Reforming Cy Pres Reform

Rob Atkinson

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Reforming Cy Pres Reform

by

ROB ATKINSON*

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* Associate Professor of Law, Florida State University College of Law. B.A. 1979, Washington and Lee University; J.D. 1982, Yale Law School. I would like to thank the New York Nonprofit Forum and the Association for Research on Nonprofit Organizations and Voluntary Action for opportunities to present and discuss earlier versions of this paper. The members of the New York Nonprofit Forum and my colleagues Barbara Banoff, Adam Hirsch, Mark Seidenfeld, and Don Weidner read drafts and offered many a useful insight, and the research assistance of Jacqueline Lebel, Brian Iten, and John Cole was invaluable. Bradford Gray, Director of the Yale Program on Non-Profit Organizations (PONPO), generously agreed to circulate the paper in PONPO’s Working Paper Series, and John Simon, PONPO’s guiding spirit, patiently read and commented on each of my numerous drafts.
The ancient doctrine of cy pres, by which courts use their equitable powers to modify the purposes of charitable trusts, has generated renewed scrutiny of late. This perennial favorite of scholarly dissection has recently attracted popular attention in two sensational cases: the oil heiress Beryl Buck’s bequest to the San Francisco Foundation and the New

1. The appendix to this paper is a supplementary introduction for those familiar with my earlier forays into the nonprofit field. Knowledge of my earlier work is not, however, a prerequisite for reading this Article.

2. Under the related doctrine of deviation, a court may alter the administrative or procedural—as opposed to substantive—provisions of a trust. As in other contexts, this distinction between substance and procedure is difficult to maintain. See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1710-13 (1976). Scholars have criticized the distinction on that ground, and on the additional ground that courts sometimes use the doctrine of deviation outside its technically proper realm of application as a means of effecting substantive changes in trusts without meeting the more rigorous requirements of the cy pres doctrine. See Joseph A. DiClerico, Jr., Cy Pres: A Proposal for Change, 47 B.U. L. Rev. 153, 154-55 (1967); Alex M. Johnson, Jr. & Ross D. Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation, 74 Iowa L. Rev. 545, 565-66 (1989). This debate need not concern us further, since the extreme limitation on dead hand control I recommend would make the distinction between cy pres and deviation obsolete.

3. In re Estate of Buck, No. 23259 (Cal. Super. Ct. Aug. 15, 1986). Ms. Buck left a gift valued at $7-10 million at the time of her death in 1975 to the San Francisco Foundation for use in Marin County, one of the nation’s most affluent counties. When the value of the gift increased to approximately $340 million, the Foundation sought to have the geographic scope of the gift expanded to include other counties in the Bay Area. The result, according to one of the Foundation’s advisors, was “[h]yperbole, calumnny, and apocryphal ... The petition [for modification] was characterized as a threat to the sanctity of wills and the health of philanthropy, and as an offense against capitalism, the American way of life, and God.” John G. Simon, American Philanthropy and the Buck Trust, 21 U.S.F. L. Rev. 641, 641 (1987). For further commentary on the Buck case, see Ronald H. Malone et al., The Buck Trust Trial—A Litigator’s Perspective, 21 U.S.F. L. Rev. 585 (1987) (discussing the results of the case and relevant pretrial and trial developments); Douglas J. Maloney, The Aftermath, 21 U.S.F. L. Rev. 681 (1987) (explaining the settlement agreement reached in Buck); Frederic D. Schrag, Comment, Cy Pres Inexpediency and the Buck Trust, 20 U.S.F. L. Rev. 577 (1986) (proposing a model cy pres statute); Roger G. Sisson, Comment, Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of Cy Pres, 74 Va. L. Rev. 635 (1988) (examining the outer limits of the cy pres doctrine).
York Yacht Club's America's Cup Race. These cases underscore the long-lamented flaws of existing cy pres doctrine and give renewed impetus to its scholarly re-examination. Yet the British Parliament, after an extensive study of the issue, recently concluded that the doctrine, though not entirely satisfactory, should not be further reformed. This Article analyzes why the push for reform has reached an impasse and suggests an alternative route.

Cy pres has long been attacked as insufficiently attuned to societal needs, as not flexible enough to permit the kind of judicially supervised updating of charities needed to ensure the socially optimal use of charita-

4. The America's Cup litigation involved a series of suits to determine what types of craft were appropriate entries under the Club's Deed of Gift, a trust instrument that sets out the rules of the race. For a detailed account of the course of the litigation, see Johnson & Taylor, supra note 2, at 555-60.

5. The British Home Secretary and Economic Secretary to the Treasury jointly commissioned Sir Philip Woodfield to conduct "an efficiency scrutiny of the supervision of charities." Charities: A Framework For The Future 3 (1989) [hereinafter White Paper]. Published in 1987, the Woodfield Report was the most comprehensive study since the Nathan Committee in 1952. It noted problems with the Charity Commission's application of cy pres under the Charities Act of 1960 and recommended that "[t]he Commission should consult widely on possible ways of relaxing the cy pres doctrine and advise the Home Secretary whether legislation would be desirable." Sir Philip Woodfield et al., Efficiency Scrutiny of the Supervision of Charities 32 (1987) [hereinafter Woodfield Report]. The Government accepted the Woodfield Report and directed a White Paper to implement its recommendations by setting out detailed legislative proposals and conducting the suggested studies. White Paper, supra, at 3.

On the issue of cy pres reform, the White Paper concluded:

Having looked at this question closely and consulted widely the Charity Commissioners take the view, and the Government accept, that legislation would not be appropriate. The problem lies not so much with the doctrine, which has an inbuilt flexibility, nor in the scope of the 1960 charities legislation [which placed the exercise of a somewhat liberalized cy pres power in the hands of the Charity Commission], as in the doctrine's application. Moreover, the flexibility of cy-pres is such that, as with the definition of charity, legislation would be positively undesirable, inhibiting its evolution and narrowing its scope.

Id. at 37. The White Paper thus put flexibility forward as cy pres's best face and fretted over scaring it with reform. The White Paper went on, however, to concede that this face is not without its flaws: "Such flexibility does of course bring with it the risk of confusion and inconsistencies in practice." Id. The proposed remedy for these flaws is superficial, if not cosmetic: "The Charity Commission will, therefore, be reviewing its precedent systems and the guidance which is given to staff." Id. In thus rejecting more radical reform, the White Paper made explicit its commitment to the basic structure of traditional cy pres, stating that the Commission's "aim will be to promote, across the board, a flexible and imaginative approach, consistent with due regard for the donor's wishes." Id. Interestingly, the Woodfield Report suggested a trustee-directed application of cy pres with respect to small charities; this anticipates in broad outline what I recommend for more general application in Part V, infra. Woodfield Report, supra, at 32, 34. The White Paper adopted this proposal, White Paper, supra, at 34-36, and it is now embodied in Sections 43 and 44 of the 1992 Charities Act. Charities Act, 1992, ch. 41 (Eng.).
ble assets. Recently, the doctrine has been attacked from a diametrically opposed position, as being insufficiently attuned to the donor's intent. This debate produces insolvable dilemmas that can only be avoided by expanding the analytic framework to include a third, mediating position: placing control of charitable assets in the hands of charities themselves, subject neither to legally enforceable donor control nor to state-imposed modification.

To understand the dilemmas the current debate produces, we must examine the compromise of which the cy pres doctrine itself is a corollary. At the root of the doctrine is an effort to balance the public benefits of charitable gifts against the donors' desires for perpetual control of the donated property. As a general rule, the state limits dead hand control through the rule against perpetuities, under which property owners can dictate the use and enjoyment of amassed societal wealth for roughly a century after death. The rule strikes a balance between a property owner's desire to exercise control from beyond the grave and a perceived societal interest in having the use of resources determined by the living.

