FISHMAN & SCHWARZ, *supra* note 13, at 107. Regarding racial restrictions and the meaning of "charitable" for purposes of tax exemption and tax-deductible contributions to charity, see *Bob Jones University v. United States*, 461 U.S. 574 (1983), and David A. Brennen, *The Power of The Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000).

136. "The City" is utilized in this discussion for simplicity. Senator Bacon actually devised the land to the Mayor and City Council, and the park was placed under the control of a Board of Managers. Evans v. Newton, 382 U.S. 296, 297 (1966). For a detailed explanation of the Macon park case, see RESTATEMENT (THIRD) OF TRUSTS § 28 reporter's notes cmt. f (2003).

137. *Evans*, 382 U.S. at 297. The Senator's exact words were that the park was to benefit the "white women, white girls, white boys and white children of the City of Macon." Evans v. Abney, 165 S.E.2d 160, 162 (Ga. 1968).

individualized conception of appropriate public policy. With his restriction, he sought to ensure that his view on the matter ruled in perpetuity. Senator Bacon has company among donors in this regard, and such discriminatory gift restrictions have prompted much litigation during and since the 1960s.[138] Clearly, a charity today would find it difficult (either legally, morally, or practically) to abide by such a restriction, thus implicating cy pres analysis by satisfying one of the threshold doctrinal triggers.[139] Both traditionally and in some jurisdictions today, however, if a charity were to seek judicial permission to deviate from the restriction pursuant to cy pres doctrine, the charity could face the disconcerting prospect of having the gifted assets removed from its control entirely.[140]

Perhaps in light of this, the City of Macon chose what to many would seem a logical course of action in its attempts to manage Senator Bacon's restricted gift. Recognizing a clearly evolving public policy on matters of racial discrimination, the City maintained Senator Bacon's park but gradually gave less and less deference to his racial limitation.[141] Senator Bacon's heirs stepped forward to challenge this departure from donor intent. In addressing the prospect of removing the racial limitation via application of cy pres doctrine, the Georgia Supreme Court, affirming the trial court's decision, found that the limitation expressed an essential element of the Senator's intentions.[142] The Senator therefore lacked general charitable intent, and the court indicated that he would not have wanted the park to continue absent the racial restriction.[143] As a result, the gift failed and the

138. *See, e.g.*, JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 742–43 (7th ed. 2005) (discussing discriminatory trusts and cy pres).

139. Adherence to such a restriction would likely be impossible or illegal. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 28 cmt. f., 67 reporter's notes cmts. b–c (2003).

140. *See supra* note 77 and accompanying text (explaining the potential negative ramifications of pursuing cy pres relief).

141. *See Evans*, 382 U.S. at 297. Consider the City's disincentive for bringing the matter to court immediately upon concluding that changing notions of the acceptability of racial discrimination precluded implementing the restrictive gift terms. By progressively ignoring the donor's restriction but not going to court, the City may have been strategically delaying the ultimate cy pres confrontation until changing racial attitudes were more generally ingrained and thus more likely to lead to a favorable judicial outcome. *See infra* Part VI.B. Even though this strategy (if it can in fact actually be ascribed to the City) did not succeed, from one perspective nothing was lost—the City's management approach at worst extended the time during which the property was dedicated to public purposes by delaying the ultimate negative consequence (forfeiture), which, from a strategic viewpoint, would likely have been the outcome in any event.

142. *See Evans*, 165 S.E.2d at 163–64.

