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A Revaluation of Cy Press Redux

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A REVALUATION OF CY PRES REDUX

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With its enactment in 2000, Section 413 of the Uniform Trust Code (UTC) introduced the most recent, and important, revision to a court's cy pres power since the nineteenth century. Section 413 expands the court's power to redistribute the assets of failing charitable trusts by transforming one of the traditional elements of cy pres into a presumption, abandoning the traditional cy pres redistribution standard, and providing an additional justification for the exercise of the power. Although scholars have scrutinized other portions of the UTC, the UTC's reconfigured cy pres has failed to provoke scholarly discussion even though it has been adopted by twenty-one jurisdictions. Notably, the vacuum of scholarly examination of UTC Section 413 intersects what has been described as "the largest intergenerational wealth transfer in history." Estimates suggest that charities alone stand to receive up to $24.8 trillion over the next several decades and some of those assets will undoubtedly be held in charitable trusts. Thus, the merger of UTC Section 413 with the massive wealth transfer over the next decades means that courts will wield increasing power to redistribute enormous sums of charitable resources as the objectives of some charitable trusts become obsolete in the future.

This Article fills that scholarly void by subjecting the modifications to cy pres introduced by the UTC to a critical evaluation and offers a view of the UTC's cy pres that is contrary to its perceived acceptance. The Article begins by outlining the evolution of cy pres in England and the United States through the promulgation of the UTC to highlight the substantial differences between the UTC's cy pres and its traditional ancestor. The historical shift represented by UTC Section 413 tilts the theoretical balance of interests too far toward the public interest and fails to fulfill its underlying goal of promoting efficient use of scare resources. To counter these theoretical and efficiency concerns, the Article proposes replacing the UTC's presumption of general charitable intent with a presumption of specific charitable

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. This Article's title is drawn from the title of a note that evaluated cy pres at the time of the Restatement (First) of Trusts, published by the Yale Law Journal. *See* Note, *A Revaluation of Cy Pres*, 49 YALE L. J. 303 (1939).

intent. Although presuming specific charitable intent is likely to result in an increase in cy pres denials, presuming specific charitable intent benefits charity generally by increasing the number of charities that will receive assets via cy pres without any loss in efficiency. In the end, a presumption of specific charitable intent not only serves as a counterweight to the trend of increasing paternalism associated with charity law, but also ultimately benefits the public by reducing litigation costs.

I. INTRODUCTION

Cy pres, the equitable power of a court to redistribute the assets of a failing charitable trust to a charitable beneficiary that comports with the donor's general charitable intent as near as possible,[1] has long been mired in confusion and controversy. Merely pronouncing "cy pres," which is shorthand for the Norman French phrase "cy pres comme possible,"[2] presents an obstacle even before considering the substance of the doctrine. Pronunciation, however, is only the first obstacle to be surmounted. Prior to the Restatement (First) of Trusts in 1935, cy pres seemed to have as many definitions as courts and commentators referring to it.[3] Furthermore, cy pres has proven difficult to distinguish from its fraternal twin—equitable deviation. Cy pres alters the substantive purposes of a charitable trust while equitable deviation only permits a court to alter the administrative provisions of a trust under changed circumstances.[4] Given that hazy distinction, courts have

1. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 431, at 114 (3d ed. 2005); 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 399 (4th ed. 1989).

2. BOGERT ET AL., *supra* note 1, § 431, at 113–14 (the phrase translates to "as near as possible").

3. John S. Bradway, *Tendencies in the Application of the Cy-Pres Doctrine*, 5 TEMP. L.Q. 489, 490 (1931) (asserting that cy pres is "susceptible of various definitions"); John Thompson Peters, Jr., *A Decade of Cy Pres: 1955–1965*, 39 TEMP. L.Q. 256 (1965) (stating that "[t]he doctrine of cy pres has been defined in almost as many ways as there are cases which have dealt with the subject").

4. EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 3 (1950). The Restatement (Second) of Trusts illustrates the subtle differences between the two doctrines. The Restatement's definition of equitable deviation is:

> The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

RESTATEMENT (SECOND) OF TRUSTS § 381 (1959). The Restatement's definition of cy pres is that:

> 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

struggled to apply the doctrines consistently, which adds another piece to an already complicated puzzle.[5] To make matters worse, the nomenclature is less than straightforward because either cy pres or equitable deviation might be referred to as "equitable approximation" or "approximation."[6] Suffice it to say that the definitional and substantive challenges make pronunciation the lowest hurdle to overcome.

Despite the questions that have dogged cy pres over time, the power is recognized in most modern courts by statute or common law.[7] Traditionally, the first requirement for judicial exercise of cy pres is that the trust is charitable, which has proven to be a more significant obstacle than might be expected because of the numerous definitions of "charitable."[8] Assuming that the trust is charitable, a cy pres applicant

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> 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.

Id. § 399. Cy pres, then, not only permits substantive modifications to the purpose of a charitable trust, but also requires general charitable intent, which is not a requirement for a court to invoke equitable deviation.

5. Committee on Charitable Trusts and Foundations, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, 399 (1973) (stating that "[t]he courts, however, had had considerable difficulty in distinguishing between the two doctrines and often a change is made in the name of cy pres when in fact only a deviation from the terms of administration is at issue. Conversely, some courts have used the deviation doctrine to accomplish results actually within the ambit of cy pres because the latter doctrine is not recognized by name." (footnotes omitted)).

6. 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, 370 n.56 (1999) (asserting that "[i]n those states in which the cy pres doctrine has been rejected, courts instead apply a liberal doctrine of interpreting a testator's charitable purpose, usually described as 'approximation'"); Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEVE. ST. L. REV. 471, 482 (1998) (referring to "equitable approximation" as the doctrine that governs administrative modifications to charitable trusts); FISCH, *supra* note 4, at 255 (equating "Deviation" with "Approximation" in the Index); Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 476 n.16 (2005) (stating that "two trust doctrines have developed for modifying a restriction: *cy pres* in a case where the charitable purpose has failed, and equitable deviation (or approximation) when the means to accomplish the purpose impede carrying out the purpose in a manner not anticipated by the settlor"); Denise Caffrey, *Charitable Bequests: Delegating Discretion to Choose the Objects of the Testator's Beneficence*, 44 TENN. L. REV. 307, 318 (1977) (referring to cy pres as "equitable approximation"). For cases that exemplify the lack of clarity in nomenclature, see The City of Philadelphia v. The Heirs of Stephen Girard, 45 Pa. 9, 28 (1863) (observing that "[t]he meaning of the doctrine of *cy pres*, as received by us, is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close *approximation* to that scheme as reasonably practicable; and so, of course, it must be enforced . It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence"); Wooton v. Fitz-Gerald, 440 S.W. 2d 719, 725 (Tex. Civ. App. 1969) (opining that "we believe the court was within its equitable powers . . . by applying the doctrine of approximation or cy-pres.").

7. *See* BOGERT ET AL., *supra* note 1, § 433, at 135.

8. *Id.* § 431. For the variety of definitions of "charity" and "charitable," see CARL ZOLLMAN,

must show that the donor possessed general charitable intent as opposed to the specific charitable intent to benefit only the charitable object identified in the instrument creating the trust.[9] Lastly, the trust must either be unlawful at its inception or become impossible or impracticable to continue as specified by the terms of the trust.[10] If such elements are satisfied, the court reallocates the charitable assets to another charitable cause that matches the donor's general charitable intent as closely as possible, which gives rise to the Norman French moniker for the power.[11]

From a practical standpoint, cy pres is the law's response to an instructional void regarding what to do with funds held in charitable trusts that no longer fulfill the donor's original charitable objective. Donors, of course, cannot foresee how changes in the future might impact their charitable gifts. As a result, some donors fail to provide instructions for distributing assets held in charitable trusts in the event that the original charitable objective is frustrated by unanticipated circumstances. Courts exercising the power of cy pres attempt to divine which charitable beneficiary would have been selected by the donor to receive the assets of the charitable trust if the donor had anticipated the changed circumstances.[12] Thus, cy pres permits a court to exercise a power that it normally does not have when dealing with a private trust—the court is empowered to assign the charitable trust's assets to a subsequent charitable beneficiary not identified by the express language of the trust.[13]

Although cy pres doctrine has remained relatively staid over time,[14] the doctrine received a legislative makeover during the latter twentieth century that has continued into the twenty-first century. The most recent revision to the doctrine of cy pres is contained in the Uniform Trust Code (UTC).[15] The UTC transforms one of the traditional elements of

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AMERICAN LAW OF CHARITABLE TRUSTS 120–60 (1924); RESTATEMENT (THIRD) OF TRUSTS § 28 (2003).

9. BOGERT ET AL., *supra* note 1, § 436; 4A SCOTT & FRATCHER, *supra* note 1, § 399.

10. The most recent Restatement adds the ground of "wasteful" as a justification for cy pres. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

11. *See* BOGERT ET AL., *supra* note 1,§ 431, at 113–14; 4A SCOTT & FRATCHER, *supra* note 1, § 399.2; Peters, *supra* note 3.

12. Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 943 (1997); Kolb v. City of Storm Lake, 736 N.W.2d 546, 548 (Iowa 2007) (a cy pres is where the court concludes that the "settlors would have wanted the trust to continue."); *In re* Estate of Crawshaw, 819 P.2d 613, 621 (Kan. 1991) (claiming that it was "difficult to determine what [the settlor] would have wanted").

13. 4A SCOTT & FRATCHER, *supra* note 1, § 399, at 480.

14. *See infra* notes 85–92 and accompanying text.

15. UNIF. TRUST CODE § 413 (2005); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). For a

cy pres—finding general charitable intent—into a presumption that can be rebutted by the party opposing the application of the doctrine.[16] Furthermore, the UTC abandons the traditional "as near as possible" standard for redistributing cy pres assets and provides an additional ground to justify the exercise of cy pres.[17] These changes not only represent the most recent reconfiguration of the doctrine, but also the most important modifications of cy pres since the early twentieth century. As evidence of its importance, the UTC has been adopted in twenty-one jurisdictions and bills proposing its adoption are making the legislative rounds in several states.[18] If the trend continues, the UTC's version of cy pres will soon become a majority rule.

A wave of commentary has been aimed at portions of the UTC involving subjects such as special and supplemental needs trusts and the information available to beneficiaries,[19] but the UTC's cy pres has barely elicited a whisper from commentators. The paucity of cy pres analysis under the UTC stands in stark contrast to the criticism directed at the versions of cy pres contained in the Restatement (First and Second) of Trusts.[20] Scholars have long argued for an expansion of cy pres to prevent spending charitable dollars on antiquated charitable objectives simply out of respect for the dead hand.[21] If silence can be

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general discussion regarding the change comprehended by the Uniform Trust Code and the Restatement (Third) of Trusts, see John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1106 (2004) (denominating the UTC and Restatement as "law revision projects"); Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law At Century's End*, 88 CAL. L. REV. 1877 (2000).

16. *See* UNIF. TRUST CODE § 413; *see also infra* Part II.C.

17. *See infra* Part II.C.

18. Dana G. Fitzsimmons, Jr., *Navigating the Trustee's Duty to Disclose*, 23 PROB. & PROP., Feb. 2009, at 40, 42 (listing the jurisdictions in which the UTC is presently the law as Alabama, Arkansas, Arizona, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming. Oklahoma, Massachusetts, and Connecticut are listed as having legislation proposing adoption of the UTC).

19. Stanley C. Kent & Richard E. Davis, *The Uniform Trust Code and Supplemental Needs Trusts*, 15 PROB. L.J. OHIO 53A (2005); Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 756–61 (2006); Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697 (2001); Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771 (2002); Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241 (2002).

20. *See, e.g.*, Note, *A Revaluation of Cy Pres*, 49 YALE L. J. 303 (1939); Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153 (1967).

21. *See* George G. Bogert, *Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts*, 5 HASTINGS L.J. 95, 99 (1954); Johnson, *supra* note 6; Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58

equated with approval, the scholarly community welcomes the liberalization of cy pres represented by the changes to the power under the UTC.

This Article fills that scholarly void by subjecting the modifications to cy pres doctrine introduced by the UTC to a critical evaluation and offers a view of the UTC's cy pres that is contrary to its perceived acceptance. Part II traces the evolution of cy pres in England and the United States through the promulgation of the UTC to highlight the substantial differences between the UTC's cy pres and its traditional ancestor. Part III of this Article demonstrates that the departure from history cleaved by UTC Section 413 tilts the theoretical balance of interests associated with cy pres too far toward the public interest and fails to fulfill its underlying goal of promoting efficient use of scare resources. To counter the theoretical and efficiency concerns associated with the UTC's cy pres, Part IV proposes replacing the UTC's presumption of general charitable intent with a presumption of specific charitable intent. Although presuming specific charitable intent is likely to result in an increase in cy pres denials, Part V argues that presuming specific charitable intent benefits charity generally by increasing the number of charities that will receive assets via cy pres without any loss in efficiency. The Article concludes that a presumption of specific charitable intent not only serves as a counterweight to the increasing paternalism of charity law, but also ultimately benefits the public by reducing ambiguity in the law, thereby saving litigation costs.

II. THE UTC'S DIVERGENCE FROM HISTORY

The doctrinal history of cy pres has a Newtonian quality about it—for every decision based upon one set of facts there is an equal and opposite decision based upon similar facts.[22] This doctrinal inconsistency caused some English judges to express a strong dislike for the power in their decisions. For example, the Court of Chancery in *Attorney General v. Andrew* opined that the lesson from past cy pres decisions was that "the doctrine of *cy pres* as to a charity ought never again to be mentioned in this Court."[23] Predictably, the doctrine's turbulent English history

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CASE W. RES. L. REV. 97 (2007); DiClerico, *supra* note 20; C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979).

22. *See, e.g.*, Moggridge v. Thackwell (1802), 32 Eng. Rep. 15, 32 (Ch.) (stating that "[a]ll I can say upon it is, I do not know, what doctrine could be laid down, that would not be met by some authority upon this point; whether the proposition is, that the Crown is to dispose of it, or the Master by a scheme").

23. Att'y Gen. v. Andrew, (1798) 30 Eng. Rep. 1194, 1202 (Ch.); *see also* Hamish Gray, *The History and Development in England of the Cy-Près Principle in Charities*, 33 B.U. L. REV. 30, 40

affected its acceptance in the early United States. A number of judges in the United States focused on the eye-opening results in some English cases and described the doctrine as "odious" and "obnoxious" in their decisions.[24] Joseph Story even commented that cy pres had been "pushed to a most extravagant length" in his famous *Commentaries on Equity Jurisprudence*.[25] Despite vocal objections, the basic elements that had to be proven by a cy pres petitioner have remained relatively stable over the course of the last century in both England and the United States. The enactment of the UTC in 2000 and its increasing adoption by states, however, upsets the stability of traditional cy pres doctrine.

A. Cy Pres in England

In England, a court of equity could exercise cy pres in one of two separate and distinct ways: as a prerogative power of the Crown where the court served as an agent of the Crown, or as a judicial power pursuant to its equitable authority.[26] The prerogative power of cy pres permitted the Crown to intervene in cases where donors either made charitable gifts whose purposes violated the law or the terms of the gifts failed to identify the trustee or beneficiary with sufficient specificity.[27] Although the charitable gifts in those cases failed, they were charitable nonetheless. As a result, the Crown acted pursuant to its role as the trustee of gifts made for public benefit and decided how to use the assets associated with the failed charitable gifts.[28] Rather than serving as an

(1953) (observing that by 1786 "many judges viewed cy-près applications . . . with some distaste").