In the case of gifts to charity, however, the state strikes a more generous bargain with donors. Donors get to extend their control indefinitely, with state assurance as well as permission. The state not only allows perpetual dead hand control, but also monitors and enforces it. The reason for this relative generosity in the case of charitable gifts is an implicit quid pro quo: In exchange for perpetual donor control, society gets wealth devoted to recognizably "public" purposes. Wealth that donors would otherwise pass to individuals for "private" purposes is in a sense devoted to the public domain. Thus the restraints the law allows to

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8. In the notoriously arcane language of the rule against perpetuities, an interest must vest or fail within a life in being at the time of the creation of the interest, plus twenty-one years. See William M. McGovern, Jr. et al., Wills, Trusts and Estates 504 (1988). I arrived at my approximation of the duration of dead hand control under the rule by assuming the creating instrument to be a will and the measuring life to be an infant alive at the testator's death. If the child lives a bit past the Biblical three score and ten, now an actuarily sound assumption, the additional twenty-one years of the rule puts the time of dead hand control right around the century mark.
endure are not wholly idiosyncratic; they must advance purposes that the
courts, as custodians of the commonweal, certify as publicly beneficial.9

The doctrine of cy pres is designed to maintain this balance between
dead hand control and public benefit, to ensure that the original bargain
between the donor and society is kept reasonably current. If, after the
gift has been made, a change in circumstances threatens either side of the
bargain—the execution of the donor's purpose or the resulting public
benefit—courts may modify the trust to restore the balance.10 Under
current cy pres doctrine, however, this power of modification is closely
circumscribed: The degree of frustration must be relatively great, the
donor must have at least implicitly assented to the change, and the de-
gree of change must be relatively small.11 This last condition gives the
doctrine its name. In modifying the trust's purpose, the court must fol-
low the donor's original purpose as closely as possible—*cy pres comme
possible*, in the Norman French of the early equity courts.12

Traditional cy pres reformers—those who seek to make the doctrine
more flexible—convincingly argue that these conditions are unduly con-
straining.13 The reformers have failed, however, to strike a satisfactory
balance between public benefit and dead hand control. On the one hand,
present reform leaves too much deference to donor control; on the other,
it places too much confidence in the courts as guarantors of the public
benefits that charitable trusts are supposed to provide. Proposals to in-
crease the flexibility of cy pres thus result in an unstable compromise
between absolute dead hand control and unfettered judicial discretion.
This is inevitable, as long as the options are limited to two: continued
dead hand control or state-administered modification. The way out of
this dilemma is to consider a third option: Eliminate legal enforcement
of dead hand control and leave the disposition of charitable assets to the


10. Cy pres can also be applied to new gifts, most commonly in the case of bequests.
Here, typically owing to the lapse of time between death and the execution of the will, the
donor would have been unaware when the gift became effective of circumstances that would
preclude the precise execution of his or her wishes within the confines of legally defined chari-
table purposes. See George Gleason Bogert & George Taylor Bogert, *The Law of
Trusts and Trustees* § 431, at 107 (rev. 2d ed. repl. vol. 1991); 4A Austin Wakeman
(quoting the Model Act Concerning the Administration of Charitable Trusts,
Devises, and Bequests (1944)).

11. Restatement (Second) of Trusts § 399 (1957).


13. Restatement (Second) of Trusts § 399.
discretion of their trustees, subject only to the constraint that they be used for charitable purposes.

Part II of this Article identifies the dilemmas cy pres reformers inevitably face in trying to work within the bipolar framework of traditional cy pres doctrine, in which any diminution of dead hand control brings a corresponding increase in state involvement. Part III suggests that the need for legal enforcement of dead hand control is not nearly as critical as cy pres reformers have assumed. Part IV argues that the notion of charitable efficiency, the standard by which reformers hope to expand the limits of cy pres while constraining judicial discretion, is inadequate. Building on these criticisms of cy pres reform, Part V sets forth my proposal to eliminate legal enforcement of dead hand control and outlines how this suggestion could both avoid the old dilemmas and strengthen the independence of the third, nonprofit sector, a traditional alternative to for-profit and governmental provision of goods and services. This suggestion is not, however, without problems of its own. The more pressing of these are addressed as they arise and the remainder are discussed in Part VI.

II. The Twin Problems of Reformed Cy Pres

To see the twin problems of reformed cy pres in proper perspective, we must step back and look at “pure” cy pres. This is a model that shows how cy pres would work if its sole function were to maintain as strictly as possible the compromise of which we have seen it to be the corollary: the implicit bargain between dead donors and society’s living members. Having examined the “pure” cy pres model, we can appreciate why reformers have asked more of the doctrine, and why within its

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14. I am using “trustees” here and elsewhere, except as noted, as shorthand for a charity’s internal governing body, whether that body is technically one or more trustees, as in the case of a charitable trust, or a board of directors, as in the case of a charitable corporation. Although the doctrine of cy pres evolved in the charitable trust context, it now generally applies to charitable corporations as well. At some risk of oversimplification, the corporation is treated as the trustee of assets held in the corporate name. See sources cited infra note 123 (discussing whether to treat gifts to charitable corporations as absolute or as gifts in trust). The fact that the internal governance of charities can be quite complex is a problem I treat separately in Part VI.A., infra.

15. The “pure” cy pres model is a heuristic device, rather than an accurate historical reconstruction or an accurate statement of existing law; the cy pres doctrine as currently applied in the United States has already moved too far in the direction of reform to serve as a useful starting point for analysis.
traditional framework they have had trouble making it meet their demands.\footnote{16}{In taking this last step, we will avoid the besetting sin of heuristic devices: their tendency to degenerate into straw men.}

A. The Pure Cy Pres Model

The “pure” cy pres analysis would be a fairly straightforward, three-step process, with a minimum of play in the joints. First, the court would determine whether the bargain between society and the donor had failed on one side or the other.\footnote{17}{Short of some such failure, the trust would go on as the donor intended.} On the donor’s side, the bargain might fail because the donor’s original intent cannot be carried out or, to use the standard phrase, becomes impossible, in a fairly literal sense. For example, polio is eliminated, as in the case of the March of Dimes,\footnote{18}{See generally BOGERT & BOGERT, supra note 10, § 438, at 168 n.15 (discussing the application of cy pres when a disease has been eliminated).} or the Thirteenth Amendment frees the slaves, as in the case of Francis Jackson’s famous abolitionist bequest.\footnote{19}{Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867).} On the public side, the bargain fails when the donor’s purpose ceases to be charitable, and thus no longer confers the public benefit that was the implicit condition of allowing it to continue in perpetuity. This would be the case, for example, with respect to charitable trusts involving invidious racial discrimination.\footnote{20}{See Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (declaring racially discriminatory policies inconsistent with charitable status under common law and federal income tax law); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that under 1964 Civil Rights Act, private, commercial, nonsectarian schools cannot deny admission to blacks); Pennsylvania v. Board of Directors, 353 U.S. 230, 231 (1957) (holding that administration of the racially restrictive Girard College trust by the city of Philadelphia violates the Fourteenth Amendment). For a discussion of the Girard College trust, see SCOTT & FRATCHER, supra note 10, § 399.4A; Elias Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 YALE L.J. 979 (1957). See also Miriam Galston, Public Policy Constraints on Charitable Organizations, 3 VA. TAX REV. 291 (1984) (discussing trust law and how public policy considerations can be taken into account); Stuart M. Nelkin, Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts, 56 GEO. L.J. 272 (1967) (exploring the various approaches to state action used by the courts in the area of racially discriminatory charitable trusts).}

In the face of such failure, the court would reach the second step of the analysis. For the assets in question to be applied to a new, court-determined charitable purpose under the cy pres doctrine, the donor’s charitable intent must be shown to have been general rather than specific. The donor, that is, must be shown to have preferred having the assets applied to a new, court-determined charitable purpose rather than paid over to specified private or charitable default takers or, in the absence of specificity on that score, into the hands of the donor’s heirs or residuary