143. *See id.*; *see also* Evans v. Abney, 396 U.S. 435, 443 (1970) ("The Georgia courts concluded, in effect, that Senator Bacon would have rather had the whole

land reverted to Senator Bacon's heirs.[144]

B. A More Consequential Analysis

In Senator Bacon's case, the gift failed because of changing attitudes about segregation and an inflexible individual-donor-intent-guided approach to cy pres and the discriminatory gift provision. A 2002 Maryland case, conversely, reflects a more consequential and policy-oriented analysis. That analysis underlies the view posited in this Part and should govern when a donor attempts to force ongoing adherence to a static snapshot of acceptable public policy.[145]

In the Maryland case, a medical rehabilitation center faced the same risk as the City of Macon because of a gift restriction for "white patients" only.[146] Interestingly, the donor in this case included a nonrestricted gift over to an alternative charitable beneficiary in the event the original racially restricted gift failed.[147] A gift over upon failure of the donor's terms is typically viewed as strong (direct or rebuttal) evidence that a donor had "specific intent"

trust fail than have [the park] integrated.").

144. *Evans*, 165 S.E.2d at 163–64, 166. The U.S. Supreme Court upheld this result against a Fourteenth Amendment challenge. *Evans*, 396 U.S. at 437. Note that departure from the donor's terms coupled with the resulting cy pres judicial analysis resulted in removal of the property from charitable uses, which is often the outcome where specific intent is found and the donor has not named an alternative beneficiary that is charitable. Donor intent and cy pres sometimes combine, in other words, to defeat the charitable nature of a gift entirely. In such a case, whether occurring months or years after the date of the gift, society does not rescind the benefits of tax deduction, prestige, etc., bestowed on charitable donees.

145. Instances of discriminatory restrictions remain an important issue even today. In some cases, such as the Maryland case discussed next, the racial restrictions were imposed during the 1960s but remained dormant until an intervening life estate expired decades later. *See, e.g.*, Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746, 748–49 (Md. 2002). More recently, issues have arisen in matters of gender and other discrimination, as well as in cases involving discriminatory scholarships. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 28 reporter's notes cmt. f (2003) ("[T]he case law is unsettled on the validity of gender-specific scholarship restrictions in charitable trusts."); *id.* § 67 reporter's notes cmt. c ("Also increasingly common and important are validity and cy pres issues concerning trust restrictions based on religion, gender, and ethnicity . . . as illustrated by numerous recent media reports."); DUKEMINIER ET AL., *supra* note 138, at 743 (discussing racially discriminatory scholarships administered by public institutions).

146. *See Home for Incurables*, 797 A.2d at 747–50.

147. *See id.* at 748, 750. Because the racial limitation was expressed so as to apply only to the original named beneficiary and not to the alternative charitable beneficiary, the alternative beneficiary could have received the gift and complied with all the donor's applicable restrictions (which, as to the alternative beneficiary, did not include any racial limitation) without any modification of the donor's terms.

under the rubric of cy pres analysis.[148] By naming a second charitable entity as the alternative beneficiary, the donor laid a clear path for a court to find a failed restriction, specific donor intent, and forfeiture by the original beneficiary—all without the detriment of removing the property from the charitable stream, by virtue of the default taker's charitable status.

The Maryland Court of Appeals, however, recognized that giving any effect whatsoever to the donor's racial restriction would affirm the donor's racial mandate in direct contravention of contemporary public policy.[149] The court thus struck the racial restriction in its entirety through application of cy pres.[150] This negated the forfeiture provision, which in turn allowed the original beneficiary to retain the gifted funds and to use them in complete disregard of the racial component of the donor's restriction. In so concluding, the court rejected the alternative beneficiary's individual-donor "freedom of testation" argument[151] in favor of upholding the public's evolved view of matters pertaining to race.[152]

In both of the foregoing cases, the objective consequence of adhering to the donors' restrictions would have been forced disregard of broader societal notions of appropriate public policy or, alternatively, forfeiture of the gifted property by a charitable organization that could not so comply. Public policy evolves and should be judged by the standards of the time at which a party's words or actions come into conflict with that policy.[153] This holds true regardless of any donor's subjective intentions or views and regardless of any donor's attempt to sanction those who would honor societal standards pertaining to the greater public good. When conflict arises in this context, it is the individual actor and not societal norms that must yield. Nevertheless, advancing notions of public policy often preclude compliance with a restriction, and conservative application of cy pres doctrine still permits donor intent to disenfranchise a charitable beneficiary. That

148. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003) ("Effect will also be given to [donor] terms . . . providing that [upon failure of the original gift] the charitable trust is to terminate and that the property . . . is to pass pursuant to a noncharitable disposition . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. c (1959) ("If . . . the terms of the trust [provide] that if the purpose should fail the trust should terminate, the property will not be applied cy pres . . . since the terms of the trust negative the existence of a general charitable intention [and any gift over will be given effect].").