24. Am. Colonization Soc'y v. Gatrell, 23 Ga. 448, 454 (1857) (rejecting the notion that the court possessed the "odious" power of cy pres to reform a trust directing slaves be colonized in Liberia); Watkins v. Bigelow, 100 N.W. 1104, 1109 (Minn. 1904) (commenting that the legislature did not intend to bestow the "obnoxious" power of prerogative cy pres upon courts); *see also* United States v. Late Corp. of Church of Jesus Christ of Latter Day Saints, 31 P. 436, 442–43 (Utah 1892) (reflecting that "this is the doctrine of *cy pres*, so far as it has been expressly adopted by us, -not the doctrine 'grossly revolting to the public sense of justice,' and 'carried to the extravagant length that it was formerly' in England by which an unlawful and entirely indefinite charity was transformed by the court or the crown into one that was lawful and definite, though not at all intended by the donor or testator." (citations omitted)), *rev'd*, 150 U.S. 145 (1893); White v. Fisk, 22 Conn. 31, 55 (1852) (noting the "extreme administration" cy pres in England); Cromie's Heirs v. Louisville Orphans' Home Soc'y, 66 Ky. 365, 374 (1867) (describing the application of cy pres in England as "arbitrary and latitudinary").

25. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 409 (12th ed., Boston, Little, Brown, & Co. 1877).

26. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.1; BOGERT ET AL., *supra* note 1, § 432, at 128.

27. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.1; BOGERT ET AL., *supra* note 1, § 432, at 128.

28. Moggridge v. Thackwell, (1802) 32 Eng. Rep. 15, 31 (Ch.) (stating that "where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as *Parens Patriae*, is the constitutional trustee").

active participant in the decisionmaking process, an English court of equity merely enforced the Crown's decision regarding redistribution of charitable assets.[29] Furthermore, the Crown did not have to account for the wishes of the donor when making its reallocation decision.[30] The Crown possessed unfettered discretion to reallocate the charitable gift as it saw fit; neither the opinion of the donor nor the court was relevant.

One of the most famous, or maybe infamous, exercises of the prerogative power of cy pres in England is described in the mid-eighteenth century case, *Da Costa v. De Pas*.[31] In *Da Costa*, a Jewish donor established a trust containing £1200 to create a reading room for the purpose of permitting Jewish individuals to study Judaism.[32] At the time, a bequest to construct a Jewish reading room was "*not good in law*"; therefore, the attempted charitable gift failed.[33] As a result, the court had to decide whether to return the funds to the donor's estate or request an order from the Crown for distribution under the Crown's prerogative cy pres power.[34] The court chose the latter option. Giving no consideration to the donor's intent, the Crown decided to use the funds to support children's education at a hospital,[35] which seems reasonable upon first blush. But the use of the funding was rather specific—to support a "preacher" and to teach the tenets of Christianity to the hospitalized children.[36] Needless to say, it is unlikely that the Jewish donor in *Da Costa* would have acquiesced to the redistribution of the trust fund to educate children about Christianity.

The Crown's authority, however, did not extend to all exercises of cy pres. To the contrary, the Crown had no authority to influence the distribution of charitable trust assets when a court of equity acted pursuant to the judicial cy pres power. The only limits on a court's exercise of judicial cy pres were those imposed by cy pres jurisprudence and the polestar of judicial cy pres was the original charitable objective of the donor. According to the court in *Attorney General v. The Ironmongers' Co.*, courts applying judicial cy pres sought to redistribute the charitable assets "to purposes approximating as nearly as might be to that expressed object [by the donor]."[37] Thus, judicial cy pres was an

29. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.1, at 484.

30. *Id.*

31. Da Costa v. De Pas, (1754) 27 Eng. Rep. 150 (Ch.) (the reading room is called a "Jesuba" or "Jesiba"—both words are used in the court's decision).

32. *Id.* at 151.

33. *Id.*

34. *Id.* (the money would have gone into the testator's residual estate).

35. *Id.* (the King was "graciously pleased" to dispose of the funds in the manner chosen).

36. *Id.* at 151–52.

37. (1834) 39 Eng. Rep. 1064, 1065 (Ch.) (statement by Attorney-General regarding the

intent-enforcing exercise of a court's equitable authority over charitable trusts while prerogative cy pres was an intent-ignoring exercise of royal power.[38]

Although judicial exercises of cy pres outnumbered prerogative exercises,[39] the dividing line between the circumstances that permitted the court to apply cy pres and those that yielded to the power of the Crown was rather blurry. Seventeenth and eighteenth century decisions based upon similar facts produced a split of authority regarding the allocation of power between court and Crown. For example, both *Attorney General v. Combe* and *Attorney General v. Baxter* involved gifts for illegal purposes, but the former vested cy pres power with the court while the latter held that the Crown possessed the power of cy pres.[40] Similarly, support for allocating cy pres power to either court or Crown could be found within lines of cases involving general gifts to charity as well as cases involving uncertainty about how the objects of the charitable bequests were to be identified.[41] Furthermore, the language used to describe the change of circumstances that triggered an exercise of cy pres only added to the confusion over the boundary between royal and judicial power in cy pres cases. The court in *Fryer v. Peacock*, a prerogative cy pres case, labeled the failure of a charitable trust at its inception as "impracticable" while the court in *Attorney General v. Boultbee*, a judicial cy pres case, denominated the same

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distribution of cy pres authority between Crown and court).

38. *But see* Att'y Gen. v. Lady Downing, (1767) 97 Eng. Rep. 1, 12–13 (Ch.) (suggesting that cy pres was a soul-saving device in addition to one that gave effect to the donor's intent).

39. *See* BOGERT ET AL., *supra* note 1, § 432, at 129.

40. Att'y Gen. v. Combe, (1679) 22 Eng. Rep. 825 (Ch.) (a bequest of £10 per year so long as there was a Saturday sermon at St. Albans, which constituted a superstitious use; therefore, court ordered that the money be devoted to lectures and a the maintenance of a Catechist); Att'y Gen. v. Baxter, (1684) 23 Eng. Rep. 446 (Ch.) (a bequest of £600 for the benefit of sixty ejected ministers declared void and applied to the maintenance of a chaplain of Chelsea College by Sign Manual).

41. *See* Att'y Gen. v. Clarke, (1762) 27 Eng. Rep. 282, 282 (Ch.) (gift to "poor inhabitants of Saint Leonard, Shoreditch" applied by the court to the inhabitants of the location "not receiving alms"). In *Clarke*, the court cited a 1749 case, *Att'y Gen. v. Browne*, as an example of a case where the gift was deemed too general to be applied by the court, and thus power to distribute the funds was vested in the Crown. Interestingly, the Editor of the report could not find any trace of *Browne* on the books despite its usage by the court in Clarke. *See also* Att'y Gen. v. Hickman, (1732) 22 Eng. Rep. 166 (Ch.) (two trustees died before settler of a trust that established support for ministers did not lapse but survived in equity; therefore, the court applied cy pres to distribute the funds); Att'y Gen. v. Snyderfen, (1683) 23 Eng. Rep. 430 (Ch.) (involving a bequest to charities as directed by a writing that was no found at the death of the settlor; therefore, the settlor left no indication of how the allocation was to be made other than evidence that the settlor favored Christ's Hospital. The court enforced the judgment of the King by virtue of his prerogative cy pres power to distribute the funds to the study of math at Christ's Hospital); Att'y Gen. v. Bishop of Chester, (1786) 28 Eng. Rep. 1229 (Ch.) (gift to parish could not take effect because parish refused the gift); Att'y Gen. v. Green, (1789) 29 Eng. Rep. 270 (Ch.) (cy applied to gift that failed at inception).

failure as "impossible."[42] Neither decision indicated whether there was a difference between "impossibility" and "impracticability" for cy pres purposes. In sum, the most generous description of cy pres jurisprudence in England prior to the nineteenth century is that it was erratic.

The most comprehensive analysis of the history and application of the cy pres power in England is Lord Eldon's 1803 opinion in *Moggridge v. Thackwell*.[43] In *Moggridge*, a testator gave "all the rest and residue of my personal estate unto *James Vaston* . . . his executors and administrators; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters."[44] Vaston predeceased the testator, which left the charitable bequest in an uncertain state.[45] On one hand, the bequest could be too indefinite to permit execution because the testator failed to identify exactly how or which "poor clergymen" were to be aided by the gift.[46] And assuming that the bequest created a charitable trust, the charitable trust had no trustee due to Vaston's death.[47] If the charitable bequest was either too indefinite or lacked a trustee, the Crown could exercise its prerogative power of cy pres to distribute the residuary as it desired. On the other hand, the testator vaguely identified the donees of the charitable gift—"poor clergymen who have large families and good characters"—and some precedent suggested that when a donor identified the objects of the gift, "defined in any degree," the court possessed the power of cy pres.[48] The case pitted the prerogative and judicial powers of cy pres against one another and the decision would broaden the authority of the court or Crown at the expense of the other.

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42. Att'y Gen. v. Peacock (1675) 23 Eng. Rep. 135 (Ch.) (describing the failure as "impracticable"); Att'y Gen. v. Boultbee, (1794) 30 Eng. Rep. 683, 687 (Ch.) (describing the failure as "impossible").

43. Moggridge v. Thackwell, (1802) 32 Eng. Rep. 15 (Ch.). The 1802 case affirmed the 1792 case of Moggridge v. Thackwell, (1792) 30 Eng. Rep. 440 (Ch.). In that case, the court found that the testatrix had created a trust and the death of Vaston did not cause the trust to lapse. *Id.* at 445. Instead, the trust could survive for the benefit of the beneficiary. *Id.* In this case, the testatrix identified a more specific charitable cause. *Id.* Given that courts have sustained charitable bequests to general causes, the court upheld that charitable trust created by the testatrix's will. *Id.*

44. *Moggridge*, 23 Eng. Rep. at 16.

45. *Id.* at 17.

46. *Id.* at 19 (citing an attorney's argument against the creation of a trust as being "an attempt to execute an indefinite, vague, intention: which is not expressed. To what extent poor clergymen are to be relieved is not defined. It is impossible for the Court to execute the intention. They may do something like it, and for the general purpose of charity: but they must make a will for the testatrix; and in so doing they may go perfectly in opposition to her intention").

47. *Id.* at 23–24.

48. *Id.* at 22–23.

According to Lord Eldon's research, the Crown, in its role as constitutional trustee, had possessed the authority to distribute charitable assets in cases "where the property was not vested in trustees, and the gift was to charity generally" since 1679.[49] In *Fryer v. Peacock*, "the generality of the gift made the effectuating [of] it impracticable;" therefore, the King altered the gift to serve the King's purposes.[50] Past decisions in cy pres cases, however, indicated that the court sought to give effect to the donor's "general intention" in cases where the "substantial intention" was charitable and the "mode" by which the trust operated failed "by accident or other circumstances."[51] Thus, the line of demarcation between royal and judicial power hinged on the donor's intent as it related to the creation of the charitable trust and the cause of that trust's failure.

Turning to *Moggridge*, Lord Eldon found that the donor did not designate Vaston as a sole trustee whose death terminated the trust, but rather denominated Vaston as "only the means and instrument" by which the donor gave effect to her charitable gift.[52] Furthermore, Lord Eldon colorfully characterized the donor as being "saturated and satiated with the idea of charity."[53] Combining those findings, Lord Eldon concluded that the donor possessed a "substantial intention" to create a charitable trust with identifiable objects, albeit vaguely, whose "mode" could not be executed because of the circumstance of Vaston's death; therefore, the court had the power to determine the disposition of the charitable trust's assets.[54] To conclude, Lord Eldon remarked that the boundary between prerogative and judicial cy pres depended upon the vagueness of the purpose of the trust created by the donor. Prerogative cy pres applied when a donor had only a "general indefinite purpose" while the court had the authority to exercise the power of cy pres when the donor identified "a trustee with general or some objects pointed out."[55] Thus, the power of the court to apply cy pres expanded while the Crown's cy pres power contracted.[56]

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49. *Id.* at 28.

50. *Id.* at 26 (citing Att'y Gen. v. Peacock (1675), 23 Eng. Rep. 135 (Ch.) (involving a gift to the "poor indefinitely," which the court construed as a gift to "all the Poor in England." The court concluded that the gift was too indefinite to be applied; therefore, the court sought the input of the King and the King obliged. The gift was distributed to support the study of mathematics by "forty Poor boys" who were learning the "Art of Navigation").

51. *Id.* at 31.

52. *Id.* (concluding that Vaston's death prior to that of the donor was irrelevant to the outcome of the case).

53. *Id.*

54. *Id.* at 32.

55. *Id.*

56. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.1, at 484 (stating that there was "a tendency

Interestingly, Lord Eldon could have decided in favor of the Crown based upon the language of the instrument. The bequest gave the residuary to Vaston, his executors, and administrators, but the power to decide which clergymen were to benefit from the gift vested only in Vaston.[57] The gift specified that Vaston was to make the distributional decision twice—it was up to "*him* to dispose of the same in such charities that *he* shall think fit" without indicating that this authority was to pass to Vaston's executors and administrators. Because of Vaston's death, Lord Eldon could have held that the gift had lapsed. But Lord Eldon ruled to the contrary and thereby established the foundation for much of the cy pres jurisprudence that followed. As evidence of the importance of *Moggridge*, one scholar commented that "[f]or practical purposes the law on indefinite gifts was established then once and for all . . . the judgment of Lord Eldon in the *Thackwell* case is the last word on the subject."[58]

Combining English seventeenth, eighteenth, and nineteenth century decisions provides a blueprint of the basic elements of judicial cy pres in England during the early nineteenth century. Application of judicial cy pres required a cy pres plaintiff to show that a donor possessed general charitable intent (*Boultbee*, *Moggridge*). Furthermore, the charitable trust must have failed by "accident or other circumstances" (*Moggridge*). Examples of such accidents or circumstances included impossibility (*Boultbee*) or impracticability, a ground that appeared in another early nineteenth century judicial cy pres opinion penned by Lord Eldon, *Bishop of Hereford v. Adams*.[59] If those requirements were satisfied, the court devised a scheme to give effect to the general intention of the donor as shown by the facts of the case (*Boultbee*, *Moggridge*). These basic elements still resonate in modern courtrooms in cases involving failed charitable trusts and the power of cy pres.

B. Cy Pres in the United States

Although the doctrine of cy pres was well-established in England by the nineteenth century, the doctrine barely left an impression on

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to enlarge the judicial cy pres power at the expense of the prerogative power").

57. This point was made in the lower court decision, *Moggridge v. Thackwell*, (1792) 30 Eng. Rep. 440, 442 (Ch.) (stating that "[t]his residue she did not give to the persons, who were trustees for the general purposes of her will, but to *Vaston*, his executors and administrators, desiring him (but not repeating the words 'his executors, &c.'), to dispose of it in charity with that recommendation").

58. Hamish Gray, *The History and Development in England of the Cy-Pres Principle in Charities*, 33 B.U. L. REV. 30, 42 (1953).

59. (1802) 32 Eng. Rep. 132, 134 (Ch.) (statement from Lord Eldon describing the failure of the charitable trust).

jurisprudence during that period in the United States.[60] One study found two published cy pres decisions from 1820–1829, seven cy pres opinions from 1840–1850, and a total of only thirty-nine cy pres cases during the forty years from 1850–1890.[61] Furthermore, fifteen states had occasion to consider cy pres and the courts in ten of those states had rejected the doctrine by 1860.[62] The Supreme Court of Pennsylvania reviled the mere thought of cy pres with its pronouncement in 1832 that "no court here possesses the specific powers necessary to give effect to the principle of *cy pres*, even were the principle itself not too grossly revolting to the public sense of justice."[63] The strength of the language notwithstanding, the virtual absence of cy pres from nineteenth century published cases involving trusts shows that Pennsylvania was not alone in rejecting cy pres.

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60. Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 167 (1967) (commenting that "[s]ince there were very few charitable trusts in existence in the United States before 1850, there was little demand for the application of cy pres by the courts").

61. *See* Bradway, *supra* note 3, at 498.