\footnote{16}{In taking this last step, we will avoid the besetting sin of heuristic devices: their tendency to degenerate into straw men.}
\footnote{17}{Short of some such failure, the trust would go on as the donor intended.}
\footnote{18}{See generally BOGERT & BOGERT, supra note 10, § 438, at 168 n.15 (discussing the application of cy pres when a disease has been eliminated).}
\footnote{19}{Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867).}
\footnote{20}{See Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (declaring racially discriminatory policies inconsistent with charitable status under common law and federal income tax law); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that under 1964 Civil Rights Act, private, commercial, nonsectarian schools cannot deny admission to blacks); Pennsylvania v. Board of Directors, 353 U.S. 230, 231 (1957) (holding that administration of the racially restrictive Girard College trust by the city of Philadelphia violates the Fourteenth Amendment). For a discussion of the Girard College trust, see SCOTT & FRATCHER, supra note 10, § 399.4A; Elias Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 YALE L.J. 979 (1957). See also Miriam Galston, Public Policy Constraints on Charitable Organizations, 3 VA. TAX REV. 291 (1984) (discussing trust law and how public policy considerations can be taken into account); Stuart M. Nelkin, Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts, 56 GEO. L.J. 272 (1967) (exploring the various approaches to state action used by the courts in the area of racially discriminatory charitable trusts).}
legatees. Here again, there need not be much room for doubt; in the absence of pretty clear evidence of general charitable intent or an express provision for a gift over to another charitable purpose, the charitable trust would fail and its corpus would pass back into private hands.

If there were evidence of general charitable intent, the court would reach the third step of the process, from which the doctrine derives its name. The court at this stage is to modify the terms of the trust, departing from the original purpose only so much as is necessary to avoid its frustration or, to look at it the other way, staying as close to that purpose as possible.

B. The Reformers' Critique of the "Pure" Model

Were cy pres to be applied in the "pure" form, it would encounter few operational difficulties. To be sure, interpretive issues would arise at each level in each case, but the doctrine would give conscientious courts and anxious donors more than adequate guidance—as much guidance as most common-law rules.

The problems for reformers would lie elsewhere, not in the doctrine's procedural machinery, but rather in its substantive outcomes. In brief, it would be oriented too much toward donors' wishes and too little toward the public's benefit. What is, in the eyes of reformers, a patently wasteful charity by contemporary standards can continue unmodified unless the donor's contrary wish can be proved. And even if the donor's wishes can be shown to have been frustrated or to have fallen outside the contemporary scope of charity, there is the further hurdle of showing that the donor would have wanted to keep the donated assets in the charitable sphere rather than to have them pass to private default takers. Finally, even if the donor's original intent could be shown to have been frustrated and even if a general charitable intent could be established, pure cy pres would only permit the smallest possible modification of the donor's original purpose. Such a change, from the reformist perspective, might well be from bad to less bad, but could not by its own terms be from bad to best, from wasteful to socially optimal or, to use the reformists' preferred term, charitably efficient.21 This poses what I take to be the central problem for reformers: how to reformulate cy pres doctrine to promote charitable efficiency without upsetting the terms of the underlying bargain between donors and society.

21. See infra note 81 and accompanying text (discussing the concept of charitable efficiency).
C. The Reformers' Dilemmas

Cy pres as actually applied by the courts involves each of the three determinations required by the "pure" cy pres model: whether the donor's original purpose has been frustrated, whether the donor had a general charitable intent, and how far from the donor's original purpose to depart. At each of these steps, traditional cy pres reformers have three options: they can look for the subjective intent of the donor; they can invoke an objective standard of efficiency; or they can try a hybrid approach. Each of these options is problematic.

Reformers may, first, look to a donor's subjective intent, in the hope of finding an actual preference for charitable efficiency on the part of donors themselves. In the event that their purposes become inefficient, would they feel that their side of the original bargain had been frustrated? If so, would they want the funds to remain in a charitable use? And if so, how far from their original purposes would they want the court to go in the name of efficiency?

There are two problems with seeking subjective intent. First, the donor's subjective intent is almost by definition not known. Worse, however, is the second problem, the situation in which the donor's attitude toward efficiency is known to be indifference or even disdain. Rather than have their original charitable designs retailed to fit reformers' tastes for efficiency, donors might prefer to have their donated assets either mothballed in their outworn patterns or handed down to private, noncharitable recipients. "Never mind justice," such donors would insist, "much less some new-fangled notion of efficiency; let my will be done, though the skies fall."

Both these problems with seeking donors' subjective preferences for efficiency suggest the second approach open to reformers. That approach is to invoke efficiency without proof of donors' real preferences, in one of two ways: either as what "average" or "reasonable" donors would have wanted had they foreseen the situation, or as what society, with the same foresight, would have required as a condition of doing the deal in the first place. In the former, weaker form, the appeal to efficiency is

22. Restatement (Second) of Trusts § 399 (1957).
23. See Laird, supra note 6, at 977-87.
24. This was John Simon's suggestion for resolving the Buck trust problem. See Simon, supra note 3, at 647-49. See also Arthur Hobhouse, The Dead Hand 225-26 (London, Chatto & Windus 1880) (arguing that most donors would favor reform in light of unforeseeable events).
intent-inferring, rather than intent-honoring. A court faced with an obsolescent charity and the absence of clear donor directions infers that the donor would have wanted to promote efficiency from the fact that similarly situated donors usually do. In the latter, stronger form, the court makes no such effort to infer intent, imposing efficiency without apology.

In either version, however, imposing the criterion of efficiency without establishing that to be the donor's subjective intent produces a dilemma of its own. Once prospective donors know of the weak, intent-inferring version, they can anticipatorily opt out, either in favor of continued eccentricity (up to the outer limits of charity)\textsuperscript{26} or in favor of gifts over to private beneficiaries, neither of which is particularly appealing to cy pres reformers. But if the strong, intent-overriding version is applied, donors may simply choose private giving or consumption rather than charitable giving in the first place, an even worse prospect from the reformist perspective.

There is, finally, a somewhat disingenuous third approach, an unhappy synthesis of the first two, somewhere between seeking a subjective preference for efficiency and resorting to an objective surrogate for that preference. Under this approach, courts would impose the irrebuttable presumption of efficiency, or something close to it, all the while insisting that it is what donors really want, even in the face of pretty clear evidence to the contrary. Present law is often faulted with falling into this position, both by those concerned with infringement of donors' real wishes\textsuperscript{27} and by those eager for the law to espouse the presumption of efficiency more overtly and aggressively.\textsuperscript{28} The charge is not without foundation.\textsuperscript{29} The supposed advantage—not to say virtue—of this position would be to pay lip service to subjective donor intent out of one side of the judicial mouth while advancing social goals out of the other. But to the extent that this approach becomes known, or perhaps even suspected, it will incur a double cost. Like the strong presumption of a donor preference for efficiency, it risks turning away prospective donors. In addition, it undermines the judiciary's candor and credibility.

\textsuperscript{26} Donors, that is to say, might specify that they want their idiosyncratic wishes followed, no matter how inefficient or extravagant or outlandish their wishes come to appear over time, up to the point at which those wishes fall outside the evolving outer limits of the definition of charity.

\textsuperscript{27} Macey, \textit{supra} note 7, at 314.

\textsuperscript{28} Chester, \textit{supra} note 6, at 425; Comment, \textit{A Revaluation of Cy Pres}, 49 YALE L.J. 303, 322 (1939).

\textsuperscript{29} According to Scott, trusts that are charitable when established are rarely held to fail and revert to private hands in the United States, and reputedly never held to do so in England. \textit{Scott & Fratcher, supra} note 10, at 518-19.
D. Summary

In the face of these dilemmas, cy pres reformers generally recommend a middle ground: a modest extension of cy pres’ applicability to the more egregiously wasteful charities, but not a wholesale overhaul of all charities that fail a stringent test of efficiency. In so doing, however, they are both too pessimistic, in their fears of disregarding donors’ intent, and too optimistic, in their hope of giving viable content to the notion of charitable efficiency. On the one hand, they wrongly assume that diminishing legal protection of dead hand control will bring shame or disaster to the cause of charity. On the other, they wrongly assume that the concept of charitable efficiency will make a modest degree of reform feasible. Part III examines the overly pessimistic assumption; Part IV, the overly optimistic.