149. *See Home for Incurables*, 797 A.2d at 756.

150. *Id.* ("The illegal racially discriminatory condition in [the] will violates Maryland public policy . . . . Consequently, the provisions of the will should be administered as if the word 'white' was not contained in the bequest . . . .").

151. *See id.* at 750, 754. With regard to freedom of testation and dead-hand control, see DUKEMINIER ET AL., *supra* note 138, at 1–30.

152. *See Home for Incurables*, 797 A.2d at 756.

153. *See, e.g.*, *id.* ("Today . . . there are few if any public policies stronger than the policy against discrimination based on race . . . .").

disenfranchisement occurs simply because society's notions of right and wrong have progressed beyond an individual donor's static and often aged comfort level. Donor intent should not be accorded such preeminence.

C. Normative Conclusions

Three normative conclusions flow from these observations. First, donor efforts to freeze the evolution of public policy lack any inherent merit, at least apart from some ideological reverence for such intent simply because the property at one time belonged to the donor. It defies logic to assert that positive benefits accrue from donor mandates that force adherence to widely rejected notions of public policy. It is one thing to tout the merits of pluralism as fostered by innovation and nonmajoritarian inclinations in the charitable sector.[154] It is quite another to suggest that societal notions of fundamental public policies should be subordinate to contrary individual-donor demands.[155]

Second, the rationale reflected in the Maryland court's decision is consistent with the more categorical and consequential approach suggested in this Article for addressing problematic donor restrictions. In the context of current cy pres doctrine, however, there is reason to doubt the influence that the Maryland decision will exert in cy pres circumstances not involving racial discrimination.[156] Furthermore, it remains unclear whether that court's view will inspire any more coherent application of cy pres so that predictability and consistency might be found across other issues and jurisdictions.

The final conclusion to be drawn from the foregoing observations ties these thoughts together in terms of practical outcomes and the analysis proposed in this Article. Donor restrictions that have the objective consequence of stifling charitable conformity to evolved notions of public policy, either via affirmative directive or negative sanction for noncompliance, reflect a category of donor motives that should be disregarded whenever public policy precludes further compliance with such restrictions. Courts can easily discern and classify such restrictions by looking to the objective consequences attendant adherence to or noncompliance with these restrictions.[157] Even though the gift may have been quite

154. For a discussion of pluralism in the specific context of donor-restricted gifts, see, for example, Goodwin, *supra* note 18, at 117–18, 122. For a more general discussion of rationales for the nonprofit sector, in which pluralism is proposed as a key rationale, see FISHMAN & SCHWARZ, *supra* note 13, at 43–60.

155. Consider the discussion of public policy versus dead-hand control set forth in RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003).

156. *See, e.g.*, Goodwin, *supra* note 18, at 101 (discussing the limited invocation of the "illegality" criterion outside the context of gift provisions that discriminate on the basis of "race, gender, [or] sometimes religion").

157. *See, e.g.*, *supra* text accompanying notes 149–50.

acceptable when made, the court need only ask whether the restriction now commands a violation of contemporary public-policy standards. If so, the donor's subjective intentions or desires on this point do not merit further inquiry or respect.

Such an approach might evoke an argument that charitable giving would be chilled by disregarding such donor directives.[158] The better view, however, holds that the only thing discouraged would be the unwarranted donor belief that through onerous and often offensive restrictions, societal progress can be bent to the donor's will. Expressly disabusing donors of such notions simply articulates a more balanced donor-charity bargain. That bargain leaves ample room for other donor directives that contribute positively to a diverse and pluralistic charitable environment.