62. *See* FISCH, *supra* note 4, at 115 n.1 (listing states that had rejected the doctrine as well as the five states that had accepted the doctrine of part of their laws).

63. Methodist Church v. Remington, 1 Watts 218, 226 (Pa. 1832). For similar judicial statements, see, for example, Bridges v. Pleasants, 39 N.C. 26, 30 (1845) (stating that "we have no authority in this country, which, like the King in England, or the Chancellor, can administer a fund upon that arbitrary principle [cy pres]"); Carter v. Balfour's Adm'r, 19 Ala. 814, 830 (1851) (concluding that "[m]y opinion is, that the bequests in the will are valid, and that a court of equity can give them effect by virtue of its common law and judicial powers, without claim to any prerogative power, and without invoking the aid of the statute of 43rd Elizabeth. I do not recognize the doctrine of 'cypres,' which, in substance is, if you cannot find the society specified in the will, or apply the fund to the charity intended by the testator, the court will then apply it to some other charity as nearly analogous to it as possible."). For judicial comments reflecting confusion between the power of cy pres in England, see Grimes' Ex'rs v. Harmon, 35 Ind. 198, 233 (1871) (stating that "the *cy pres* power as possessed and exercised by the courts of chancery in England was derived directly from the king and constituted a part of the prerogative power."); Doughten v. Vandever, 5 Del. Ch. 51, 64 (1875) (asserting that "[t]he principle or doctrine of the exercise of this ministerial function of the English chancellor was what is known as *cy pres;* that is to say, where there was a definite charitable purpose which could not take place, the court would substitute another, and formerly of a very different character. It was not, however, in the exercise of the judicial function of his office, but in the exercise of his ministerial function, that the English chancellor applied the fund to a different purpose from that contemplated by the testator, provided it was charitable"); White v. Fisk, 22 Conn. 31, 54 (1852) (observing that "[t]here may be other cases in this country, and there certainly are many in England, in which charities, more equivocal and uncertain than the one we are considering, have been sustained; but we are persuaded that this has been done either avowedly, or under the influence of the principle of *cy pres*. Several such cases have been brought to our notice on this argument; but we repel the authority of them, as we have not adopted that principle into our system of jurisprudence. We think it inconsistent with the limited and defined powers of the judiciary, as understood and approved in this state. By the theory of the English constitution and laws, the king is *parens patriæ*, the guardian of infants, the dispenser of charities, and his chancellor, as the keeper of his conscience, acts in his stead. The doctrine of *cy pres*, is a doctrine of prerogative; and it seems to be this, that if it can be seen that a charity was intended, by a testator, but the object specified can not be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a sort of waif, and apply them as his, or the king's good conscience, shall direct.").

The basic reason that cy pres struggled to gain a foothold in nineteenth century trust jurisprudence in the United States is attributable to the jungle-like nature of English cy pres jurisprudence. For some courts in the United States, the differing predicates that dictated whether the Crown or the court controlled the distribution of charitable assets was a distinction without a difference.[64] As a result, some courts identified cy pres exclusively with the power of the Crown without recognizing that a court of equity could exercise its own authority under judicial cy pres.[65] The Supreme Court of Wisconsin, for example, called cy pres "a doctrine of prerogative or sovereign function, and not strictly a judicial power," which, of course, was incorrect.[66] Cases like *Da Costa* made the power of cy pres seem dangerous and subject to abuse because it ignored a donor's intent.[67] Furthermore, associating cy pres with the power of the Crown suggested that cy pres was inconsistent with separation of powers principles.[68] The power of the Crown undoubtedly stirred images of royal privilege, and privilege of any stripe was unpopular.[69] Thus, conflating the prerogative and judicial forms of cy pres led some courts to reject cy pres in its entirety, even if the given jurisdiction recognized charitable trusts.

Although charity had not been the proverbial favorite of the law during much of the nineteenth century,[70] the tide against charity began to turn in its favor as individuals amassed wealth and states sought to defray the governmental expense of funding charities.[71] A republican view of great wealth emerged which held that wealth not only benefited the heirs of the wealthy, but also brought with it some responsibility to benefit the public.[72] As a consequence, legal restrictions on charities

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64. *See* FISCH, *supra* note 4, at 58.

65. *Id.*

66. Heiss v. Murphey, 40 Wis. 276, 292 (1876). For similar judicial statements, see *supra* note 63. For more discussion of the impact of English law on the adoption of cy pres in the United States, see FISCH, *supra* note 4, at 56–90.

67. *See* FISCH, *supra* note 4, at 59–60.

68. *See White*, 22 Conn. at 54; FISCH, *supra* note 4, at 116–17 (stating that "early courts reviled and excoriated the English charity doctrine in some of the most impassioned and vitriolic opinions to be found in American case law").

69. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 254 (3d ed. 2005).

70. *See* HOWARD S. MILLER, THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY, 1776–1844, at 16–20; 40–49 (1961); FRIEDMAN, *supra* note 69, at 254.

71. EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS 28 (1974).

72. ZOLLMAN, *supra* note 8, § 184, at 120–21. For a judicial comment in this regard, see Wachovia Banking & Trust Co. v. Ogburn, 107 S.E. 238, 242 (N.C. 1924) (opining that "[t]he tendency of modern thought is more and more that the ownership of great wealth is not merely for the transmission of it to one's own family, but that it is largely a public trust, and that where the fund is more than sufficient for the reasonable needs of the heirs and next of kin, there should be some direction given by devise for the public welfare or for the general benefit of the community").

and charitable trusts eroded and a number of states that had previously refused to recognize charitable trusts reversed field and held that charitable trusts were valid.[73] Virginia, for example, had refused to recognize charitable trusts at all until the state legislature enacted a statute validating charitable trusts in 1860.[74] Furthermore, courts began to rule that the Rule Against Perpetuities did not apply to trusts for charitable purposes and that a trust for the benefit of an entity that was not in existence at the time of trust creation was nevertheless valid because of its charitable nature.[75] Although the dead hand retained significant control and suspicions remained,[76] charities were becoming "favorites of the law."

As part of the liberalization of rules associated with charities generally, courts revisited the historical underpinnings of cy pres and corrected misunderstandings that had led them to reject the doctrine.[77] To that end, a total of twenty-seven jurisdictions applied the doctrine of cy pres for the first time after 1900.[78] Correcting its historical misinterpretation of cy pres, the Supreme Court of Wisconsin explained that "in some of the earlier cases the cy pres doctrine was repudiated. It is quite clear that what was repudiated was the prerogative power exercised by the chancellor, not as a judge, but as a representative of the crown."[79] Moreover, a number of states codified cy pres by statute.[80] The increasingly receptive legislative and judicial attitude toward charitable trusts during the early twentieth century is inextricably linked to concern about the efficient use of charitable resources. To make the most of the charitable dollar in trust, courts must have the power to modify the charitable trust to prevent that dollar from being wasted on outmoded charitable initiatives.

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73. *See* FISCH ET AL., *supra* note 71, at 25.

74. *Id.* (citing VA. CODE ch.80, § 2 (1860)).

75. Johnson v. Holifield, 79 Ala. 423, 424 (1885) (finding that "gifts to charitable uses, being highly favored by the courts, and the public being regarded as concerned in upholding such trusts, will be sustained and carried into effect, though their duration may be perpetual."); Crerar v. Williams, 34 N.E. 467, 470–72 (Ill. 1893) (construing a charitable gift to be a present gift thereby avoiding Rule Against Perpetuities issues); Schmidt v. Hess, 60 Mo. 591, 595 (1875) (stating that even though "there was no one *in esse*, at the time of making the donation, capable of being the recipient of the trust; yet the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation"). In addition to these changes, changes to state and federal tax laws also provided incentives to make charitable bequests after 1900. *See* FISCH, *supra* note 4, at 120.

76. *See* FISCH, *supra* note 4, at 119.

77. *See* FISCH ET AL., *supra* note 71, at 28.

78. *Id.* at 29 n.41.

79. First Wis. Trust Co. v. Bd. of Trs. of Racine College, 272 N.W. 464, 468 (Wis. 1937).

80. *See* FISCH, *supra* note 4, at 120 n.16.

The increasing acceptance of cy pres post-1900 brought a wide variety of definitions of the doctrine. Because they deemed application of the doctrine fact-sensitive, courts refrained from articulating a precise definition of cy pres.[81] As a result, judicial references to cy pres described the general circumstances when the power could be invoked without enumerating specific elements of the doctrine. Predictably, judicial descriptions of cy pres in the absence of a statute exhibited a large measure of variety.[82] Even if courts had a statute to apply, legislative definitions varied from jurisdiction to jurisdiction.[83]

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81. *See, e.g., In re* MacDowell's Will, 112 N.E. 177, 180 (N.Y. 1916) (stating that "[n]o general rule can be enunciated as to the manner in which the *cy pres* doctrine will be applied. Each case must necessarily depend upon its own peculiar circumstances"); Thatcher v. Lewis, 76 S.W.2d 677, 682 (Mo. 1934) (commenting that "[t]he reason for the rule is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter. As in the case of most other equitable rules, 'no general rule can be enunciated as to the manner in which the *cy pres* doctrine will be applied, but each case must necessarily depend upon its own peculiar circumstances.'").

82. First Congregational Soc'y v. Bridgeport, 121 A. 77, 80 (Conn. 1923) (finding that cy pres applied "if the object of the charity cannot be accomplished, the funds or property may be applied to other charitable purposes, as near as may be to the original purpose of the charity"); Bruce v. Maxwell, 143 N.E. 82, 85–86 (Ill. 1924) ("The cy pres rule was an English rule, and formerly resorted to as an exercise of the prerogative power of the crown, but is applied in this country as an exercise of judicial power. The basis of the rule is that, where the clear intention of the donor was that the gift should be devoted to a charitable purpose, and the trust cannot be administered in the exact way directed, the donor's purpose will not be allowed to fail, but the exact directions of the donor as to management of the trust may be regarded as merely directory, and, if necessary to preserve the trust and carry out the leading purpose of the donor under the cy pres doctrine, a court may apply it to a similar purpose by different means. That doctrine only applies when there is a valid gift to charity, and it is clear the exact directions of the donor cannot be carried into effect."); Reasoner v. Herman, 134 N.E. 276, 280 (Ind. 1922) (stating that "where a charity is involved, the *cy pres* doctrine of liberal construction will cause courts to be keen to discover whether the main purpose is charity and, if it is, to treat the testator's machinery of administration, not as conditions precedent to vesting, but as suggestions regarding the management. And, if his directions as to management are impracticable, unreasonable, or unlawful, a court of equity will change testator's scheme to one that is practicable, reasonable, and lawful").

83. *Compare* GA. CIVIL CODE § 3338 (1900) ("A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, [a] court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator."), *and id.* § 4007 ("If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed."), *with* 1927 Minn. Laws ch. 180, MINN. STAT. ANN. § 501.12(3) (1948) (stating that a charitable trust "shall be liberally construed by the Courts so that the intentions of the Donor thereof shall be carried out whenever possible, and no such Trust shall fail solely because the Donor has imperfectly outline the purpose and object of such charity or the method of administration. Whenever is shall appear to the District Court of the property county that the purpose and object of such charity is imperfectly expressed, or the method of administration is incomplete or imperfect, or that the circumstances have so changed since the execution of the instrument creating the Trust as to render impracticable, inexpedient, or impossible a literal compliance with the terms of such instrument, such Court may upon the application and with the consent of the Trustee, and upon such notice as said Court may direct, make an order directing the such Trust shall be administered or expended in such manner as in the judgment of

Similarly, scholarly definitions of the doctrine spanned the spectrum of specificity.[84] In sum, the number of definitions of cy pres asymptotically approached the number of individuals that encountered the doctrine.

Seeking to clarify the law of trusts generally, the American Law Institute began work on the Restatement (First) of Trusts in 1927 and a final product emerged eight years later in 1935.[85] According to § 399 of the Restatement (First) of Trusts, a court has the authority to invoke cy pres:

> [i]f 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.[86]

Twenty-four years later, the American Law Institute issued the Restatement (Second) of Trusts in an effort to update the state of the law since the first edition.[87] Despite changes to other sections, the text of § 399 remained identical to its predecessor.[88] In fact, the only difference between the 1935 and 1959 versions of cy pres in the Restatements is that the latter has more explanatory notes.[89] The American Law Institute's effort proved to be successful—the definition of cy pres in the Restatements became one of, if not the most, commonly

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said Court will, as nearly as can be accomplished the general purposes of the instrument and the object and intention of the Donor without regard to, an free from any, specific restriction, limitation or direction contained therein, provided, however, that no such order shall be made without the consent of the Donor of said Trust if he is then living and mentally competent. The attorney general shall represent the beneficiaries in all cases arising under this act, and it shall be his duty to enforce such trusts by proper proceedings in the courts.").

84. *Compare* 4A SCOTT & FRATCHER, *supra* note 1, § 399 ("The principle under which the courts thus attempt to save a charitable trust from failure by carrying out the more general purpose of the testator and carrying out approximately though not exactly his more specific intent is called the doctrine of cy pres"), *with* ZOLLMAN, *supra* note 72, at 77–78 ("In short, the rule in the last analysis is a simple rule of liberal, judicial construction, designed to ascertain and carry out, as nearly as possible, the true intention of the donor." (footnotes omitted)).

85. RESTATEMENT OF TRUSTS ix (1935). Because of his influential work in the field of trusts generally, Austin W. Scott was the Reporter for the Restatement of Trusts. *Id.* at x. In fact, the numbering of sections in the Restatement is identical to that in Scott's influential treatise on the law of trusts.

86. *Id.* § 399.

87. RESTATEMENT (SECOND) OF TRUSTS VII (1959).

88. *See id.* § 399.

89. *See id.* The 1935 edition has notes a–m while the 1959 version has notes a–r.

cited definitions of the power by courts and commentators.[90]

The striking aspect of the definition of cy pres provided by the Restatements is its similarity to both English descriptions of judicial cy pres and early judicial definitions of cy pres in the United States. The elements of cy pres that had to be proven by a cy pres plaintiff described in eighteenth and early nineteenth English cases like *Moggridge*, *Boultbee*, and *Ironmongers' Co.* unambiguously appear in the definition offered in the Restatement. Furthermore, those same elements surfaced in nineteenth century judicial opinions describing the power in the United States long before the Restatements. The 1884 Supreme Court of Rhode Island, for example, asserted:

> [I]f a trust be designed for a purpose which is accomplished before it becomes available, or is impracticable, the court will sometimes, though not always, apply it to some other proximate purpose. And again in the case of a trust which has been long in existence, if, by change of circumstances, it ceases to be useful according to its original intent, it will be reapplied either wholly or in part to some new purpose, as nearly like to the old as possible.[91]

While jurisdictions differed regarding the precise definition of cy pres and the circumstances under which it applied, the definitions embodied the same fundamental concepts—a cy pres petitioner had to prove that the donor had general charitable intent and that changed circumstances frustrated the donor's intent.

As the American Law Institute began work on the Restatement (Third) of Trusts in the late 1980s to account for developments since the Restatement (Second) of Trusts, trust law remained sparse even though the use of trusts as planning devices had increased.[92] Furthermore, proposed codifications like the Restatements failed to address some topics, which left trust law in a "fragmentary" state.[93] As a result, the National Conference of Commissioners on Uniform State Laws decided to address the gaps in trust law in 1993.[94] While several states had comprehensive trust statutes in their state codes, the UTC represented the "first comprehensive uniform act on the subject of trusts" and was

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90. For judicial references, see, for example, Simmons v. Parsons Coll., 256 N.W.2d 225, 227 (Iowa 1977); Dunbar v. Bd. of Trs. of George W. Clayton Coll., 462 P.2d 28, 30 (Colo. 1969); Burr v. Brooks, 416 N.E.2d 231, 234 (Ill. 1981). For academic commentary, see Rudko, *supra* note 6; Committee on Charitable Trusts and Foundations, *supra* note 5; Peters, *supra* note 3.