III. The Reformers’ Overly Pessimistic Assumption—The Dangers of Diminished Legal Protection for Donor Intent

The suggestion that donor intent be denied legal enforcement raises three distinct but related objections. The first is that disregarding donors’ intent is inherently wrong, either because it deprives donors of property rights or, more generally, because it involves the breaking of commitments, irrespective of the consequences.

The second and third objections concern the consequences of breaking commitments. The second is that disregarding donor intent will have an adverse effect on charitable giving; once donors know their intentions can be disregarded without legal penalty, they will be less inclined to give. The third objection is concerned with the adverse consequences for overall social productivity. The fear is that potential donors, realizing they may no longer use their wealth to create charitable gifts subject to their perpetual control, will be discouraged from earning the money in the first place. As a result, society will be deprived to that extent of their labor and its fruits. In the terms of economic analysis, prospective donors, faced with this diminution in the subjective value of what they re-

30. See, e.g., Simes, supra note 6, at 139; John S. Bradway, Tendencies in the Application of the Cy-Pres Doctrine, 5 Temp. L.Q. 489, 514-15, 528-29 (1931); Chester, supra note 6, at 424; Fisch, Changing Concepts, supra note 6, at 393; Laird, supra note 6, at 985-87; Sisson, supra note 3, at 651-53.

31. See, e.g., Johnson & Taylor, supra note 2, at 567-68.

32. See, e.g., Simon, supra note 3, at 662-63 (arguing against this objection as applied to a moderate liberalization of cy pres).
ceive for their labor, will be inclined at the margin to consume more of
their labor as leisure and sell less of it to others in the market.33

A. Bringing the Objections into Focus

All three of these objections get much of their purchase from two
related misunderstandings. The first is the confusion of the legally unen-
forceable with the legally prohibited. To say that a restriction on the use
of charitable funds is legally unenforceable is not to say that the law
forbids honoring the restriction. Consider, for example, the status of ra-
cially restrictive covenants in real estate deeds. In the wake of Shelley v.
Kraemer,34 such covenants were no longer enforceable in court. But that
did not mean, as a matter of either logic or law, that they were unen-
forceable privately, by moral suasion or neighborhood pressure.35 They
eventually did become illegal as well as legally unenforceable, but only by
special legislative action.36

The other misunderstanding is the confusion of moral with legal ob-
ligation. To say that dead hand restrictions on charitable gifts should be
legally unenforceable is not to say that these restrictions should not be
heeded by the recipients of the gifts on moral grounds. Most of us feel
compelled, morally or socially or otherwise, to keep a wide range of com-
mitments that are not legally binding upon us. We send our parents
birthday cards; we give to the church or synagogue of our choice (and
sometimes even attend its services); we respond to our alma maters’ calls
to alms.

33. This parable of the lost talents comes from the gospel of the law and economics cru-
POSNER, ECONOMIC ANALYSIS]. See also Macey, supra note 7, at 297-99 (noting that regula-
tion of a settlor’s disposal of wealth will decrease the incentive to accumulate wealth). Though
I use “labor” in the text, since it is the most intuitively clear example, a parallel substitution
effect could occur with respect to capital: Consumption would tend to displace savings and
investment. Posner, accordingly, uses the more general term “accumulate wealth,” which cov-
ers both selling one’s labor and investing one’s capital.

34. 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants
violates the Equal Protection Clause of the Fourteenth Amendment).

35. See LORRAINE HANSBERRY, A RAISIN IN THE SUN (1958), for a poignant depiction
of both the social pressure and the moral force that backed such restrictions in the immediate
aftermath of Shelley.

36. This occurred under the Federal Fair Housing Act of 1968, Pub. L. No. 90-284, 82
1991). See also Steven R. Swanson, Discriminatory Charitable Trusts: Time for a Legislative
Solution, 48 U. PITK. L. REV. 153 (1986) (proposing a model antidiscrimination statute that
expresses the legislature’s opinion on the proper equilibrium between the grantor’s and soci-
ety’s wishes and authorizes courts to delete sexually or racially discriminatory provisions from
charitable trusts).
B. Answering the Objections

With these two misunderstandings removed, we can now turn to the objections themselves. The third objection—the danger to overall social productivity—is the least compelling, and can be dispensed with rather quickly. Even if donors were unable to make gifts to charity subject to perpetual, legally enforceable restrictions, the range of their options for disposing of their wealth during life or at death would not be significantly diminished. They could still use their wealth in ways that seem in fact to be more popular than making restricted charitable gifts: personal consumption, private gifts, and unrestricted charitable gifts.37 Given these remaining (and apparently more popular) options, it is unlikely that wealth accumulators would be much deterred in amassing their fortunes.38

What, then, of the objection that disregarding donor intent is inherently wrong?39 This objection, as suggested above, has two forms: One concentrates on property rights; the other focuses, more broadly, on honoring commitments. The suggestion that disregarding donors' intent is wrong because it interferes with their property rights in some absolute, natural law sense must, for present purposes, be put in its place rather


38. Two other points about the problem of deterring wealth accumulation should be noted. First, dead hand control creates costs that may offset its beneficial stimulation of productivity, though to an extent disputed among economic analysts themselves. Compare Posner, ECONOMIC ANALYSIS, supra note 33, at 508-12 (arguing that containing these costs, particularly those associated with locking resources into undesirable uses, provides economic justification for the traditional cy pres doctrine) with Macey, supra note 7, at 303-06 (arguing that without cy pres intervention donors can deal at least as efficiently with these costs as the courts).

The second point is that even if interfering with dead hand control is at odds with the goal of wealth maximization, that is hardly the end of the story. Wealth maximization is neither the only social value (if it is an intelligible value at all, see Ronald M. Dworkin, Is Wealth a Value?, 9 J. LEGAL STUD. 191 (1980)), nor the social value most commonly associated with charities. As I will discuss more fully, charities have traditionally been concerned at least as much with wealth distribution as wealth accumulation. See infra text accompanying notes 89-93.

39. Arthur Hobhouse, an early critic of dead hand control, nicely captured both the substance and the spirit of this objection: And what between hazy notions about a natural right of posthumous gift, and hazy notions about the motives for making such gifts, aided by the rigidity of legal maxims and a certain magical effect of the word 'Charity,' it was very generally concluded, or felt, that we have no right to ask questions whether compliance with a Founder's directions is useless or injurious to society, but that as long as those directions can possibly be obeyed, they shall be. Hobhouse, supra note 24, at 220.
than rebutted, for it proves too much. Society, through the legal system, restricts dead hand control dramatically in noncharitable transfers through the rule against perpetuities and allied doctrines. Unless we are to revisit long-standing and deeply entrenched limits on dead hand control across the whole field of property law, we must, for present purposes, take the general legitimacy of restricting dead hand control as given.40

The broader wrongfulness argument, which focuses on the general obligation to honor commitments, loses much of its force as soon as we distinguish moral from legal obligation. Not only do we feel obliged on nonlegal grounds to honor legally unenforceable commitments; through a variety of nonlegal mechanisms, obligations of this kind are quite frequently enforced, both in the context of charitable giving and in other contexts.

The interactions between charities and their constituents—members, donors, and others—often involve recourse to informal enforcement techniques. Charitable organizations frequently use extralegal pressures to encourage their members to make contributions—pressures that may be more or less formalized (and more or less subtle).41 These enforcement mechanisms may well be more effective than recourse to the legal system, even when that recourse is available.42 Hence, in a neighboring precinct within the nonprofit sector, social clubs post the names of delinquent members on the dining room door. And in the heartland of char-

40. For a discussion of the natural law arguments in favor of free testation and legally protected dead hand control, see Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 IND. L.J. 1, 6-7, 15-16 (1992). For a brief survey of the general arguments against natural law normative theories, see Rob Atkinson, Beyond the New Role Morality For Lawyers, 51 MD. L. REV. 853, 872-89 (1992) [hereinafter Atkinson, New Role Morality] (particularly Part II, “A Metaethical Interlude”). For my response to the less sweeping argument that abolition of dead hand control would violate the constitutional restrictions on taking private property or impairing the obligations of contracts, see infra Part VI.E.