VII. A POWER GRANTED—A POWER EXERCISED

The fourth and final categorical motivation underlying donor-imposed restrictions is a catchall category that includes those restrictions without an objective consequence that has been classified previously. The motivation is quite straightforward: donors impose restrictions because the law sanctions and enforces that exercise of power. This Part concerns the proper scope of the donor's power where the restriction does not fall under any of the donor motivations yet described.

Donor restrictions that fall into this category include, for example, a requirement that the donor's name be displayed prominently on a particular facility, that some charitable activity be carried out only on a particular piece of property, or that some ritual or aesthetic fancy be adhered to.[159] Restrictions that support the preservation of some standard, belief, or style but that do not implicate any significant public-policy or inherently charitable

158. For examples of responses to this "chilling" argument, see Atkinson, *supra* note 21, at 86 (discussing and refuting consequentialist arguments often presented in support of dead-hand control); Johnson, *supra* note 7, at 357 ("Instead of chilling the creation of charitable trusts, the expansive use of *cy pres* can result in the increased creation of charitable trusts once [donors] realize that the . . . assets will be put to optimal use to benefit society beyond the period that the [donor] can foresee, consistent with the [donor's] intent."); Sisson, *supra* note 27, at 650 ("The suggestion that a less slavish adherence to the terms of charitable trusts would discourage their creation is untested, although . . . historical evidence actually indicates otherwise."). Professor Scott cites the English experience that limitations on donor control had no chilling effect on donor contributions whatsoever. SCOTT & FRATCHER, *supra* note 23, § 399.4; *see also* Sisson, *supra* note 27, at 650 (discussing this aspect of Professor Scott's observations).

159. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. e (2003) (concerning mixed-purpose trusts); *id.* § 28 cmt. *l* (regarding the definition of "charitable" purposes); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999) (exploring the legal consequences attendant various types of donor purposes).

concerns would also fit this category.[160] The argument here, however, in no way endorses the casual disregard of restrictions falling within the category. Rather, the argument is one of prioritization.

A. Adaptive Prioritization

Restrictions falling into this category deserve respect when cy pres analysis is implicated. That respect, however, should neither consume nor dictate the analysis. Donor restrictions that fall into this final category of motivation should be adhered to and accommodated, but the decision maker should have the flexibility to adapt restrictive details that might otherwise thwart the pursuit of overriding charitable objectives.

A naming restriction that purports to memorialize a donor indefinitely, for example, should be honored, but not to the extent of dictating charitable outcomes. Such a restriction finds traction in the donor-charity bargain because the law authorizes such concessions as a quid pro quo for the charitable gift. Absent any legal compulsion, such outcomes might still pertain, although at the charity's discretion and by virtue of public-relations concerns or a sense of moral obligation.[161]

In other words, the existence of such gift restrictions *as cy pres instigating and determinative* is ultimately attributable to the legal force accorded such restrictions. The idea that the law must grant such extensive concessions to the restrictions at issue here, however, is neither self-evident nor even clearly defensible.[162] Assertions that "it was the donor's property and the donor should therefore be allowed to give it away subject to whatever limitations the donor desired" simply present a value judgment that can never be shown more true than false. Such arguments, moreover, suggest that a charitable donor is effectively entitled to purchase from the public a

160. This is not to suggest that gifts directed at, for example, the preservation of some historical attribute of an art or other cultural or architectural trend would not have charitable significance in its own right, worthy of prominent consideration under the analysis posited in Part IV.A.

161. Should problems later arise, the charity would have little difficulty altering the specific implementation of this obligation. One commentator has even suggested that the constraints of moral obligation and potentially negative publicity provide adequate safeguards to donor intent in this regard. *See* Atkinson, *supra* note 4, at 1124–30; *see also* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. ch. 4 introductory note at 6 (Tentative Draft No. 2, 2009) ("[C]harities have reasons beyond their legal obligations to honor donors' wishes."). *See generally* Atkinson, *supra* note 9 (updating his ideas on cy pres reform over a decade after the publication of Atkinson, *supra* note 4).