91. Pell v. Mercer, 14 R.I. 412, 435–36 (1884).

92. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 144 (2002).

93. *Id.*

94. *Id.* at 145.

enacted by the Commissioners in 2000.[95] The UTC covers everything from the creation of an express trust to the reporting duties of trustees regarding trust information.[96] Charitable trusts are the subject of Sections 405–413 and the UTC's version of cy pres is detailed in Section 413(a).[97] Section 413(a) states that:

> if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:
> (1) the trust does not fail, in whole or in part;
> (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
> (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.[98]

Section 413(b) reduces the eligible number of takers of assets upon failure of a charitable trust by limiting the effect of a gift-over to a noncharitable beneficiary.[99] To be effective, the gift-over must either return to the donor while living or become operative within twenty-one years from the trust's creation.[100]

C. Comparing Traditional Cy Pres and UTC Section 413(a)

Comparing the traditional elements of cy pres to those enumerated in UTC Section 413(a) shows that they are far from mirror images. The most important change to the traditional power of cy pres is not obvious from the text of Section 413 because it arises from an omission in the text of Section 413(a). Traditionally, the party seeking to invoke the court's cy pres authority had to show that the donor possessed general charitable intent. Section 413(a), however, says nothing about the necessity of finding that a donor had general charitable intent. As the Comment to Section 413 makes clear, the Commissioners did not

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95. *Id.* at 144 (listing California and Texas as states with comprehensive trust statutes).

96. UNIF. TRUST CODE §§ 401–409 (2005); *id.* § 813.

97. *Id.* §§ 405–413.

98. *Id.* § 413(a). Section 413(b) states that:

> [a] provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:
>
> (1) the trust property is to revert to the settlor and the settlor is still living; or
> (2) fewer than 21 years have elapsed since the date of the trust's creation.

Id. § 413(b).

99. *Id.* § 413(b).

100. *Id.*

completely omit the requirement. Instead, Section 413 silently creates a presumption of general charitable intent.[101] If the charitable trust is or becomes unlawful, impossible to achieve, impracticable, or wasteful, the court may alter the trust in a manner that comports with the donor's presumed general charitable intent.[102] The practical effect of this presumption is to shift the burden to prove the intent element of cy pres from the party asking the court to implement its cy pres power to the party challenging it.[103] Opponents of cy pres petitions, in other words, must proffer evidence that donors possessed specific charitable intent.

To justify this change, the Comment to Section 413 suggests: "In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor."[104] Furthermore, Commissioners expressed concern about the possibility that the funds held by charitable trusts would revert to the heirs of a donor upon failure.[105] The presumption decreases the probability that the assets will revert to the donor's heirs by shifting the burden of proof to the cy pres challenger; failure to rebut the presumption eliminates the possibility of reversion.[106] Thus, the presumption of general charitable intent reduces one of the obstacles to relief for cy pres petitioners.

The jurisprudential history of cy pres demonstrates that the newly created presumption of general charitable intent in Section 413(a) breaks from the historical foundation of the doctrine. In England, the requirement that a cy pres applicant prove that a donor possessed general charitable intent appeared at the end of the eighteenth century and became firmly established in cases like *Boultbee* and *Moggridge* during the nineteenth century.[107] Thus, imposing the burden of proving a donor's general charitable intent on a cy pres petitioner has been part of English cy pres jurisprudence for well over a century. Similarly, the element of general charitable intent and its associated burden has been on the books since cy pres gained widespread acceptance in the United States. Nineteenth century courts applied cy pres only upon a petitioner's showing of general charitable intent and many early cy pres

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101. *See id.* § 413.

102. *Id.*

103. *See* BOGERT ET AL., *supra* note 1, § 436, at 157.

104. UNIF. TRUST CODE § 413 cmt.

105. Halbach, *supra* note 15, at 1902.

106. *See* BOGERT ET AL., *supra* note 1, § 436, at 160.

107. J. C. Hall, *Recent Developments in the Cy-Près Doctrine*, 1957 CAMBRIDGE L.J. 87, 89 (1957).

statutes explicitly included the requirement of general charitable intent as a prerequisite to the exercise of cy pres.[108] Even if early statutes did not expressly identify general charitable intent as an element of cy pres, courts often construed the statutes as not only incorporating the requirement implicitly based upon prior case law, but also placing the burden on the party seeking relief.[109] Like England, placing the burden of proving that a settlor had general charitable intent at the time of the creation of the charitable trust has been part of cy pres jurisprudence in the United States for over a century.[110]

In addition to its role as an element of cy pres that required proof, including general charitable intent in definitions of cy pres served another role when a court acted pursuant to its power of cy pres. Traditionally, the textual command for a court exercising cy pres was that it was to redistribute charitable assets "as near as possible" to the donor's general charitable intent. Courts used the phrase in their descriptions of the power and legislatures codified the phrase in cy pres statutes.[111] Although the Restatements retained general charitable intent

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108. For early cases requiring or discussing general charitable intent, see, for example, Jackson v. Phillips, 96 Mass. 539 (1867); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 51–52 (1890); Trs. of Adams Female Acad. v. Adams, 18 A. 777 (N.H. 1889) (discussing "substantial intention"). For early statutes, see 1927 Minn. Laws, ch.180 § 3; MINN. STAT. ANN. § 501.12(3) (1948); 1901 New York Laws, ch. 292 § 2.

109. *See* BOGERT ET AL., *supra* note 1, § 436, at 158.

110. The one notable exception to the uniform requirement of general charitable intent is found in Pennsylvania. In 1947, Pennsylvania did away with the distinction between general and specific charitable intent in Act of April 24, 1947, P.L. 100, § 10, 20 P.S. § 301.10. The statute reads:

> Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may . . . order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intent of the conveyor, whether his charitable intent be general or specific.

111. For cases using the phrase, see Pell v. Mercer, 14 R.I. 412 (1884); Jackson v. Phillips, 96 Mass. 539, 592–93 (1867) ("It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable. Where the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes, and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as administering a branch of the prerogative of the king as *parens patriæ*. 'What is the nearest method of carrying into effect the general intent of the donor must of course depend upon the subject matter, the expressed intent, and the other circumstances of each particular case, upon all which the court is to exercise its discretion.'"); Heuser v. Harris, 42 Ill. 425, 435 (1867) (stating that "[a] court of equity will execute it *cy pres*, or as near to the intention of the testator as it can, to effect the purpose."). For statutes using the phrase, see, for example, KAN. STAT. ANN. § 59-22a01 (2009) (commanding that the court direct that the funds be distributed "as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator."); MD. CODE ANN. EST. & TRUSTS § 14-302 (2009) (permitting a court to "order an administration of the trust, devise or

as an affirmative element of cy pres, they simultaneously watered down the traditional redistribution standard. According to the Restatements, a court should "direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."[112] The UTC goes one step further than the Restatements because excluding general charitable intent as an affirmative element creates a textual hole that must be filled by a phrase that instructs a court how to apply the funds cy pres. To fill that hole, Section 413(a) permits a court to modify a charitable trust using cy pres "in a manner consistent with the settlor's charitable purposes."[113] By abandoning the traditional redistribution standard, UTC Section 413 severs another link to the history of cy pres doctrine.

The final change to the traditional concept of cy pres comprehended by the UTC is readily apparent from its text. Section 413(a) adds "wasteful" as a justification for an exercise of cy pres to traditional cy pres foundations of unlawfulness, impossibility, and impracticability of the trust's objectives.[114] Interestingly, the UTC fails to define "wasteful" to elucidate how that might differ from the commonly known grounds of "impossible" or "impracticable." According to one scholar, however, the Commissioners added "wasteful" to the traditional grounds for cy pres to address situations where the trust corpus had grown larger than needed to accomplish the original charitable objective.[115] Under these circumstances, the UTC permits a court to order that such excess funds be distributed cy pres even though the original charitable objective is ongoing and viable.[116] The excess monies could be expended in the same manner, but the public fails to gain any added benefit by so doing.[117] Continued expenditure is deemed "wasteful" and the court is empowered to direct an alternative distribution of those excess funds using its cy pres authority.

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bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator."); N.C. GEN. STAT. § 36-23.2 (1967) (providing that "the superior court may . . . order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator."); OKLA. STAT. tit. 60, § 602 (2009) (permitting a court of "general equitable jurisdiction . . . [to] order an administration of the trust, devise, or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator.").

112. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

113. UNIF. TRUST CODE § 413(a) (2005); *see also* John K. Eason, *The Restricted Gift Life Cycle, Or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 730 (2007) (recognizing the textual change).

114. UNIF. TRUST CODE § 413(a).

115. *See* Halbach, *supra* note 15, at 1902.

116. *Id.*

117. *Id.* (stating that the newly added ground of "'wasteful' might be appropriate" to describe situations involving the distribution of excess funds).

Combining all of the UTC's changes to cy pres reflects how far the power has veered from its historical roots. Section 413 creates a new presumption that transfers the burden of proving the nature of the donor's charitable intent from a cy pres petitioner to a party objecting to the exercise of cy pres. Furthermore, the UTC continues the erosion of the redistribution standard by abandoning the traditional "as near as possible" maxim and replacing it with a standard that only requires that the redistribution be "consistent" with the donor's original charitable purpose. Finally, the UTC adds a new justification for the exercise of cy pres; a court is empowered to redistribute assets held by charitable trusts if continued administration would be "wasteful." Without question, the UTC "liberalizes the doctrine of cy pres" and "expands the ability of the court to apply cy pres."[118] The underlying principle of these substantial alterations to the historical cy pres power under UTC Section 413 seems to be "that property once given to charity is forever dedicated to charity."[119]

III. THE THEORETICAL IMPACT OF THE UTC'S CY PRES

The historical stasis associated with cy pres jurisprudence led one scholar to comment that "it would be overstating the case to say that significant developments have occurred to date."[120] Of course, concluding that cy pres jurisprudence has not been the subject of "significant developments" elides the historical changes that led to the widespread adoption of the doctrine during the late nineteenth to mid-twentieth centuries. Whatever the merits of the conclusion that nothing of significance has happened pre-UTC, the post-UTC world of cy pres jurisprudence casts a different, and larger, shadow over the law of charitable trusts. UTC Section 413 not only loosens the ties to traditional cy pres doctrine, but also alters the theoretical framework of cy pres while attempting to redress inefficiencies in cy pres litigation. As a result, UTC Section 413 unquestionably qualifies as a "significant development" in cy pres doctrine.

A. The Theoretical Imbalance of the UTC's Cy Pres

Cy pres mediates the balance between two competing policies—

118. *See* English, *supra* note 92, at 179 (stating that "the UTC liberalizes the doctrine of *cy pres* in a way believed more likely to carry out the average settlor's intent. First, the Code expands the ability of the court to apply *cy pres*." (footnote omitted)).

119. Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382, 382 (1959).

120. Halbach, *supra* note 15, at 1901.

respect for the dead hand and promoting the well-being of the public.[121] Following a decedent's instructions regarding what to do with property after death is sacred ground in the law.[122] Charitable gifts occupy a special place on that sacred ground because they benefit the public. Reflecting the elevated stature of charities in the eyes of the law, a common judicial refrain is that "charities are favorites of the law."[123] As evidence of their favored status, charitable trusts are immune from the grasp of the infamous Rule Against Perpetuities; therefore, charitable trusts can last forever.[124] Permitting charitable trusts to exist in perpetuity comes at a price—the purposes for which charitable trusts are created may become obsolete as circumstances change in the future and the corresponding public benefit diminishes. Traditional cy pres ensures that the public continues to receive a benefit despite the passage of time by reassigning funds held in charitable trusts in a manner that comports as closely as possible to the original donor's intent.[125]

Stretching the efficiency of the charitable dollar in pursuit of the public welfare, however, is not a cost-free undertaking. One method to assess the theoretical cost of the UTC's cy pres is to measure the balance between a donor's intent and the public interest comprehended by cy pres pre- and post-UTC Section 413. Historically, courts have vacillated between strict and broad interpretations of the cy pres elements.[126] A

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121. Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L. J. 1111, 1114–15 (1993).

122. *See, e.g.*, Cauffman v. Long, 82 Pa. 72, 77 (1876) (observing that "[n]o right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust, the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern.").

123. Wooton v. Fitz-Gerald, 440 S.W.2d 719, 726 (1969); *In re* Farrow, 602 A.2d 1346, 1348 (1991). For general comments about the law's favorable treatment of charities, see FRIEDMAN, *supra* note 69, at 254.

124. *See* 4A SCOTT & FRATCHER, *supra* note 1, §365, at 109–13.

125. The history of two charitable trusts created by Benjamin Franklin provides a rather famous exercise of cy pres to modify charitable trusts.. Franklin created two charitable trusts to assist "young married artificers, under the age of twenty-five years, as have served an apprenticeship in the said town . . . in setting up their businesses." But the apprenticeship model became outdated with the passage of time; therefore, the purpose of Franklin's charitable trusts became obsolete. As a result, the trustees of the Franklin trust sought to modify the trust using the court's power of cy pres and have done so repeatedly over time. In fact, a court exercised the power of cy pres on Franklin's charitable trusts during the mid-twentieth century. SEE LEWIS SIMES, PUBLIC POLICY AND THE DEAD HAND 141-53 (1955).

126. Chester, *supra* note 21, at 416–17 (describing the "slow, but steady" expansion of the doctrine); Committee on Charitable Trusts and Foundations, *supra* note 5, at 392, 395 (noting the variation in the stringency with which courts construe the justifications for cy pres and suggesting that general charitable intent is easier to find if a trust fails after creation); Fisch, *supra* note 119, at 384 (describing the varying degrees of impossibility required for cy pres).

broad interpretation of general charitable intent, unlawful, impossible, or impracticable makes cy pres more readily applicable, which tips the cy pres balance in the direction of the public interest and away from donative intent. Conversely, a narrow application of the cy pres elements skews the cy pres balance toward donative intent and away from the public interest. Interpreting the recent trend associated with construction of cy pres elements shows that the cy pres balance has increasingly favored the public at the expense of the donor. According to one view of the interpretive history, courts eased the stringency with which they interpreted the traditional prerequisites for cy pres to the point that the elements had a "tendency towards liquefication."[127]

The UTC's presumption of general charitable intent exemplifies the "liquefication" of cy pres elements. Throughout the history of cy pres jurisprudence, a cy pres petitioner had to prove all of the traditional cy pres elements before a court would order a cy pres redistribution of charitable funds.[128] The primary protection afforded donative intent is the requirement of proving that a donor possessed general charitable intent. UTC Section 413(a), however, reassigns that burden to the party opposing the cy pres petition. If the opponent of the cy pres action cannot overcome the presumption, the cy pres applicant may obtain the desired remedy without presenting any evidence of the donor's charitable intent to the court prior to its exercise of cy pres. Similarly, a cy pres challenger might elect to forgo a challenge to the presumption and instead contest the impracticable, impossible, or wasteful element of cy pres under the UTC. If that challenge is unsuccessful, the court will again not examine any evidence regarding the donor's intent prior to ordering a cy pres redistribution of charitable trust assets. Given the diminution of the obstacle facing cy pres applicants, the UTC's presumption hastens the corrosion of the cy pres requirements; the balance of interests weighed in the cy pres scale further tilts toward the public and away from the donor.

The UTC, however, offers donors a way to avoid the presumption of general charitable intent in Section 413(a). Section 105 of the UTC divides the entire code into mandatory and default rules, the difference between the two categories being that the latter are permitted to be

127. Fisch, *supra* note 119, at 382–83; *see also* Note, *supra* note 20, at 320 (observing that "[g]radually, however, the factor of public welfare became more important in these cases and it became less difficult to establish impossibility or impracticability of applying the gift as designated"); Bradway, *supra* note 3, at 526 (asserting that "[w]hile there is some difference among the courts as to what set of facts is occasion for its [cy pres] application, there seems to be a more liberal view coming into existence").