41. See BARRY P. KEATING & MARYANN O. KEATING, NOT-FOR-PROFIT 71-75 (1980) (emphasizing that it is difficult to get members to “pay-up voluntarily,” that individuals want to receive the benefits of the nonprofit (or “pressure group”) without paying dues, and that small organizations often use social sanctions quite effectively to “coerce” their members into supporting group goals). See generally Geraldine Fennell, Persuasion: Marketing as a Behavioral Science in Business and Non-Business Contexts, in ADVANCES IN NONPROFIT MARKETING 95-160 (Russel W. Belk ed., 1985) (describing marketing persuasion; distinguishing it from coercion, brainwashing, and therapy; and reviewing its potential as a method of increasing donor contributions); Henry C. Suhrke, A Preview of “Pledges to Non-Profit Organizations: Are They Enforceable and Must They Be Enforced?”, THE PHILANTHROPY MONTHLY, Dec. 1991, at 44 (previewing a forthcoming study of problems with the legal enforceability of pledges to nonprofit organizations).

42. For the proposition that informal enforcement mechanisms persist even when state enforcement is available, see David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 373, 376-78 (1990), and Anthony T. Kronman, Contract Law and the State of Nature, 1 J.L. ECON. & ORGAN. 5, 24-25 (1985).
ity, educational institutions have created elaborate systems of moral obligation loans. Students receive financial aid in return for commitments—explicitly designed not to be legally enforceable—to make offsetting "contributions" after graduation.43

While charities use such informal means to control their constituents, the converse is also true: Donors themselves have long used informal means to constrain charities. Indeed, extralegal pressure by donors is the historic foundation of the charitable trust, which donors developed to compensate for the nonenforceability of use restrictions in the early English law courts. Donors had to rely on social (and eventually ecclesiastical) pressures on the titular owners of the donated property, the predecessors of modern trustees, for enforcement of their charitable wishes.44

The same absence of legal enforceability was initially true of private as well as charitable trusts,45 and extralegal enforcement mechanisms remain important well beyond the bounds of the nonprofit sector. Ellickson, for example, has noted the role that informal notions of neighborliness play in land use control,46 and Charny and others have explored the continued importance of nonlegal sanctions in the context of commercial transactions.47 These are part of a long-standing tradition of extrajudicial dispute resolution in the United States.48 The contemporary alternative dispute resolution movement can be seen as an effort,

44. SCOTT & FRATCHER, supra note 10, § 348.2, at 27-28. The absence of legal enforceability was in some respects advantageous to the earliest known charitable beneficiaries in England, the Franciscan friars, because it lent credibility to the claim that their collective vow of poverty remained inviolate. Id. See also REINHOLD NIEBUHR, MORAL MAN AND IM- MORAL SOCIETY 6 (1932) (noting that churches have traditionally used excommunication and the interdict as means of coercing their members).
46. In his early treatment, Ellickson was not very sanguine about the use of informal mechanisms in large, mobile, and generally unneighborly countries like the United States. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 683-86 (1973). Subsequent empirical studies led him to acknowledge that informal enforcement plays a much larger role. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Robert C. Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 STAN. L. REV. 623, 628, 685 (1986).
47. See, e.g., Charny, supra note 42, at 425-26.
48. Auerbach writes of the early colonists' reliance on extralegal remedies to settle conflicts or community disputes, and their reluctance to view law as anything but an "alien value
often supported by the state and even the courts, to move a wide range of disputes outside formal judicial fora, sometimes out of the purview of state resolution entirely.\textsuperscript{49} Enforcement of agreements must frequently rely on nonstate mechanisms, for reasons that range from the absence of adequate suprastate institutions in international law to the difficulties criminals and criminal organizations such as the Mafia have invoking state sanctions to guarantee honor among thieves.\textsuperscript{50} Indeed, at the most general level of analysis, it can be objected that focusing on the state as the sole source of legal obligation and enforcement—the legacy of legal positivism—is a fundamental jurisprudential mistake. Theories opposing positivism insist that, properly understood, the legal system itself includes the kinds of nonstate enforcement mechanisms I have labelled “extralegal” to indicate that they do not directly invoke the authority or power of the state.\textsuperscript{51}

system, one antithetical to Christianity itself.” Jerold S. Auerbach, Justice Without Law? 22 (1983). He argues:

In colonial society non-legal dispute settlement expressed a strong communitarian impulse that was vastly different from anything most contemporary Americans would find familiar, or comfortable. . . . The tighter the communal bonds, the less need there was for lawyers or courts. Colonists who rejected law made a self-conscious choice. . . . [T]hey preferred to live within a communal framework that rendered formal legal institutions superfluous or even dangerous. For them, law was a necessary evil or a last resort, not a preferred choice.

Id. at 19-20. To invoke this tradition is not, of course, to invite its wholesale return. As Auerbach documents, a concomitant cost of pervasive reliance on informal, communitarian dispute resolution was the loss of privacy and autonomy, and the risk of “coerced conformity.” Id. at 45. To return to informal controls in the very narrow context of cy pres reform is hardly to incur such broad societal costs.

49. See generally Stephen B. Goldberg et al., Dispute Resolution (1985) (providing a general overview of alternative dispute resolution); Sally Engle Merry, Disputing Without Culture, 100 Harv. L. Rev. 2057 (1987) (reviewing Goldberg, supra). For an analysis of the historical development of the alternative dispute resolution movement over the last twenty-five years, see Auerbach, supra note 48, at 115-37; Frank E.A. Sander, Alternative Methods of Dispute Resolution: An Overview, 37 Fla. L. Rev. 1 (1985). For a criticism of the ADR movement and a reply, compare Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) (arguing that settlements do not reflect the social values found in substantive law) with Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1985) (arguing that settlement calls on substantive community values).

50. See Kronman, supra note 42, at 5-6, 9 (summarizing literature on methods of informally enforcing agreements and the contexts in which these methods are employed). According to Kronman, the common theme of this diverse literature is “the opportunities that individuals exploit, and the arrangements they invent, to enhance the security of their agreements where no legal remedies for breach exist (or where those that do are plainly inadequate).” Id. at 6.

51. This is the view, for example, of sociological jurisprudence. See Eugen Ehrlich, Fundamental Principles of the Sociology of Law 61-82 (1936). It also finds expression in the works of the Legal Realists, see, e.g., Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence
Charities and their apologists explicitly hold themselves to a higher standard of conduct than the legally enforceable. Such claims cannot be readily dismissed as window-dressing, at least in the context of honoring donor restrictions. Here, several related factors suggest that a system of nonstate-enforced compliance would serve donors to charity. For one thing, the trustees of a particular charity share one fear with cy pres reformers: a policy of departing too far from donors' wishes risks alienating future donors. This is the message, for example, that parishioners send their clergy through collection plate boycotts. The prospect that trustees would be thus chastened in the use of legal power to depart from donor wishes should diminish the fear of cy pres reformers about giving trustees that power. Indeed, the wilier charitable trustees are, the more appropriate guardians they may be for the henhouse of charitable donations, whose inhabitants produce golden eggs. And of course, trustees would not be left entirely to their own devices. Their discretion would be corralled by the outer limits of charity and nonprofit status, and the government would still be around to foreclose cruder forms of vulpine behavior through the nondistribution constraint.


54. Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 YALE L.J. 835, 838 (1980) [hereinafter Hansmann, Nonprofit Enterprise] (defining the nondistribution constraint as the prohibition against distributing a nonprofit's net earnings, if any, to individuals exercising control over it, such as members, officers, or trustees).
In addition to protecting their organization's access to future donations, trustees have other reasons for not exercising too cavalierly a legal power to depart from donor-imposed restrictions. For one thing, an organization's reputation for fair play and even-handedness may be an important element of its appeal to those who are not donors. Thus, for example, in interpreting the terms of their Deed of Gift that deal with qualification of challengers and conditions of competition, the sponsors of the America's Cup race may have sufficient incentive to preserve a sense of fair and open competition that judicial oversight is unnecessary. To shift sports, who wants to play ball with those who cheat on the line calls?

Trustees, moreover, have to consider not only their organizations' reputations, but also their own. As Jonathan Macey points out, "[i]ndividuals develop reputational capital not only as experts in particular specialties (such as economists and lawyers), but also for general personal qualities such as honesty and scrupulousness." This, in turn, creates strong, though extralegal, constraints on the behavior of charitable trustees:

[W]here a trust specifies that it is to be used for some general purpose such as the funding of scientific research or the elimination of poverty, there is in place a community of scientists and social workers with very clearly defined ideas and expectations regarding the appropriate bounds of proper conduct. Thus . . . there is an (admittedly loose) set of standards for judging the performance of the trustees of such trusts.

This set of standards, which might be called community standards, is bolstered by the fact that trustees who stray markedly from adherence to such standards are likely to face precipitous drops in the value of their own reputations within the relevant communities. This fear of loss of reputational capital is particularly acute where, as generally occurs, the trustees are drawn from the communities directly affected by the trust. Thus by choosing trustees whose personal reputation is at stake, [donors] can obtain some assurance that the trusts they create for the provision of public goods will be administered faithfully.

The effectiveness of this inclination to preserve reputational capital is nicely illustrated by an aspect of recent cy pres litigation in the Pennsylvania state courts involving the Barnes Foundation. The founda-

55. Cf. Charny, supra note 42, at 388 (stating that the market may effectively sanction employers who treat employees unfairly but within the limits of the law).
56. See Johnson & Taylor, supra note 2, at 563-65.
57. Macey, supra note 7, at 320.
58. Id.
59. The following account is based on Marie C. Malaro, Deaccessioning in Hard Times, in AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 25, 37 (1992);
tion, created in 1922 by the patent medicine manufacturer and art aficionado Albert C. Barnes, owns an art collection particularly notable for its modern French paintings. In 1991, faced with what it saw as otherwise insuperable maintenance problems, the foundation's management filed a cy pres petition seeking, among other things, permission to sell part of the collection and to use the proceeds for upgrading the foundation's facilities. Outcry in the museum community was swift and vociferous, based on the generally accepted principle of museum management that the proceeds of sales of artworks in collections should only be used to acquire additional or superior pieces. This principle, like many principles of museum management embodied in codifications of the museum community, is stricter than the legally enforceable standards applicable to museum directors as fiduciaries. Yet, faced with their peers' extralegal pressure to comply, the Barnes Foundation trustees responded as Macey's theory of reputational capital would suggest. Within a matter of months, they withdrew the request for permission to sell part of the collection.

Placing the reputation of the organization or its trustees at risk is a special case of what Anthony Kronman calls "hands tying." In hands tying, the parties to a nonsimultaneous transaction "make a promise [to perform] more credible by putting it out of the promisor's power to breach without incurring costs he could otherwise have avoided." In accepting a charitable contribution with restrictions on its use, the donee organization and its trustees are, in Kronman's words, "giv[ing their] reputation in the community as security for [their] promise to per-


60. See Malaro, supra note 59, at 27-28.

61. The court ultimately granted the foundation's request to deviate from the trust's terms to permit a one-time tour of some of the Barnes Foundation's French paintings to the National Gallery of Art in Washington, D.C., the Musee d'Orsay in Paris, the Museum of Western Art in Tokyo, and the Philadelphia Museum of Art, with the proceeds to be used for repairs and renovation. In re Barnes Foundation, No. 58,788, slip op. at 17-18 (Pa. Ct. C.P., Orphans' Ct. Div. July 21, 1992). For the elusive distinction between the doctrine of deviation from the administrative provisions of a trust, which a court purported to apply in the Barnes Foundation case, and the cy pres doctrine, see supra note 2.


63. Id. at 18.
In the context of charitable gifts the promise is to honor express, though legally unenforceable, donor directions. The cost of breach to the trustee is the loss of the trustee’s reputation for professional integrity or the loss of the organization’s ability to attract future contributors. In both cases, breach tends to preclude “opportunities for other favorable exchanges in the future.”

It might be objected here that, although individual charities and their trustees have an incentive to protect their individual reputations, the example of a few unscrupulous violators of donor intent might nevertheless harm the public perception of the charitable sector as a whole. No matter how much individual charities polish their reputations in this regard, a few bad apples will spoil the barrel. Thus, the argument would run, legal enforcement of donors’ wishes needs to be preserved. In evaluating this objection, much depends on what economists might call the elasticity of supply of charitable giving. If donors are strongly inclined to charitable giving, they might not diminish their gifts when faced with the example of unscrupulous charities. Instead they might take steps to ensure that the apples of their charitable eyes do not go bad, using the extralegal enforcement pressures suggested above.

If moral force and the other extralegal enforcement mechanisms previously described would in fact ensure that donors’ wishes are heeded, then has my argument proved too much? If donors’ wishes will invariably be obeyed without legal enforcement, removal of legal recourse would not only do no harm; it would also do no good. Removal, in that case, would fail to inject any additional flexibility.

The answer to that fear is twofold. First, we recognize that, as a matter of ordinary morality, commitments may sometimes properly be

64. Id. at 18-19.
65. Id. at 18.
66. Hansmann makes a similar point in discussing the possibility that removal of the federal tax exemption of charitable organizations would result in increased gifts made in an effort to offset the revenues charities would lose to taxes. Henry Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 YALE L.J. 54, 65-66 (1981) [hereinafter Hansmann, Exempting Nonprofit Organizations].
67. See HOBHOUSE, supra note 24, at 238 (arguing that trustees’ inertia makes them an unlikely source of reform for charitable trusts); POSNER, supra note 33, at 511 (arguing that trustees of perpetual charitable gifts, unlike outright owners, lack the economic incentives to manage assets efficiently).
68. It is important to be clear here on precisely what claims I am making for ordinary morality. I do not mean to suggest that such precepts of ordinary morality as honoring commitments and keeping promises have any foundation other than the common assent of those who acknowledge them, or that such precepts have any binding force beyond the class of people who acknowledge them. I have no answer to anyone who rejects those precepts on the ground that they are based only on social convention, and are thus not binding on those who
broken. Second, informal enforcement of commitments, relying as it often does on moral force, is likely to be weakest with respect to precisely those commitments that have lost their moral force.

Several circumstances in which commitments are generally thought to be weak as a matter of ordinary morality are relevant in this context. For one thing, actively sought commitments are more compelling morally than those only implicitly assumed. Thus, we would think more harshly of an organization that breached a condition for which the donor actively bargained—"I will leave you the bulk of my estate, but only if you use it to build a gym"—than an organization that learned of the gift and the condition only after the testator's death. Even if accepting the latter gift is seen as an implicit acceptance of its terms, the commitment is intuitively weaker. The obligation to honor the commitment seems even less firm if there is evidence that the donor was mistaken in his or her assessment of the worthiness of the designated purpose.69

Dishonoring donor directions, moreover, is likely to be less morally troubling in the case of the dead than the living. For one thing, the living can be talked to, reasoned with, confronted with new facts, and thus brought around to changing their minds. For another, the dead may not be as constrained as the living in the social utility of their property dispositions. While the owner of property is alive, the opportunity cost of foregone personal consumption operates as a significant deterrent to truly pointless eccentricity in charitable giving and other dispositions of property. The dead are under no such constraints, and thus their more eccentric requests are less deserving of respect.70 It is hard, for example, to fault Kafka's friend and executor for disobeying Kafka's testamentary instructions to destroy nearly all of his manuscripts.71 This intuition is embodied in the law itself. The owner of an art collection may legally choose to disregard such conventions. Indeed, I argue at some length elsewhere that efforts to place ordinary morality or any moral system on a firmer foundation than the assent of its adherents are deeply misguided. Atkinson, New Role Morality, supra note 40, at 977-79. The following moral analyses (or casuistries, in the narrow, nonpejorative sense), then, are directed to the community of those who, even if only implicitly, adopt conventional views about the sanctity of commitments.