162. *See, e.g.*, Atkinson, *supra* note 21, at 85–86 (discussing and refuting arguments often presented in support of dead-hand control); *see also supra* note 158 and accompanying text (regarding the lack of support for the argument that charitable giving would be "chilled" absent extensive concessions to donor control).

perpetual right to define and control the public good. Unless accepted wholesale as an absolute based on the ideology of donor control, such assertions provide little insight for resolving the problems of stale gift restrictions that now seem ill-suited to a modern charitable environment. Indeed, the early incorporation of that value set into traditional cy pres doctrine goes far toward explaining its many failings.[163]

This is not to say that all donors vacuously impose such restrictions or do so without considered thought or more personal reason. There are a number of reasons—donor submotivations, one might say—that affect the restrictions grouped into this category. A donor might, for example, impose a naming restriction based on some personal desire for immortality or wish to be remembered fondly. A donor might also impose similar restrictions in pursuit of peer equality, recognition, or simply out of imitation of what others have done before.[164] On the other hand, the basket of restrictions that fall into this catchall category sometimes arise from nothing more cogent than a sense of donor entitlement. That entitlement centers on the legal force accorded such restrictions and the property-rights view that a donor is entitled to part with her property upon whatever terms she desires.

For present purposes, however, these observations suggest that any deeper analysis of this particular category of donor-restriction motivations would do little to take us beyond the already-noted ideology of donor control, providing little insight on questions relating to the management and resolution of restrictive-gift issues. Such observations also begin to veer too far back toward the particulars of an individual donor's subjective intentions and away

163. *See* Comment, *supra* note 18, at 309–10 ("Another source of confusion concerning the cy pres doctrine as it was introduced to the American courts lies in the overemphasis placed upon the effectuation of the donor's intent. . . . In origin . . . cy pres was employed chiefly with the aim of advancing purposes believed to be of great social benefit. Gradually, however, this emphasis changed; judicial cy pres tended more and more to become . . . solely an intent-enforcing instrument.").

164. By way of further example, a donation of artwork on condition that it always be displayed prominently in a particular vestibule of a given museum might be based on the donor's supposition that only if the artwork remains on active display will the donor maintain her status as on par with other community philanthropists. Sometimes, however, such conditions reflect donor preferences that can be attributed to nothing more than the donor's own idiosyncratic personality. The classic case of George Bernard Shaw's alphabet trust provides an example. *See* Pub. Tr. v. Day (*In re* Shaw), [1957] 1 All E.R. 745 (Ch.) (Eng.). For an analysis of the psychological motivations underlying certain donor restrictions, see Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505 (2008); Hirsch, *supra* note 159, at 75–78. *Cf.* John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 670–79 (2001) (discussing various theories explaining the existence of "altruism").

from the more objective and consequential approach proposed here. Restrictions falling into this final category have little objective consequence—particularly with regard to promoting charitable ends—apart from the bare idea that the restrictions limit the charitable recipient for reasons and in ways that fall outside of the donor concerns noted in Parts IV through VI. Such restrictions do not to any meaningful degree force adherence to a given public-policy viewpoint, delineate or augment managerial fiduciary duties in relation to charitable pursuits, or otherwise directly facilitate the accomplishment of charitable ends.