128. Again, one exception to this statement is Pennsylvania's abandonment of an intent element in its definition of cy pres. *See supra* note 110.

overridden by the donor.[129] The power of cy pres in Section 413 is a default rule;[130] therefore, the settlor has the authority to escape Section 413 by providing an alternate distribution in the terms of the trust to be given effect if the trust becomes unlawful, impracticable, impossible, or wasteful.[131] If the settlor/donor leaves an instructional vacuum in the terms of the trust, Section 413 fills the empty space with its presumption and subsequent redistribution of the charitable assets pursuant to the court's equitable power. Under the UTC, then, the *donor's* failure to account for the possibility that a charitable trust might struggle to meet the charitable objective in the future caused the balance to tip in favor of the public interest at the expense of the donor's intent.

The UTC's recognition that a donor possesses the power to draft around the possibility of an exercise of cy pres does little more than codify a power that long belonged to donors.[132] Despite the drafting authority vested in donors, some courts invent reasons to avoid giving effect to gift-over provisions and deploy cy pres regardless of the express language of the instrument. In *Home for Incurables of Balt. City v. University of Maryland Medical Systems Corp.*, for example, the settlor created a charitable trust so that the Home could construct a facility for "white patients who need physical rehabilitation."[133] If, for some reason, the charitable gift was "not acceptable," the donor instructed that the charitable funds should be distributed to the University of Maryland Hospital.[134] The lower court held that the University of Maryland was entitled to the charitable funds per the gift-over and the Home appealed that ruling.[135] The University argued that the presence of the gift-over indicated that the donor possessed specific charitable intent thus barring cy pres, but the court of appeals disagreed.[136] According to the appellate court, including the gift-over to another charity indicated that the settlor possessed general charitable intent.[137] Thus, the court awarded the funds to the Home sans the

129. UNIF. TRUST CODE § 105 (2005).

130. *Id.* § 105(b)(4).

131. *Id.* § 413. The Comment to § 413 states that "[s]ubsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered." *Id.* § 413 cmt.

132. *See* BOGERT ET AL., *supra* note 1, §§ 436–37, at 160–70; Fisch, *supra* note 119, at 391 (concluding a "crystallized" rule exists that "cy pres is inapplicable when the donor by a gift over declares how the funds should be used upon failure.").

133. 797 A.2d 746, 747 (Md. Ct. App. 2002).

134. *Id.*

135. *Id.* at 750, 756.

136. *Id.* at 754.

137. *Id.* at 756 (stating that "where the gift over is also to a charity, it would seem that the

unlawful racial restriction.[138]

Contrary to *Baltimore City*, many courts construe the inclusion of a gift-over as meaning that the donor possessed specific charitable intent.[139] For those courts, including a gift-over suggests that a donor had a specific plan in mind if circumstances warranted an alternate distribution, which is equated to specific charitable intent.[140] Conversely, omitting a gift-over suggests that a donor possessed general charitable intent. Reasoning that the inclusion of a charitable gift-over equates to general charitable intent, like the court in *Baltimore City*, defies the language of the instrument and commonly accepted rules of interpretation in cy pres cases. The donor presumably intended for the gift-over to be given effect if the initial gift failed or else the gift-over would not have been included in the language of the instrument. And whatever the *Baltimore City* donor intended by the phrase "not acceptable," the phrase must invariably include a finding that the racial restriction is unlawful. As a result, the court should have awarded the charitable funds to the University. In combination with decisions like *Baltimore City*, then, both the presence and absence of a gift-over is sufficient evidence of general charitable intent to invoke cy pres.

Like the court in *Baltimore City*, other courts have not hesitated to employ cy pres notwithstanding the inclusion of a gift-over in the event that the charitable trust becomes obsolete.[141] Courts have employed a variety of techniques to circumnavigate a gift-over without reaching the thorny question of the applicability of cy pres.[142] For example, courts have relied on the discretion of trustees, modified charitable trusts using equitable deviation, or broadly construed the original charitable gift to avoid honoring a gift-over.[143] Because of the ample evidence that the inclusion of a gift-over has not always been honored by courts, the UTC's denomination of cy pres as a default rule does not offer the greatest protection for a donor's intent. The protection afforded donative intent is only as great as the court permits; therefore, the

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testator's general charitable intent is confirmed.").

138. *Id.*

139. *See* BOGERT ET AL., *supra* note 1, § 437, at 165; 4A SCOTT & FRATCHER, *supra* note 1, § 399.2, at 492–96.

140. Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41, 45 (1989) (finding that "[c]onceptually, the chief reason for the rule is the general charitable intent requirement itself; specifically, a gift over shows a specific alternative intent inconsistent with the possibility of general charitable intent.").

141. *See* Fisch, *supra* note 119, at 390; Note, *supra* note 20, at 318 (citing *In re* Young Women's Christian Ass'n of N.Y., 126 A. 610 (N.J. Ch. 1924); Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613 (N.Y. 1921)).

142. *See* Chester, *supra* note 140, at 57–59.

143. *Id.*

historical ability of courts to escape the language of charitable trust instruments fails to return the interests weighed in the cy pres balance to a position of equipoise.

In addition to the textual omission that occasioned the presumption of general charitable intent, the two textual changes drafted into UTC Section 413 also alter the balance of interests comprehended by cy pres. Interestingly, the Comment to UTC Section 413 is silent about the change from the traditional "as near as possible" cy pres standard to the "in a manner consistent" standard. Nonetheless, one clue to the meaning of this textual change can be found by examining the Restatement (Third) of Trusts. The Uniform Law Commissioners commenced work on the UTC in 1993 and coordinated their efforts with those drafting the Restatement (Third) of Trusts.[144] In fact, Commissioners worked so closely with the drafters of the Restatement (Third) of Trusts that the UTC "could be described as a codification of the Restatement."[145] As a result, the comments affixed to the Restatement (Third) of Trusts illuminate the cy pres provision in the UTC.

Section 67 of the Restatement (Third) directs that charitable assets be distributed to a charitable purpose that "reasonably approximates the designated purpose."[146] The "reasonably approximates" standard of the Restatement (Third) diverges from the traditional "as near as possible" standard—those two phrases are neither textual nor functional equivalents. As evidence of the divergence, the Comment to the Restatement (Third) expressly states that the distribution ordered by the court "need not be the nearest possible but one reasonably similar or close to the settlor's designated purpose."[147] Furthermore, the Comment suggests that numerous uses might be "reasonably close to the original," but the court should opt for the use that has a "greater usefulness than the others that have been identified."[148] The Restatement (Third) of Trusts justifies this linguistic change on the ground that "it is reasonable to suppose that among relatively similar purposes charitably inclined settlors would tend to prefer those most beneficial to their communities."[149]

The influence of the Restatement (Third) of Trusts on the UTC is reflected in the UTC's redistribution standard. Textually, the UTC's requirement that a court disburse funds "in a manner consistent with the

144. English, *supra* note 92, at 147.

145. *Id.* at 148.

146. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

147. *Id.* at cmt. d.

148. *Id.*

149. *Id.*

settlor's charitable purposes" is not the equivalent of the traditional command to assign funds "as near as possible" to the donor's original intent. The UTC's phrase suggests a broader conception of cy pres than the traditional notion that the assets be applied "as near as possible" to the settlor's original charitable intent. Indeed, the UTC's language could be used to justify the redistribution of the charitable assets from a Jewish reading room to teaching children about Christianity in *Da Costa*. After all, both promote education, which was "consistent with the settlor's charitable purposes." In light of the change to the phrase, the power described in the UTC should no longer be called "cy pres" because the definition of the traditional phrase no longer applies. Instead, the redistribution standard embraced by the UTC should be coined *suffisamment proche de*, which means that the court's redistribution is satisfactory if it is "near enough to" to the donor's original charitable purpose.

Whether courts exercise the increase in latitude given to their redistribution decisions remains to be seen, but the change represents more than just semantics. The UTC, and the Restatement (Third) of Trusts for that matter, signifies a fundamental transfer of decisionmaking power from donors to courts. Indeed, the Chairman of the Committee that drafted the UTC remarked that UTC Section 413 "simplifies cy pres and gives a judge more options than the existing law of many states."[150] The UTC justifies this expansion on the ground that most donors would prefer that their original charitable gifts be used for other charitable purposes if the original objective can no longer be obtained. The underlying assumptions are that donors not only possess such a preference, but also that they would acquiesce to the court's power to make the decision. Both assumptions are speculative.

The second textual change, the addition of "wasteful" as a ground justifying an exercise of cy pres, shifts the theoretical cy pres balance in the same direction as the UTC's other changes. As a general matter, relief is more readily accessible with a greater number of avenues leading to relief. To draw an analogy from another area of law, New York had one ground for divorce throughout much of the twentieth century—adultery based upon a 1887 statute written by Alexander Hamilton.[151] New York courts nonetheless granted annulments on a wide variety of grounds.[152] Consequently, New York had one of the

150. Maurice A. Hartnett III, *A Judge's View of the Uniform Trust Code*, UTC NOTES, Fall 2003, at 2, 3, *available at* http://www.nccusl.org/Update/UTCNotes3Q03.pdf.

151. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 30 (1988).

152. J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF

lower divorce rates in the country, but led the nation in the number of annulments granted to those seeking an alternative to divorce.[153] The expansion of the cy pres grounds in UTC Section 413 portends a similar effect. Adding "wasteful" as a ground for cy pres to the existing grounds of "impossible" and "impracticable" provides cy pres applicants another avenue to relief. If the facts do not fit the definitions of "impossible" or "impracticable," they may fit under the umbrella of "wasteful." This expands the public interest at the expense of the donor's original charitable intent.

B. Efficiency and the UTC's Cy Pres

Because of the variety of ways in which they are applied by courts, presumptions have been called "the slipperiest member of the family of legal terms."[154] Nonetheless, presumptions serve an important evidentiary function within the courtroom and are created for a variety of reasons. A presumption, for example, might be created to support a social policy, such as the nineteenth century's presumption that possession of land equated to ownership, which promoted the development of land.[155] Presumptions are also created to reallocate a burden of proof to ameliorate an inequality between the parties regarding access to evidence.[156] Whatever the reason(s) for creating a presumption, the basic reason for the creation and continuing utility of a presumption is that it reflects the most likely outcome if the foundational facts were presented to the court.[157] In other words, a presumption is a probabilistic gauge of what the evidence would show if the court had access to the direct evidence of intent.

An underlying reason for creating the presumption is to promote judicial economy. In the past, the determination of whether the donor had general or specific general intent has been the most litigated element

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DIVORCE IN TWENTIETH CENTURY AMERICA 90 (1997) (reciting that "Empire State jurisprudence allowed over 150 grounds for annulment.").

153. *Id.* (noting that only California granted somewhere near the number of annulments as New York); JACOB, *supra* note 151, at 35 (pointing out the New York courts also liberally construed the annulment statutes. As a result, "New York consequently had the highest annulment rate of the nation, accounting for as many as one-third of all annulments in the United States."). For a comparison of divorce rates in the United States by state, see PAUL H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 100, tbl. 48 (1959) (showing New York's divorce rate to be among the lowest in the country from 1940–1950).

154. CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 572 (6th ed. 2006).

155. Seddon v. Harpster, 403 So.2d 409, 413 (Fla. 1981).

156. *See* MCCORMICK, *supra* note 154, § 343, at 574.

157. *Id.*

in cy pres cases.[158] The UTC's presumption of general charitable intent conserves judicial resources by eliminating the initial burden of proving the most frequently contested cy pres element. So long as a cy pres applicant musters factual evidence that the present administration is unlawful, impossible, impracticable, or wasteful, the applicant need not provide any evidence of intent unless the presumption is rebutted by a cy pres opponent. The presumption not only lowers the obstacle that impedes the path to cy pres relief for petitioners, but ostensibly saves judicial resources by eliminating the necessity of presenting evidence of intent.[159]

The presumption of general charitable intent, however, falls short of guaranteeing that judicial resources will be conserved during cy pres litigation. Expanding the scope of cy pres provides litigants with more options to pursue legal relief; "giving judges more options" simultaneously presents more opportunities for cy pres litigants as well. Furthermore, the UTC changes the cost–benefit calculus associated with deciding whether to go to court by increasing the probability of success. To that end, some evidence suggests that the number of cy pres cases is already on the rise. The state supreme courts of Washington, Nebraska, Iowa, and Missouri have each issued opinions involving the applicability of cy pres and its scope in the recent past.[160] If newspaper articles and blog posts concerning recent and ongoing litigation are an accurate gauge,[161] such as the coverage of a recent cy pres case involving Georgia O'Keeffe and Fisk University,[162] the doctrine of cy pres will

158. *See* FISCH, *supra* note 4, at 128; *see also* BOGERT ET AL., *supra* note 1, § 436, at 160; Chester, *supra* note 20, at 417 (asserting that the intent element causes "much expensive and time-consuming litigation.").

159. *See* BOGERT ET AL., *supra* note 1, § 436, at 158.

160. Kolb v. City of Storm Lake, 736 N.W.2d 546, 549–50 (Iowa 2007); Niemann v. Vaughn Cmty. Church, 113 P.3d 463 (Wash. 2005); Obermyer v. Bank of Am., N.A., 140 S.W.3d 18 (Mo. 2004); *In re* R.B. Plummer Mem'l Trust Loan Fund Trust, 661 N.W.2d 307 (Neb. 2003).

161. For coverage in print, see, for example, Paul Sullivan, *To Avoid Conflicts Later, It's Best to Keep Bequests Flexible*, N.Y. TIMES, May 2, 2009, at B2; John Hechinger, *New Unrest on Campus as Donors Rebel*, WALL ST. J., Apr. 23, 2009, at A1; Karen W. Arenson, *When Strings Are Attached, Quirky Gifts Can Limit Universities*, N.Y. TIMES, Apr. 13, 2008, at A18; Stephanie Strom, *Donors Gone, Trust Veer From Their Wishes*, N.Y. TIMES, Sept. 29, 2007, at A1; Molly Corbett Broad, *Recipients Need Flexibility; Strict Readings of Donors' Intent Constrain Institutions, Devalue Gifts*, USA TODAY, May 28, 2008, at A11; Maria Di Mento & Ben Gose, *Court Rules Helmsley Trustees Not Bound by Donor's Instructions*, 21 CHRON. PHILANTHROPY, Mar. 12, 2009, at 14 (2009); Lisa Vernon-Sparks, *Town to Ask Court to Rule on Proper Use of Trusts*, PROVIDENCE JOURNAL-BULLETIN (Rhode Island), Sept. 24, 2008, at 1. For blog posts, see, for example, Todd Zywicki, A Wave of Donor Intent Lawsuits Coming?, (April 25, 2009), http://volokh.com/posts/1240675635.shtml.; Gerry W. Beyer, Cy Pres Doctrine (July 11, 2006), http://lawprofessors.typepad.com/trusts_estates_prof/2006/07/cy_pres_doctrin.html.

162. Siobhan Morrissey, The Art of the Sale, 94 A.B.A.J. 11 (2008); Farai Chidyea, Nat'l Public Radio, Bloggers' Roundtable: Pop Culture & Politics (Mar. 10, 2008), *available at*

increasingly clog court dockets across the country.