69. See, e.g., Wilber v. Owens, 65 A.2d 843, 847-48 (N.J. 1949) (applying the doctrine of cy pres to modify a trust for the publication of the testator's "Random Scientific Notes" (in which the court found no scientific merit) to allow Princeton University to use the bequest for scientific and philosophical research).

70. In the words of Hobhouse: "Nor need the gift involve the slightest sacrifice on the part of the giver: for all who give by will give simply what they can no longer keep; they give out of the pockets of their successors, and not out of their own." Hobhouse, supra note 24, at 221.

destroy it during life, but a personal representative is not legally bound to execute a testamentary direction to the same effect.\textsuperscript{72}

The moral force of commitments may also diminish over time. This is attributable, at least in part, to our shared sense that the nearer a wish is to fulfillment, the dearer it becomes.\textsuperscript{73} This insight underlies the economists' practice of discounting to present value,\textsuperscript{74} and something of this principle probably reinforces the rule against perpetuities. Beyond a point, the value to a donor (charitable or otherwise) of controlling the future probably diminishes to the verge of vanishing. Therefore, suggesting that the wishes of long-dead donors carry declining moral force, particularly since those wishes are likely to be growing more onerous (or at best less beneficial) to the living, should not strain our ordinary moral intuitions too much.\textsuperscript{75} Indeed, at times we will come to see them as in-

\textsuperscript{72} See, e.g., Board of Comm'ts v. Scott (\textit{In re Scott's Will}), 93 N.W. 109, 109 (Minn. 1903); McGovern et al., \textit{supra} note 8, at 154. The law's acceptance of this intuition has the imprimatur of economic analysis, or at least the imprimatur of one of law's leading economic analysts. See Posner, \textit{Economic Analysis, supra} note 33, at 512 (indicating approval of the \textit{Scott} result). But cf. Ellen R. Forges, Note, \textit{Protecting the Public Interest in Art}, 91 \textit{Yale L.J.} 121, 143 (1981) (urging legal protection of art in the hands of the living).

\textsuperscript{73} To be sure, some people have a peculiar fascination with, and derive enjoyment from the prospect of, influencing the very distant future. This is evident, for example, in the case of time capsules. Their purpose is frustrated if they are opened before the appointed day, a day valued for its seductively distant remove from the present. Something similar, perhaps, is true of the directions "Do not open until Christmas." But these examples are, I would suggest, the exceptions that prove the nearer-and-dearer rule, a conclusion supported by comparing the popularity of holiday gifts to that of time capsules (which have longer fuses). For a theoretical account of this phenomenon, see George Loewenstein, \textit{Anticipation and the Valuation of Delayed Consumption}, 97 \textit{Econ. J.} 666 (1987).

An analogy that is perhaps more apt, and less readily dismissed, is the deep yearning of some artists, particularly writers, for distant fame. But with the exception of a very few—Stendhal comes to mind—what most want is probably not deferred but continued fame; fame that begins now and endures, not fame that springs up later and is on that very account more dear. And in the case of Stendhal, at least, the desire of distant fame may have been a value borne of necessity; at the time he wrote of its appeal, it must have seemed the only fame he was likely to enjoy. See Stendhal (Henri Beyle), \textit{The Life of Henry Brulard} (Jean Stewart and B.C.J.G. Knight trans., The Noonday Press 1958) (1836) (autobiography in which Stendhal repeatedly addressed the reader of the late nineteenth and early twentieth centuries and accurately predicted that his works would be read and understood not by his contemporaries, but by a future audience). See also Jean Dutourd, \textit{The Man of Sensibility} 75 (Robin Chancellor trans., 1961); Marcel Gutwirth, \textit{Stendhal} 112 (1971); Joanna Richardson, \textit{Stendhal} 292 (1974); Isabelle Naginski, \textit{Stendhal—A Writer for Today, in The Stendhal Bicentennial Papers} 1 (Avriel H. Goldberger ed., 1987).

\textsuperscript{74} See generally Paul A. Samuelson & William D. Nordhaus, \textit{Economics} 271-72 (14th ed. 1992) (explaining the process of converting future income into an equivalent present value).

\textsuperscript{75} Hirsch and Wang observed:

[Use restrictions (of all sorts) are apt to grow marginally more costly with the passage of time, as the state of the world diverges from the testator's expectations. Si-
herently bad. The racially restrictive covenants on land at issue in *Shelley v. Kraemer*, it is worth bearing in mind, have their analogues in the field of charity.

The fact that ordinary morality recognizes situations in which commitments may be broken bears on all three objections to eliminating legal enforcement of donor-imposed restrictions on charitable gifts. Most obviously, morally justified departures from donors’ wishes should count as exceptions to any notion that breaching commitments is inherently wrong. Beyond that, the more potential donors realize that a decision to depart from past donors’ conditions was morally justified rather than arbitrary or overreaching, the less they will be deterred from either giving to charity or accumulating wealth. This is not to suggest, however, that potential donors will not be deterred to some extent, particularly in their charitable giving. To see whether that predictable cost is worth bearing, Part IV examines the costs of reforming the present system,

multaneously, the marginal benefit to the testator of imposing the restriction should diminish over time, dropping off sharply after the first or second generation.


77. *See sources cited supra* note 20.

78. *See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1214-18 (1967)* (explaining that the more (or less) property owners’ senses of fairness are affronted by a regulation devaluing their property, the more (or less) demoralized they will be as prospective investors in property).

79. Traditional cy pres reformers sometimes cite the history of English charity reform as evidence that loosening the dead hand’s grip will not deter the making of charitable gifts. They point in particular to the high levels of charitable giving that followed both Henry VIII’s abolition of religious foundations and the mid-nineteenth-century Parliamentary relaxation of the terms of educational endowments. *4 Scott & Fratcher, supra* note 10, at 536; Simon, *supra* note 3, at 662-63 (following Scott); *Hobhouse, supra* note 24, at 226 (citing Tudor abolition).

Although this argument should support my position as well, it has a critical, if not fatal, flaw. Exogenous factors like a general economic expansion and consequent increase in private wealth might have spurred private giving in these periods, offsetting what otherwise might have been a lag in giving attributable to interference with dead hand control. In other word, cy pres reformers overlook the very real possibility that a rising economic tide lifted charitable giving over mudbanks of legal reform that might have deterred donations in drier times.

80. Not all would agree that reduction of gifts subject to dead hand control is to be reckoned a cost. Hobhouse, after discounting the likelihood that limiting dead hand control would deter giving, concluded that the alternative was worse:

‘‘[P]roperty subject to unalterable trusts is not a blessing but a curse. If the application of endowments is to be the same for ever, we should be far better without them than with them. If a man will not give except on the terms of having his commands obeyed for ever, then, say I, let him keep his money, and let it perish with him. *Hobhouse, supra* note 24, at 225.''

and Part V examines the benefits of a system in which the legal enforcement of the dead hand is removed.

C. Summary

Cy pres reformers have been overly pessimistic in their worries about relaxing the legal enforceability of dead hand restrictions. Appreciating the ready availability of extralegal enforcement mechanisms should diminish these worries, and cy pres reformers should be willing to loosen substantially the legal enforcement of dead hand restrictions in order to advance their goal of more efficient use of resources committed to charitable purposes. But that opportunity points to the second fundamental problem of cy pres reform: giving content to the notion of "charitable efficiency."