B. An Example Revisited

Consider the earlier example involving a hospital and the treatment of tuberculosis.[165] Recall that the donor devised funds to City Hospital for the establishment and support of a wing to house and care for tuberculosis patients. Now assume further that the donor specified that the hospital wing should be named "The Jane Doe Memorial Treatment Center" after herself. As discussed previously, the lack of any need for such in-hospital treatment ultimately resolves itself (under the analysis posited in this Article) into utilizing the donor's gift for a tuberculosis outpatient center, with the donor's chosen hospital having the first opportunity to pursue that charitable endeavor.[166]

Upon resolution of that core issue, the donor's naming requirement—or any other restriction of the type contemplated in this Part and adaptable to that resolution—would receive its due.[167] Most simply, the name can attach to the modified charitable endeavor in some manner that reflects the donor's associative demand. Comprehensively viewed, the approach proposed in this Article thus suggests that addressing these types of donor restrictions should follow the resolution of issues that now confound the implementation of the donor's other restrictive terms. The analysis should first resolve questions about the proper charitable class and purposes to be served going forward, taking into account managerial past conduct and prospective plans for employing the donor's gift as modified. Restrictions that attempt to freeze in place some rejected notion of public policy can be discarded. The ultimate resolution would then accommodate naming and other similar restrictions, consistent with the modified charitable design.

C. Summary

The suggested prioritization recognizes that restrictions

165. *See supra* Parts I.C., IV.B.

166. *See supra* Part IV.B.

167. Concerning the recognition of donor expressions that remain viable in the aftermath of cy pres modification of restrictions more central to charitable purpose, see *supra* notes 98, 131 and accompanying text.

categorized in this Part have little to do with the accomplishment of any charitable purpose, beyond the bare (and generally weak) premise that the restrictive opportunity may have facilitated the contribution to charity in the first instance. The *restriction itself* promotes only private concerns and should not be accorded the same weight as a restriction that contributes in some way to the meaning, pursuit, or accomplishment of charitable objectives. The approach here posits that such donor mandates should hold only limited power over the accomplishment of more broadly conceived charitable ends. Ultimately, that power should be an adaptive one that does not hold primacy in a reformulated cy pres doctrine or carry the import of potentially defeating a charitable gift entirely.

CONCLUSION

By abandoning the notion of slavish adherence to a given donor's subjective intentions, the analysis proposed in this Article provides a more structured and objective approach to dealing with donor-restricted gifts and the problems that such gifts often cause. This approach pays due homage to the foundational "donor intent" premise that underlies centuries of cy pres development while avoiding much of the variability wrought by that unsteady foundation in practical application. The resulting analytical framework better serves the modern managerial context in which restricted charitable gifts are so often put to use. The proposal set forth here achieves these ideals by asking, from a more general and categorical point of view, an essential question: why did the donor impose this restriction?

The four donor motivations identified in this Article underlie a meaningfully different conception of donor intent. This view ultimately derives from the inescapable fact that a donor identified a charitable purpose, progressively narrowed that purpose via her gift restrictions, put someone in charge of implementing the gift in service to that purpose, and then asserted a measure of dead-hand control with knowledge that consequences flow from that exercise of donor power. This recasting of donor intent therefore turns not upon some variable divination of subjective donor thoughts but rather upon the objective consequences that flow from the restrictions at issue.

Thus emerges a structure and rationale that should, in contrast to current doctrine, positively influence managerial conduct toward honoring donor intent long before gift restrictions become problematic. The incorporation of past managerial conduct into the evaluation of proposed cy pres outcomes provides an incentive for managerial attentiveness to a donor's terms in the ongoing stewardship of restricted charitable gifts. The predictability fostered by this Article's more objective analytical inquiry, moreover, should embolden management to pursue a favorable gift

interpretation or modification in an open forum subject to public scrutiny, as opposed to following the "low road" of possibly usurping donor restrictions and falling prey to the opportunities for malfeasance that such a path presents.

Inevitably, circumstances change and human beings find themselves time and again surprised by the course of what transpires. Logic therefore dictates that donor attempts to control the use of gifted property in perpetuity will often eventually conflict with the accomplishment of charitable objectives. When conflict does arise, donor intent matters, but such intent should not be allowed to run roughshod over evolving notions of service to the public good. Any approach to resolving problematic gift restrictions should keep such charitable considerations prominent in their own right and, indeed, primary to all that follow. The approach set forth in this Article proceeds just so, allowing "charity" to remain always central to defining the boundaries of what is possible and permissible by virtue of a donor's generosity.