A major obstacle to increasing the efficiency of cy pres litigation is the absence of a coherent distinction between general and special charitable intent. Without a definition of general or special charitable intent, courts refer to a maze of jurisprudential guideposts to divine the nature of the donor's intent. In addition to the presence or absence of a gift-over as an indicator of general charitable intent,[163] the amount of the donor's estate directed toward charity is commonly cited as an indicator of intent. Courts uses phrases like the "bulk of an estate" or classify the charitable gifts as "numerous" to capture the quantity of charitable giving that might serve as the foundation to conclude that a donor manifested general charitable intent.[164] Of course, courts fail to define what constitutes the "bulk of the estate" or how "numerous" is sufficient for cy pres purposes because such is impossible to quantify. The same is true of other commonly cited indicators—the nature of the donor's relationship to the charitable beneficiary, the type of assets held by the charitable trust, or the donor's personal circumstances when the charitable trust was created.[165] Regardless of the factor analyzed, courts have a great deal of leeway in assessing such factors, which translates to incongruous results.[166]

One case, *In re Estate of Rood*, is a prime example of the questionable validity of the variables employed by courts to gauge the existence of general charitable intent.[167] Apparently very, very concerned about the future of government in the United States, John Rood created a

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http://www.npr.org/templates/story/story.php?storyId=88035282; Theo Emery, *O'Keeffe Museum Asks Court to Stop Art-Sharing Deal by University in Tennessee*, N.Y. TIMES, Oct. 17, 2007, at E3; Patrik Jonsson, *A college's art treasure dilemma: to sell or to hold?*, CHRISTIAN SCI. MONITOR, Aug. 28, 2007, at 3.

163. *See supra* notes 139–141 and accompanying text.

164. Hardy v. Davis, 148 N.E.2d 805, 813 (Ill. App. Ct. 1958) (noting a donor's "obvious desire to give the bulk of her estate to charity"); *In re* Estate of Rood, 200 N.W.2d 728, 739 (Mich. Ct. App. 1972) (holding that "a general charitable intent will be implied where the bulk of donor's property is given for charitable purposes."); Ky. Children's Home v. Woods, 157 S.W.2d 473, 475 (Ky. Ct. App. 1941).

165. *See* BOGERT ET AL., *supra* note 1, § 437, at 160–89.

166. *Compare* Simmons v. Parsons College, 256 N.W.2d 225 (Iowa 1977) (refusing to apply cy pres because of reverter clause that distributed charitable trust assets to heirs upon if trust failed), *with* State v. Fed. Square Corp., 3 A.2d 109 (N.H. 1938) (narrowly construing a reverter clause and permitting cy pres to apply to a charitable trust after the land in the trust had been taken by the State's power of eminent domain). *Compare* City of Belfast v. Goodwill Farm, 103 A.2d 517 (Me. 1954) (donation of real property deemed to be indicative of specific charitable intent because of donor's close connection to the property), *with In re* Williams' Estate, 46 A.2d 237 (Pa. 1946) (court applies cy pres to redistribute real property placed in charitable trust). *See also* BOGERT ET AL., *supra* note 1, § 437, at 189 (concluding that "different courts sometimes come to diametrically opposite conclusions on quite similar sets of facts").

167. 200 N.W.2d 728.

testamentary charitable trust designed to benefit schools that taught political science courses that comported with his views.[168] To avoid confusion, Rood "set forth . . . the bare bones of political science" as he wanted it to be taught within the terms of his will.[169] The "bare bones" of Rood's political science class consumed eleven of the fifteen pages of his will.[170] Furthermore, the terms of Rood's trust directed that specific books be used in conjunction with the political science courses.[171] If a nonbeneficiary school proved that a beneficiary school was not complying with Rood's conditions, the nonbeneficiary school was eligible to receive the beneficiary school's benefits for the subsequent twenty-five years so long as it adhered to Rood's conditions.[172] Evidence adduced at trial showed the Rood's political views had fallen into "disfavor," and the books covered outdated material; therefore, the Attorney General filed a cy pres petition on the ground that the goals of the trust were impossible to achieve.[173] The trial court agreed that the objective of Rood's trust had become impossible to achieve and found that Rood possessed general charitable intent.[174] As a result, the court decided to exercise its cy pres power and invited proposals from

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168. *Id.* at 742.

169. *Id.* at 742–46.

170. *Id.* at 737 n.8. Among the shortest descriptions in Rood's will are subsections four and five:

> (4) To prevent self-*Seek*ers getting into this conservative house, its members should be required to serve without compensation other than necessary expenses proved to and allowed by the public auditor, as so often urged by Dr. Franklin and others in the convention that wrote the Constitution of the United States, and, finally, lost by only one vote.
>
> (5) No class is safe which has no voice in the government, or when some other class is particularly dependent upon the government for their economic support and, therefore, especially active in elections.

Id. at 743.

171. *Id.* at 746. The provision states that "[a]s a general proposition, I wish the *doctrines and contents of my primer of political science* taught and made available to the public schools. This political science primer, *The History of Building the Constitution of The United States*, and another book—*Family Security*, are now in type owned by me, and in storage at the printing office of the Typocraft Company, 445 York Street, Detroit, Michigan, and may be removed by my executors and trustees, reprinted, or revised, as the occasion may require." *Id.* (emphasis added).

172. *Id.* at 748. The provision contained in a codicil to Rood's will states that:

> Any school or college organized and operating in the State of Michigan which shall establish by a Decree of a Court of Record of this State that any school or college receiving benefits under this Will has for the period of one year or longer violated the provision of my Will shall for the succeeding twenty-five years receive the benefits under this Will which were formerly paid to the negligent or offending school under the same conditions as such former school.

Id.

173. *Id.* at 732.

174. *Id.*

alternative takers that aligned with Rood's intent.[175] Rood's heirs appealed the trial court's decision to apply cy pres on the ground the Rood's intent was specific and not general.[176]

For indicia of general intent, according to the court, Michigan courts looked for the presence of a gift-over or a reverter clause and made a quantitative evaluation of how much of the donor's estate had been directed toward charity.[177] The court examined the text of Rood's will and found neither a gift-over nor a reverter in his will.[178] Next, the court declared that "the bulk of Rood's estate was given in trust for charitable purposes."[179] Without the benefit of a gift-over or reverter, the charitable assets could return to the donor's heirs via intestacy. But the court noted that a presumption against intestacy existed and reasoned that the evidence in the case validated that presumption.[180] The provision permitting a nonbeneficiary school to acquire benefits from a prior beneficiary amounted to a "clear implication [. . . .] that Rood, one way or another, intended some educational institution to benefit from his generosity."[181] The court affirmed the lower court's application of cy pres and offered four suggestions to educational institutions regarding the use of the funds:

> (a) a course in conservative political philosophy in American politics;
> (b) a course in American conservative politics;
> (c) a course in conservative political science;
> (d) a comparative course in conservative and liberal political science or philosophy.[182]

The trial and appellate court's conclusion that Rood possessed general charitable intent is an impressive display of interpretive gymnastics. Rood's will and the terms of his charitable trust are the very definition of "specific"—the outline of what he wanted taught has seventeen subsections that delve into minute detail of his view of political science. Similarly, Rood identified specific books by name and provided the name and address of the printer that has the books he wanted teachers to use in the courses. While Rood neglected to draft an express gift-over in his trust, the provision permitting a nonbeneficiary school to acquire the

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175. *Id.*

176. *Id.* The value of the assets in the charitable trust was approximately $452,000 at the time of the trial court's decision.

177. *Id.* at 738–39.

178. *Id.* at 739.

179. *Id.*

180. *Id.* at 738–40.

181. *Id.* at 740.

182. *Id.* at 741.

benefits of a nonconforming school is the functional equivalent of a gift-over. The provision operates to transfer the charitable assets to another charitable entity upon breach of a condition in the trust, which is exactly the function of a gift-over. The court noted that the "clear implication" of that provision is that Rood intended an educational institution to benefit from his generosity, but the benefits only flowed to those schools that abided by Rood's über-meticulous instructions regarding the contents of a political science course. And despite the court's conclusion that the "bulk" of Rood's estate went to charity, the court failed to reveal the quantitative analysis that yielded such a conclusion. In sum, the court's application of its guideposts for concluding that Rood's possessed general charitable intent is specious at best.

The wealth of contradictory precedent, along with the plasticity of the indicators of general charitable intent, erect a substantial impediment to the unstated, yet compelling, goal of conserving judicial resources associated with the presumption of general charitable intent. Donors either have general or specific charitable intent under cy pres jurisprudence and the factors that are used to prove the existence of one type of intent bear on the existence of the other type of intent. The UTC's burden to show that a donor possessed specific charitable intent is heavy because evidence regarding a donor's intent is sparse under any circumstances.[183] Any evidence that might be uncovered, however, could be used to rebut the presumption and likely find some support in the case law because of its volume and ambiguity. In the end, the historical inconsistency of cy pres intent jurisprudence threatens to deplete the cost-savings of the UTC's presumption of general charitable intent.

An additional threat to the anticipated cost-savings comes in the form of the new justification of "wasteful" in UTC Section 413(a). Courts have encountered situations involving an excess of charitable trust funds for the stated charitable objective in the past and have not had difficulty applying traditional cy pres doctrine to reallocate such funds. In such cases, courts often employ the cy pres ground of impossibility or impracticality to distribute the extra money to causes or entities allegedly within the settlor's general charitable intent.[184] Rather than add clarity to cy pres doctrine, a novel justification for cy pres threatens to inject confusion into a category of cy pres cases adequately handled by traditional cy pres jurisprudence. The inclusion of "wasteful" must

183. *See* BOGERT ET AL., *supra* note 1, § 437, at 186–89 (finding that "[i]n most cases, the evidence on the question of general or particular intent is very meager.").

184. *Id.* § 438, at 199; Bogert, *supra* note 21, at 99 (stating that American courts had a "tendency . . . to construe 'impracticality' as including wastefulness").

mean that the situations it covers differ from those addressed by the existing grounds of unlawful, impossible, or impracticable, and courts will be forced to delineate those differences because the UTC fails to define those terms. In the end, the addition of "wasteful" as a ground for cy pres threatens to increase, not decrease, the consumption of judicial resources as courts attempt to distinguish "wasteful" from the other cy pres grounds.

IV. REWEIGHING THE CY PRES BALANCE WITH A DIFFERENT PRESUMPTION

The ready-made remedy for the theoretical and economic shortcomings of the UTC's cy pres is to undo the changes thereby returning cy pres doctrine to the status quo pre-UTC. Like cy pres doctrine during the latter twentieth century, the UTC itself could receive a makeover during its next review that eliminates the presumption of general charitable intent, reinstates the "as near as possible" redistribution standard, and redacts the ground of wasteful from the cy pres lexicon. Each of these changes would, in effect, return cy pres doctrine to the status quo pre-UTC. Reverting to the status quo pre-UTC, however, is not necessarily desirable. The cy pres balance had already tipped in the direction of the public interest; the elements of cy pres had undergone a judicial "liquefication." The changes imposed by the UTC only hastened the process by skewing the balance even more heavily in favor of the public. If the pre- and post-UTC trend of eroding cy pres requirements continues, the time might come when the cy pres requirements disappear altogether and trustees might have free rein to redistribute assets without judicial oversight.[185]

To correct the theoretical imbalance of interests perpetuated by pre- and post-UTC cy pres jurisprudence, this Article argues that a different presumption should be incorporated into cy pres doctrine—a presumption of specific charitable intent. The validity of any presumption lies in the match between the basic evidentiary facts and the ultimate fact to be concluded.[186] The Supreme Court offered some insight regarding where to draw a line between a permissible and impermissible presumption. In *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, the Court wrote that a "there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall

185. *See* Fisch, *supra* note 119, at 393 (arguing in favor of eliminating all cy pres requirements).

186. County Court v. Allen, 442 U.S. 140, 158–60 (1979).

not be so unreasonable as to be a purely arbitrary mandate."[187] Almost sixty years later, the Court defined "rational" for purposes of the constitutionality of presumptions as "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[188] In other words, where the inference lacks "a reasonable relation to the circumstance of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts."[189] The weight of the inference of the presumed fact from proof of another fact "depends upon the generality of the experience upon which it is founded."[190]

Because the validity of presumption rests upon the "rational connection" between the "generality of experience" and the presumed fact, the probable experience of most donors of charitable trusts must be established. Despite the UTC's assertion that most donors possess general charitable intent, courts and commentators repeatedly recognize that donors, in all likelihood, do not consider the possibility that future circumstances might nullify the original charitable objective.[191] The Supreme Court of Ohio, for example, acknowledged the likelihood that donors do not contemplate how changing circumstances might affect their charitable gifts in *Rice v. Stanley*.[192] According to the court, "it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter."[193] If such commentary is accurate, the

187. Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910).

188. Leary v. United States, 395 U.S. 6, 36 (1968).

189. *Id.* at 34.

190. *See Turnipseed*, 219 U.S. at 42.

191. Miranda v. King, 78 A.2d 98, 104 (N.J. Super. Ct. App. Div. 1951) (reciting that "[i]t is perhaps true in most of such instances that the testator or testatrix has not contemplated the possible failure of his or her particular administrative method, and in the observance of the *cy pres* doctrine the courts do indulge in a reasonable conjecture of what the donor would have intended if he or she had envisioned the exigency. Obviously, some courts go much further than others in applying the doctrine."); Howard Sav. Inst. v. Peep, 170 A.2d 39, 42 (N.J. 1961); *In re* Estate of Thompson, 414 A.2d 881, 886 (Me. 1980); *In re* Estate of Rood, 200 N.W.2d 728, 737 n.9 (Mich. Ct. App. 1972); 4A SCOTT & FRATCHER, *supra* note 1, § 399.2, at 490 (stating that "[i]t is seldom that the testator's intention can be definitely analyzed and divided into a particular and a general intention. It is ordinarily impossible to determine what disposition the testator intended should be made of the property if his particular purpose could not be carried out. Indeed it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter"); BOGERT ET AL., *supra* note 1, § 436, at 159 (commenting that "[u]nless the settlor expressly accepted the cy pres rule for his trust, or negated the application of it, it seems very doubtful whether he gave any thought to the disposition of the charitable fund in the case of failure of the charity").

192. 327 N.E.2d 774 (Ohio 1975).

193. *Id.* at 783.

"general experience" is that donors do not plan for a contingency that would require a redistribution of charitable assets in the future.

If donors fail to consider the impact of changes in the future on their charitable trusts, then the presumption of general charitable intent lacks a "reasonable relation to the facts of life as we know them." Furthermore, experience suggests that there is no "substantial assurance" that the presumed fact of general charitable intent exists based upon the factors used as proxies for the element. The flimsy foundation for the presumption of general charitable intent is reflected in the tortured decisions involving the guideposts used to discern the nature of the donor's intent. The Supreme Court of Rhode Island noted the contradictory nature of its own general charitable intent jurisprudence in *Industrial National Bank v. Guiteras*.[194] In that case, the court recited that cy pres required general charitable intent, but "[w]hile these principles are easily stated, the possible conflict in application is clearly made to appear from a reading of two leading cases in this jurisdiction."[195] As a whole, the jurisprudence involving the presence or absence of general charitable leaves the impression that the Supreme Court of Ohio's description of the search for the nature of a donor's intent as a "guess" is correct.

Rather than rely on a guess regarding the nature of the donor's charitable intent, courts have ready access to the best evidence of the donor's intent—the language used in the instrument creating the charitable trust. Courts often rely on the language of an instrument as the foremost indicator of a donor's intent.[196] Evidence regarding the donor's intent is sparse and what little evidence is available to illuminate the donor's intent at the time the trust was created is subject to the vicissitudes of time.[197] Memories fade and documents are lost with the passage of time. But the language the donor employed to create the charitable trust is inoculated against the strains of time, at least as

194. 267 A.2d 706 (R.I. 1970).

195. *Id.* at 711. The two leading cases from the jurisdiction were *R. I. Hospital Trust Co. v. Williams*, 148 A. 189 (R.I. 1929) and *Gladding v. St. Matthew's Church*, 57 A. 860 (R.I. 1904). In both cases extrinsic evidence was used to establish the presence of general charitable intent. The court in Gladding found the charitable intent to be specific, while in Williams the court found the charitable intent to be general.

196. *See, e.g.*, Smith v. Bell, 31 U.S. 68, 75 (1832) (statement by Chief Justice Marshall that "[t]he first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."); *In re* Estate of Ganser, 255 N.W.2d 483, 486 (Wis. 1977) (asserting that "the language of the will is the best evidence of testatrix's intent"); Heirs of Mills v. Wylie, 466 S.W.2d 937 (Ark. 1971) (looking to the language of a will to determine intent).

197. *See* BOGERT ET AL., *supra* note 1, § 437, at 186–89 (finding that "[i]n most cases, the evidence on the question of general or particular intent is very meager.").

compared to the other forms of evidence available at the time of the cy pres action. The trust language at the moment of trust creation is identical to the trust language at the time the trust is subject to cy pres redistribution in the future. In the absence of direct evidence from the donor or consistently reliable indicia of intent, the most precise, and reliable, indicator of the donor's intent is the language that created the charitable trust.

The language employed by donors in some cases unambiguously shows that they possessed general charitable intent, but the history of cy pres shows that including such a clear indicator of intent is not the norm. Some donors expressly state that they possess general charitable intent in the language creating the trust.[198] Other donors plan for a change of circumstances in the future by explicitly consenting to cy pres within the terms of the trust. The donor in *Puget Sound National Bank v. Easterday* specifically instructed that "[i]n the event that the said Home should be discontinued or for any other reason the Trust can not be literally carried out I direct that the French rule and doctrine by Cy-Pris be invoked."[199] In comparison, most instruments in cy pres cases do not contain language that clearly indicates general charitable intent or that cy pres should be applied if necessary. The most probable reason for the absence of language expressing general charitable intent is that the donor lacked such intent when creating the trust. After all, "when a testator has a real intention, it is not once in a hundred times that he fails to make his meaning clear."[200]

Pointing out that the language of donative instruments frequently omits explicit language denoting general charitable intent does not mean that all donors lack such intent when creating their trusts. Presumptions, however, are generally based upon probabilistic notions regarding the existence of the presumed fact after establishing a different fact. In the context of cy pres, the probability that specific charitable intent exists on the basis of the language in a donative instrument is far greater than the probability that donors possess general charitable intent based upon the same language. Widespread recognition that donors ignore the impact of the future on their charitable trusts indicates that a presumption of specific charitable intent bears a "reasonable relation to the circumstance of life as we know them." In short, the benchmarks of presumptions

198. *See, e.g.*, Cushing v. Ft. Worth Nat'l Bank, 284 S.W.2d 791, 793 (Tex. Civ. App. 1955) (involving a provision that stated that "the Trustee in its lawful discretion shall apply such assets for charitable purposes in assistance of the aged and needy, in accordance with the general charitable intent as evidenced by the will of W. H. Grove, Deceased").

199. 350 P.2d 444, 445 (Wash. 1960).

200. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW § 702,at 316 (1909).

support a presumption of specific charitable intent and not a presumption of general charitable intent.

Ironically, filing an action for cy pres implicitly demonstrates that the donor's charitable intent was specific and not general. Charitable trusts with the broadest objectives have no need for cy pres modification because of the latitude they create for distributional decisions made by the trustees. For example, a charitable trust created "for the benefit of mankind" is likely to be immune from cy pres modification because of the scope of expenditure that might benefit mankind.[201] Any number of distributions might be said to benefit mankind; therefore, the overall purpose of the trust is malleable to the nth degree—it cannot become impossible, impracticable, or wasteful. Conversely, the beneficiaries designated in cy pres cases are specific—a named school, a named hospital, or the like. The intended beneficiary is limited by the language used by the donor. If the named school ceases to exist, a cy pres action may be filed to reallocate the funds to another educational institution upon the fiction that the donor's general charitable intent was to promote education. The probability of a cy pres modification is inversely proportional to the generality of the language describing the purpose of the charitable trust.

In addition to satisfying the general jurisprudential requirements to create a presumption, presuming specific charitable intent has a more specific impact on the theoretical cy pres balance. A presumption of specific charitable intent increases the protection given to donative intent by forcing cy pres plaintiffs to proffer evidence that the donor had a broader charitable purpose than that which is expressed by the specific language of the donative instrument. If cy pres applicants are unable to muster sufficient evidence of general charitable intent to overcome the presumption, their requests for cy pres will be denied. By protecting the donor's intent as originally specified in the donative instrument, a

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201. The language "for the benefit of mankind" is similar, but not identical, to the language that incorporated the Rockefeller foundation. The statute states that the foundation is

> [F]or the purpose of receiving and maintaining a fund or funds and applying the income and principal thereof to promote the well-being of mankind throughout the world. It shall be within the purposes of said corporation to use as means to that end research, publication, the establishment and maintenance of charitable, benevolent, religious, missionary, and public educational activities, agencies, and institutions, and the aid of any such activities, agencies, and institutions already established and any other means and agencies which from time to time shall seem expedient to its members or trustees.

1913 N.Y. Laws, ch.488 § 1, *available at* http://www.rockefellerfoundation.org/uploads/files/30ff1883-9e8f-44fd-9dd9-8bf2d6803578.pdf. The language creating this institution is not only broad in its description of the charitable objective, but also broad in its grant of authority to trustees to expend the funds of the foundation.

presumption of specific charitable intent shifts the cy pres balance back toward the fulcrum between donor intent and public interest.

V. THE PRACTICAL CONSEQUENCES OF PRESUMING SPECIFIC CHARITABLE INTENT

Although a presumption of specific charitable intent narrows the availability of cy pres, contracting the availability of cy pres is not the equivalent of eliminating the doctrine in its entirety. A court's failure to authorize cy pres relief for a trust that has allegedly become impossible, impracticable, or wasteful does not necessarily terminate an existing trust.[202] Assuming that the trust became effective,[203] the trust may continue to be administered in the same manner and the public will continue to receive the same benefit from the charitable trust the day after the cy pres petition is denied as it did the day before the cy pres petition was filed. Nevertheless, denying cy pres raises fairness and efficiency concerns regarding the use of charitable assets upon termination of the charitable trust. The presumption of specific charitable intent, however, minimizes those concerns.

A. Rethinking Objections to the Traditional Remedy

The natural question that follows the possibility of an increase in cy pres rejections involves the disposition of assets held in charitable trusts if those charitable trusts are terminated. The traditional answer is that the charitable assets are returned to the donor's estate by way of resulting trust.[204] Returning the assets to a donor's estate, however, has been the subject of much criticism, particularly if unnamed heirs are in the best position to obtain the charitable assets upon return.[205] By

202. If the trust is or becomes unlawful, the trust may be modified or deemed unenforceable because it is contrary to public policy.

203. *See, e.g.*, National Soc'y of the Daughters of the Am. Revolution v. Goodman, 736 A.2d 1205 (Md. Ct. Spec. App. 1999) (involving a testamentary trust created to support a nursing home facility run by the DAR. The DAR did not run a nursing home facility and the funds were applied cy pres due to impossibility at the time the trust was to take effect); Trs. of Watts Hosp. v. Bd. of Comm'rs, 58 S.E.2d 696 (N.C. 1950) (the expenses of a charitable hospital had increased to the point that the income from the original charitable gift could not sustain the operation of the hospital).

204. *See* BOGERT ET AL., *supra* note 1, § 468, at 567; 4A SCOTT & FRATCHER, *supra* note 1, § 399.2 , at 496. For cases, see President and Fellows of Harvard Coll. v. Jewett, 11 F.2d 119 (6th Cir. 1925); First Universalist Soc'y of Bath v. Swett, 90 A.2d 812 (Me. 1952); Searcy v. Lawrenceburg Nat'l Bank, 229 S.W.2d 312 (Ky. Ct. App. 1950); Indus. Nat'l Bank v. Drysdale, 125 A.2d 87 (R.I. 1956).

205. *See* Peters, *supra* note 3, at 260 (commenting that "as charitable gifts are favored, charity in a general sense is usually benefited, and often it is only a matter of which charity will reap the tangible benefits. In other words, heirs are disfavored whenever it is possible to say that a trust exists."); Alex M. Johnson Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying*

designating a charity as the first beneficiary of the assets held in trust, the donor manifested an indirect intent to bar unnamed heirs from sharing in the assets.[206] If the donor had wanted the unnamed heirs to receive a share of the estate, the donor would have explicitly named them, or their ancestors, in the original disposition of the estate. And if the donor included a residuary clause, the existence of such a clause suggests that the donor did not intend for unnamed heirs to receive as share of assets upon return. The inclusion of a residuary clause suggests that the donor preferred distributing assets to residuary takers rather than allowing the assets to be assigned to the donor's statutory heirs.[207] The underlying objection to returning the charitable assets to a donor's heirs is that it appears inequitable because it provides those heirs with an unexpected windfall.

Although a residuary clause indicates that a donor prefers to distribute charitable assets to residuary legatees–devisees vis-à-vis the donor's heirs, courts are split as to whether residuary takers are eligible to receive those assets.[208] Some courts assign the assets of a terminating charitable trust to the takers identified by the explicit terms of a residuary clause, or even their heirs, without expressing any concern about the outcome.[209] But other courts blatantly ignore the residuary clause and assign the returning charitable assets to the donor's heirs.[210] Such courts reason that the assets were removed from the estate at the time the trust became operative; therefore, they are not subject to distribution by a residuary clause.[211] Similar to the objection to returning assets to the donor's heirs, permitting residuary beneficiaries to obtain a share of assets that were removed from the estate provides them an unexpected windfall.

Any party that receives the charitable assets, however, upon a change

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Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation, 74 IOWA L. REV. 545, 575 (1989) (arguing that charitable "trust assets should never revert to the settlor's heirs").

206. Peters, *supra* note 3, at 267 (asserting that "if the courts can find a charitable hook upon which to hang its cy pres hat, the hook will be utilized, to the disappointment of heirs who, in most cases, were anything but objects of the testator's bounty").

207. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.4, at 529.

208. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003); *see* 4A SCOTT & FRATCHER, *supra* note 1, § 399.3, at 526 (pointing out the issue does not emerge unless the charitable trust fails in the future because the residuary takers obtain assets of trusts that fail to become operative, which means that such assets have not be distributed by the settlor).

209. *See, e.g.*, Nelson v. Kring, 592 P.2d 438 (Kan. 1979). For a collection of cases that address whether the donor's heirs or residuary beneficiaries obtain the charitable trust's assets upon termination, see W. W. Allen, *Devolution of Property to Testator's Heirs or Next of Kin, or to His Residuary Devisees or Legatees, Where Testamentary Charitable Trust which became Operative Later Fails*, 62 A.L.R.2d 763 (2008).

210. *See, e.g.*, Indus. Nat'l Bank v. Drysdale, 125 A.2d 87 (R.I. 1956).

211. *See, e.g.*, President and Fellows of Harvard Coll. v. Jewett, 11 F.2d 119 (6th Cir. 1925).

of circumstances or the termination of a charitable trust is the beneficiary of a windfall. The charitable beneficiary that receives assets via cy pres obtains a windfall because it was not originally intended to receive any benefit from the trust. The donor did not contemplate that the subsequent cy pres beneficiary would receive any benefit from the charitable trust because the subsequent cy pres beneficiary was not identified by the donor. Similarly, the donor's heirs or the residuary legatees/devisees receive an unexpected windfall upon reversion. Although the residuary takers stand in a better position to take than any unnamed heirs, a residuary clause disposes of assets that are undistributed by the donor.[212] But the donor, in fact, distributed the assets by creating a charitable trust to take title to the assets. As a result, the donor did not intend for residuary takers to share in the charitable trust's assets. In the end, an unexpected windfall is the unavoidable consequence of a lack of information about what the donor would have wanted if the donor would have anticipated that the administration of a charitable trust would be frustrated in the future.

A second objection to returning the assets to the donor's heirs or residuary beneficiaries lies in the cost of redistributing the assets to those parties. The transaction costs of funneling assets back to the donor's successors in interest after the termination of a charitable trust long after its creation may be significant.[213] The heirs that object to a court's exercise of cy pres in the hope that they will receive the charitable assets if the court rejects the cy pres petition may not be the only heirs that stand to take upon reversion. As a result, all eligible heirs must be identified and notified if the assets must be distributed upon termination of the charitable trust. While it might seem straightforward, the process is complicated by the multiplication of successors over time. Furthermore, the attorney general must be notified of the intent to terminate a charitable trust and either must consent to the termination or is a necessary party to a judicial action seeking to terminate a charitable trust.[214] The charitable assets must be valued and distributed to the takers along with any necessary paperwork that accompanies the transfer of title.[215] While some of these tasks are relatively inexpensive in isolation, the costs accrue as the redistribution process advances.

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212. *See* 4A SCOTT & FRATCHER, *supra* note 1, § 399.4, at 529.

213. *Id.* § 399.3, at 518 (opining that "it is frequently impossible and always expensive to ascertain the persons who would be entitled to the property.").

214. *See, e.g.*, 760 ILL. COMP. STAT. § 55/15.5 (2009) (consent of attorney general); IND. CODE § 30-4-3-24.4 (2009) (judicial termination); R.I. GEN. LAWS § 18-9-16 (2009) (consent of attorney general required for charitable trusts with assets of less than $200,000).

215. For example, a writing must be prepared in conjunction with the transfer of an interest in real property that satisfies the Statute of Frauds. Furthermore, the deed should be recorded.

Although returning assets to unnamed heirs or residuary beneficiaries can consume resources, the process of identifying and selecting a cy pres beneficiary can be a complicated and costly exercise as well. Heirs are fixed by statute and residuary beneficiaries are identified in a donative instrument, but subsequent cy pres beneficiaries are chosen by the court without the benefit of a statutory list of potential takers or written instructions from the donor. As a result, the decision regarding which charitable beneficiary should receive the charitable assets is not nearly as easy it may seem upon first blush. Some courts request that interested parties submit cy pres proposals to aid in the decisionmaking process.[216] But courts risk getting more than they asked for when so doing. In *duPont Estate*, for example, nine institutions vied for a share of the assets of a charitable trust subject to cy pres redistribution.[217] The nine claimants submitted "voluminous evidence in support of their claims to this fund and their plans to utilize it."[218] Furthermore, an amicus curiae not only submitted an "exhaustive" report that recommended distribution to one of the claimants, but also filed a supplementary report that answered the complaints of the "disappointed claimants."[219] Not satisfied with the amicus report, three of the claimants filed a further appeal to the court's cy pres ruling.[220] Given the transaction costs associated with making a cy pres decision, choosing between competing proposals can be as costly as redistributing the charitable assets to the donor's successors in interest.[221]

Another efficiency-draining possibility arises if real property is included among the charitable assets to be redistributed because of the risk of fractionation. In 1968, Garrett Hardin used the phrase "tragedy of the commons" to describe the process by which common ownership of a resource leads to its overuse and eventual depletion.[222] While common ownership can lead to a tragedy of the commons, excessive ownership creates an impediment to the efficient use of resources as

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216. *See, e.g.*, *In re* Estate of Rood, 200 N.W.2d 728, 732 (Mich. Ct. App. 1972); *In re* Abrams, 574 N.Y.S.2d 651 (N.Y. Sup. Ct. 1991).

217. Du Pont Estate, 37 Pa. D. & C.2d 456, 457 (Oprhan's Ct. 1965).

218. *Id.*

219. *Id.*

220. *Id.* at 458.

221. For other cases involving multiple cy pres proposals or requests for proposals from multiple parties, see Blumenthal v. State Street Bank & Trust, CV02008773S, 2006 Conn. Super. LEXIS 578 (Conn. Super. Ct. 2006) (four applicants vying for cy pres assets); Town of Brookline v. Barnes, 97 N.E.2d 651 (Mass. 1951) (two proposals); *In re* Estate of Crawshaw, 806 P.2d 1014 (Kan. Ct. App. 1991) (three proposals), *aff'd*, 819 P.2d 613 (Kan. 1991).

222. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

well, which is referred to as a "tragedy of the anticommons."[223] An anticommons develops when ownership becomes splintered into numerous shares—ownership is fractionated—and multiple owners of a resource possess the power to exclude.[224] Even though their ownership shares are small, ownership permits owners to engage in strategic behavior and the risk of holdouts is high, which leads to economic waste in the form of resource underutilization.[225] Although a more recent addition to the vocabulary of property law than "tragedy of the commons," the "tragedy of the anticommons" has attracted an increasing degree of scholarly attention.[226] The fundamental lesson from the tragedy of the anticommons reflects an old adage: too many cooks spoil the broth.

Within the context of cy pres, denying a petition for cy pres threatens to create a fractionation problem if real property is redistributed to heirs or residuary designees. In the 1966 case of *Evans v. Newton*, for example, the Supreme Court struck down a charitable gift of land for use as a park with the condition that it was to be used "for white people only" as a violation of the Fourteenth Amendment.[227] The Court's constitutional decision left open the question as to what was to be done with the property because the donor's instructions could not be followed, which was the exact question before the Supreme Court of Georgia two years later in *Evans v. Abney*.[228] Not only did the court rule that cy pres did not apply because of the donor's specific charitable intent, but it also held that the land reverted to the donor's heirs.[229] The number of heirs, however, had increased since the original gift in 1911.[230] In fact, the number of heirs had grown to the point that dividing the reverted property among them would create a large number of minute interests in the property.[231] Thus, the traditional rule providing for a reversion to the donor's successors upon a termination risks fractionation and the economic inefficiency associated with it.

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223. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

224. *Id.* at 624.

225. *Id.* at 676–78.

226. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 700 n.130 (2003) (referring to the anticommons problem in conjunction with obtaining permission to use copyrighted works); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

227. Evans v. Newton, 382 U.S. 296, 297–302 (1966).

228. 165 S.E.2d 160, 164 (Ga. 1968), *aff'd*, 396 U.S. 435 (1970).

229. *Id.* at 164–66.

230. Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L. J. 295, 305 (1988).

231. *Id.*

Indeed, the duration of many charitable trusts almost guarantees that a large number of successors will be eligible to take a share of real property held by charitable trusts upon return.[232]

The law's remedy to the threat of waste associated with fractionation upon reversion is a partition by sale. Common ownership of real property can lead to inefficiency because of the high transaction costs of dealing with the property.[233] A partition by sale places the subject property up for auction to the highest bidder and the proceeds of the sale are distributed to the owners according to their interests.[234] The highest bid reflects the value placed on the property; therefore, the property moves from a low value use to a higher value use, which is an efficient outcome. Of course, some fractional owners are forced to sell their interests.[235] But the value placed on the property by owners who receive their interests via cy pres does not, in all likelihood, exceed the fair market value of the property. The fractional cy pres owners probably do not attach much, if any, subjective value to the property because they have not owned the property for a long period of time. And although the public loses the charitable use of the real property, the public gains in the form of taxes generated from the private use of the property. The public, in effect, paid for the charitable use of the property with the lost taxes on the property because of its charitable use.[236] Upon partition, the charitable assets are funneled back into the private sector and the gain associated with the tax revenue could represent a net gain for the public.

Given the costs associated with judicial application of cy pres in favor of a subsequent beneficiary, redistributing the assets of charitable trust to a donor's successors in interest is at least as efficient as allocating the assets to a subsequent charitable beneficiary via cy pres.[237] Cy pres

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232. Real property is commonly held in charitable trusts. *See, e.g.*, Belfast v. Goodwill Farm, 103 A.2d 517 (Me. 1954) (charitable trust assets included home of testator); *In re* Williams' Estate, 46 A.2d 237 (Pa. 1946) (home given to charitable trust by testator); *In re* Estate of duPont, 663 A.2d. 470 (1994) (home in charitable trust to be use as monument); Kolb v. City of Storm Lake, 736 N.W.2d 546 (Iowa 2007) (farmland placed in charitable trust); Niemann v. Vaughn Cmty. Church, 113 P.3d 463 (Wash. 2005).

233. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 75 (7th ed. 2007).

234. JESSE DUKEMINIER ET AL., PROPERTY 291–300 (6th ed. 2006).

235. Thomas J. Miceli & C. F. Sirmans, *Partition of Real Estate; or, Breaking Up Is (Not) Hard to Do*, 29 J. LEGAL STUD. 783 (2000).

236. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 766 (7th ed. 2005) (stating that "[b]ecause taxpayers in effect subsidize charities by way of federal tax deductions.").

237. *See* Macey, *supra* note 231, at 306 (asserting that "the argument that the *cy pres* doctrine unambiguously serves the interests of economic efficiency by reconciling the goals of settlors with unanticipated future events seems doubtful when examined closely. An alternative rule which stipulates that the settlor's assets always revert back to his heirs whenever any significant aspect of the settlor's intentions are thwarted, unless the settlor provides for a contrary result, would serve the interests of

comprehends an undue windfall to whichever party obtains the assets of the charitable trust subject to the action and the costs of redistribution to a donor's heirs or residuary beneficiaries are not unambiguously greater than the costs of cy pres. Furthermore, partitioning real property formerly held by a charitable trust may prove to be an efficiency-promoting solution. Land uses change over time; therefore, the subsequent private use of the land may represent the highest and best use of the property and provide a greater benefit to the public compared to its prior use. Different cases, of course, will involve different costs, but disfavoring the donor's heirs solely because of the potential costs associated with redistribution to those heirs exaggerates the cost savings of cy pres.

B. The Drafting Impact of Presuming Specific Charitable Intent

While the traditional justifications for presumptions have little, if any, impact on an individual's decisionmaking unless that individual is involved in litigation,[238] presuming specific charitable intent can be a harbinger of change outside of the courtroom. Paradoxically, a presumption of specific general charitable intent would provide manifest evidence of what the UTC presumes—the existence of general charitable intent. If, as the UTC surmises, most donors would prefer to have charitable assets reallocated to another charitable beneficiary rather than revert to successors in interest, they will presumably make that intent clear in the donative instruments. After all, an increase in cy pres denials resulting from the presumption of specific charitable intent gives donors what the UTC alleges most donors do not want—a reversion. If donors do not possess the UTC's presumed general charitable intent, then they possess specific charitable intent and the proposed presumption protects that specific intent. To that end, the language donors employ will reflect the nature of the intent they possess. Thus, the presumption of specific charitable intent can serve as a stimulus for improved planning and drafting.

Incorporating language into donative instruments to indicate one's intent upon a change of circumstances could be as simple as an explicit statement indicating that a donor wishes to opt-in or opt-out of cy pres in the event that the donor's objective is thwarted in the future. The history of cy pres jurisprudence demonstrates that courts have not always been

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efficiency at least as well.").

238. *See* MCCORMICK, *supra* note 154, § 343, at 574; *see also* Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196–207 (1954) (listing eight different ways in which courts use presumptions).

faithful to gift-over language in charitable instruments, but a gift-over is not the equivalent of an express opt-in or opt-out clause in the donative instrument. Language creating a gift-over simply names a subsequent beneficiary, which gives the court ample leeway to evade the language by describing the gift-over as "secondary" or the initial charitable gift as reflecting the donor's "primary" intent.[239] On the other hand, a decision that is contrary to express opt-in or opt-out language on the face of the instrument would require interpretive gymnastics that would contravene that maxim that a court first looks to the language of the instrument to determine the intent of the donor.[240] Provided that courts honor the language drafted by the donor, straightforward opt-in and opt-out clauses reduce the error rate associated with the intent determination because they unambiguously indicate the donor's preferences under the circumstances. Errors cannot be eliminated entirely, but the probability of reaching an erroneous result can be reduced compared to the probable error rate under the UTC.

From an economic perspective, the presumption of specific charitable intent shifts the costs associated with deciding how to distribute charitable assets upon a change of circumstances that could be addressed by cy pres. Both pre- and post-UTC cy pres jurisprudence permits donors to transfer those costs to a court if unanticipated circumstances arise that bring cy pres into the picture. Externalizing the transaction costs at the time that the charitable trust is created has a snowball effect—the transaction costs associated with a future cy pres action accumulate over time as heirs and residuary takers multiply. Presuming specific charitable intent relocates the costs of decisionmaking to donors by prodding them to make a decision or suffer what are ostensibly disfavored consequences. Donors either draft substitute plans in the instruments creating their charitable trusts or assume the consequences and costs of having the charitable assets return to their heirs or residuary beneficiaries. In other words, the history of cy pres jurisprudence permits donors to externalize the costs of making the redistribution decision while the presumption of specific charitable intent incentivizes donors to internalize those costs by accounting for a disposition of charitable trust assets in the future.[241]

The presumption of specific charitable intent not only provides an

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239. *See, e.g., In re* Young Women's Christian Ass'n, 126 A. 610 (N.J. Ch. 1924).

240. This is not to say that such language makes it impossible for courts to stray from the express language of the instrument. The history of cy pres jurisprudence is proof that express language creates little-to-no hindrance for some courts.

241. For more on the terminology of law and economics, see Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

incentive to improve planning, but also increases the diversity of charities slated to receive charitable contributions. Because donors with general charitable intent should identify subsequent charitable institutions as beneficiaries to avoid the possibility of reversion, a greater number of charitable institutions will receive benefits from charitable trusts. While some of these subsequent charitable beneficiaries will undoubtedly be sizable entities without cy pres assets, others are likely to be smaller and chosen by the donor because of a personal connection. The acquisition of charitable assets via cy pres can help to sustain a charity that is underserved by the charitably minded. The subsequent charitable institutions identified by the donor may receive the assets in the future, but they nevertheless have a greater probability of receiving assets than in the absence of such identifying language.

The importance of maintaining and increasing the diversity of charitable giving extends beyond improving the viability of smaller charitable institutions. Commenting on the link between tax exemptions and charity, Justice Powell observed that tax exemption play a vital role in "encouraging diverse, indeed often sharply conflicting, activities and viewpoints."[242] The same link exists between presuming specific charitable intent and the diversity of charitable giving. Subsequent charitable beneficiaries, as well as the initial charitable beneficiary, are likely to reflect the views of the individual donor. Donors generally do not make contributions to support causes that they find reprehensible. Because donors are permitted to be as idiosyncratic as they desire—within the limits of the law—increasing the diversity of charitable giving sustains a broader array of individualized viewpoints about those causes deserving charitable support in society.[243] As a result, promoting the diversity of charitable donations by implementing a presumption of specific charitable intent permits individuals to control the destinies of their charitable gifts and wrests power away from courts; the cy pres balance shifts back toward equilibrium.

V. CONCLUSION

The change to cy pres doctrine that most closely approaches that comprehended by UTC Section 413 is the transition of cy pres from legal outcast to widespread acceptance during the late nineteenth to early twentieth centuries as charities became favorites of the law.[244] During

242. Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring).

243. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)).

244. *See supra* notes 70–76 and accompanying text.

that period, cy pres doctrine evolved to patch the hole in the public purse that would be created if public money had to be expended to meet an increasing need for charity in light of changing social and industrial conditions.[245] According to one study, however, probate and nonprobate mechanisms will be involved with the "largest intergenerational wealth transfer in American history," which is estimated to be between $40.6 trillion and $136.2 trillion dollars worth of estates from 1998 through 2052.[246] Charities alone stand to receive between $6 trillion and $24.8 trillion after accounting for estate fees and taxes.[247] Given the proliferation of nonprobate vehicles for wealth distribution after death,[248] some of this money will undoubtedly be earmarked for charitable trusts. Thus, the expanding scope of a court's power to regulate the disposition of charitable assets under UTC Section 413 fortuitously intersects a period that is likely to involve an increasing number of cy pres cases.

Rather than supplement the public support of charities that accompanied the shift in cy pres acceptance during the nineteenth century, the expansion of cy pres represented by UTC Section 413 is part of a more general trend of increasing paternalism in charity law generally. Courts and legislatures inject themselves into the functions of charitable entities, and charitable trusts more specifically, with increasing frequency.[249] Pennsylvania, for example, enacted a statute requiring a charity to consider the impact of "any action" upon any party affected by the action in response to the Hershey Trust debacle.[250] Language that requires a charitable entity to consider the effect of "any action" is an invitation to litigation because of the scope of the activities

245. *See* FISCH ET AL., *supra* note 71, at 24.

246. John Leland, *Breaking the Silence*, N.Y. TIMES, Mar. 18, 2008, at H1.

247. John J. Havens & Paul G. Schervish, *Why the $41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLANNING 11, 49 (2003) (the calculations utilize dollar values from 1998).

248. John H. Langbein, *The Nonprobate Revolution and the Future Law of Succession*, 97 HARV. L. REV. 1108 (1984).

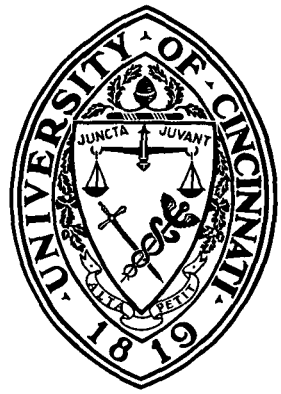
249. Evelyn Brody, *Whose Public? Parochialism and Paternalism in Charity Law Enforcement*, 79 IND. L.J. 937, 941–43 (2004) (referring to the increasing meddling of courts in the affairs of charitable entities. The paper details judicial involvement with the much litigated Hershey Trust. *Id.* at 985–99.). For additional examples of the trend, see Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2487 (2005) (suggesting that judges apply the operational test and the commerciality doctrine in a way that benefits their individual views of what constitutes a cause worthy of charitable support); Mark Sidel, *The Nonprofit Sector and the New State Activism*, 100 MICH. L. REV. 1312, 1329–30 (2005) (discussing the refusal of courts to recognize an expanded role for the Attorney General of New York in monitoring a trust).

250. Brody, *supra* note 249, at 996–97. The House bill is H.B. 2060, 185th Gen. Assem., Reg. Sess. (Pa. 2002).

that might come within its reach. An increase in litigation equals an increase in the opportunities for a court to exercise control over the charitable assets. Within the post-UTC realm of cy pres jurisprudence, the court not only has expanded power to decide how to distribute assets of charitable trusts, but litigants also have more avenues to relief. The presumption of specific charitable intent serves as a counterbalance to the increased judicial control of the redistribution of assets in failing charitable trusts represented by UTC Section 413.

Although it may be counterintuitive, sliding the cy pres scale toward the private individual and away from the public interest serves one of the underlying justifications for cy pres—increasing efficient use of scarce resources. Clear legal rules allow individuals to order their affairs and the resulting individual benefits equate to public benefits in the aggregate. One of the primary benefits to the public stemming from clear legal rules is avoiding litigation resulting from ambiguity in the law. Instead of perpetuating the ambiguity in pre- and post-UTC jurisprudence, the presumption of specific charitable intent creates an incentive to plan for the distribution of charitable trust assets in the future that has been absent in cy pres jurisprudence throughout its history. The lengthy history of cy pres is a testament to the consistent failure of the law to establish an incentive for donors to consider what effect the future will have on their charitable trusts. So long as courts give effect to the language employed by donors, the public will avoid costly cy pres litigation.[251] Given the amount of money likely to be placed in charitable trusts in the future, avoiding litigation that drains those assets bestows a vital benefit on both the public and courts.

251. Cy pres litigation can be very expensive. Litigation seeking to modify the Buck trust cost somewhere in the neighborhood of $4 million. *See* Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 646 (1988).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