IV. The Reformers' Overly Optimistic Assumption—The Possibility of Giving Content to the Charitable Efficiency Standard

Cy pres reform rests on the assumption that some method can be, or has been, devised for measuring how much bang is produced by the charitable buck, a metric now generally referred to as "charitable efficiency." But no one has devised such a metric, and the available candidates hold little promise. Furthermore, pursuing the goal of reformist cy pres without such a metric could result in standardless judicial modification of charitable trusts, a grim prospect for those who cherish the diversity and independence of the nonprofit sector. Thus, it is important to examine the possible foundations on which a standard of effi-

81. The term "charitable efficiency" is more commonly used by commentators than by courts. Courts have, however, followed reformist commentators' suggestion to move away from the traditional "impossibility" or "illegality" as the level of frustration required to trigger the application of cy pres. Instead, liberalizing courts now tend to require only "inexpediency" or "impracticability." SCOTT & FRATCHER, supra note 10, § 399.4. With these terms courts try to capture the idea that modification of a trust's purpose may be appropriate when the costs of enforcing the donor's intent become excessive relative to the benefits. Statements of the liberalizing approach, however, have a Scylla-or-Charybdis quality about them:

The line between impossibility, impracticability, and inexpediency on the one side, and inconvenience or slight undesirability on the other, may be difficult to draw, but it may constitute the boundary between the use of cy pres and the refusal to apply that doctrine. . . . [T]he court will not substitute a new scheme merely because the trustee or the court believes it would be a better plan than that which the settlor provided. . . . [B]ut greatly diminished usefulness of the charity due to changed conditions has been considered by some courts as justifying the use of the doctrine. . . . BOGERT & BOGERT, supra note 10, at 171-73 (citations omitted). The obvious question, obscured by the conclusory terms "inexpedient," "impracticable," and "inefficient," is how courts are to know when the burden of enforcing a restriction exceeds its benefit.
ciency might be established and the dangers of standardless judicial modification.

A. The Shaky Foundations of the Efficiency Standard

The very word "efficiency" suggests a utilitarian calculus, as does its scholarly application in the context of cy pres. 82 But this calculus is notoriously difficult to apply, even if it is accepted as appropriate in principle. 83 Are the pleasures of animals, and perhaps plants, to count? 84 Are all human pleasures to count equally, or are some higher or lower than others? 85 Is it right to sacrifice an innocent (and unwilling) individual to save a multitude? 86

Economic analysis has tried to overcome these problems of utilitarianism, 87 and it is tempting to think that the efficiency of which cy pres reformers speak might be usefully equated with the technical economic concept of efficiency. As a matter of fact, it does not seem that this is


83. For a concise account of the faults of utilitarianism, see Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103, 111-79 (1979) [hereinafter Posner, Utilitarianism]. For contemporary debate on the merits of utilitarianism, see J.C.C. Smart et al., Utilitarianism: For and Against (1973); Utilitarianism and Beyond (A. Sen & B. Williams eds., 1982).

84. Compare Singer's detailed argument that they should, Peter Singer, Animal Liberation (1977) (especially chapter 1), with Posner's biting observation that "[a] philosophy that does not distinguish sharply between people and sheep should be congenial to people with collectivist or interventionist sympathies," Posner, Utilitarianism, supra note 83, at 115 n.46.

85. Mill's answer was clear: "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied." John Stuart Mill, Utilitarianism 14 (Oskar Fiest ed., The Library of Liberal Arts 1957) (1861). Whether his justification for the distinction rests on utilitarian premises is, however, another matter: "And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides." Id.

86. See Fyodor Dostoevski, The Brothers Karamazov 226 (Manuel Komroff ed. & Constance Garnett trans., The New American Library 1957) (1879-80):

Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last. Imagine that you are doing this but that it is essential and inevitable to torture to death only one tiny creature—that child beating its breast with its fist, for instance—in order to found that edifice on its unavenged tears. Would you consent to be the architect on those conditions? Tell me. Tell the truth.

what reformers have had in mind. Nor is it likely that the economic concept would work well for the reformers.

To see why not, we must first be clear about what economists mean by efficiency. Economic analysis reduces the practical problems of classic utilitarianism with a radically simplifying assumption: How much people value something is to be measured by how much they are both willing and able to pay for it, rather than, in classic utilitarian terms, by how much pleasure it brings them. A transaction is socially optimal, or efficient, if it brings resources into the hands of those who value them most, in the stipulated sense of being willing and able to pay most for them.

An example will illustrate why this notion of efficiency will not work well as a standard for cy pres reform:

Suppose that pituitary extract is in very scarce supply relative to the demand and is therefore very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price. . . . A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.

To make the conclusion indelicately explicit, purchase by the wealthy family is more efficient, and thus, in the eyes of economic analysis, the proper outcome.

Richard Posner, author of the example, uses it to illustrate the limitations of economic efficiency as an ethical criterion, though he insists that the limitations are "perhaps not serious ones, as such examples are very rare." Even if he is right about the relative rarity of such examples in the economy as a whole, they certainly bulk larger in the realm of charity, where the problem of allocating vital but scarce resources like

88. The cy pres reformers' notion of "efficiency" antedates the advent of economic analysis of law. Compare the January 1960 publication date of Professor Karst's article, Karst, supra note 82, with Posner's observation that "economics had no real impact on legal theory (save in a few fields like antitrust law where the legal norm was explicitly economic) until the 1960s," Posner, Utilitarianism, supra note 83, at 105-06.

89. Posner, Utilitarianism, supra note 83, at 119 (defining his notion of value), 127-35 (testing his notion of value against the standard objections to utilitarianism). For two less sanguine assessments of this substitution of wealth for happiness, see Dworkin, supra note 38, especially Part VII, and Arthur Allen Leff, Economic Analysis of Law: Some Realism about Nominalism, 60 VA. L. REV. 451, 456-59 (1974).

90. POSNER, ECONOMIC ANALYSIS, supra note 33, at 13.

91. Id. at 12 (footnote omitted).
health care, food, and shelter among the needy is all too common. Indeed, in the world of charity, Posner’s exceptional case is more likely to be the rule.

The problem is that, in order to avoid the complexities of classical utilitarianism, economic analysis takes the existing distribution of wealth in society as a given, without questioning the equity of that distribution. This assumption, though perhaps harmless enough in many contexts, runs counter to the traditional role of much of the charitable sector, which is to rectify perceived maldistributions of wealth or ameliorate their consequences. Thus, it would strain no one’s conception of charity for a hospital charged with allocating Posner’s pituitary extract to award it to the poor child rather than to the rich child, contrary to the dictates of economic efficiency.

Another approach to defining efficiency would be to import a New Deal or Progressive Era notion of public good, which played a prominent role in the writings of the legal realists and is at least implicit in the writings of those cy pres reformers who took their cue from these movements. This would seem quite compatible with (if not derivable from) the notion, deeply imbedded in the general law of charity, that charity’s essential function is to provide public benefits.

There are, however, serious problems with this approach. Most fundamentally, the “New Dealish” notion of a monolithic public good iden-

92. See Leff, supra note 89, at 478-81.
93. Economic analysis does offer the prospect of an efficient redistribution of wealth. For an unpacking of this counterintuitive concept, which bases the optimal level of wealth redistribution on the amount of redistribution that the wealthy are willing and able to pay for, see Rob Atkinson, Altruism in Nonprofit Organizations, 31 B.C. L. Rev. 501, 521 n.69 (1990) [hereinafter Atkinson, Altruism].
94. See, e.g., Chester, supra note 6, at 414-16, 425 (noting the influence of Pound and the Realists on reformist cy pres); Edith L. Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375, 384 (1953) (“The transition from stress on the dead hand to interest in public benefit is in accord with Pound’s legal philosophy.”); Comment, supra note 28, at 322-23 (arguing that courts applying cy pres should expressly state that “the element of public welfare” was among the factors used, particularly when “reaching results which obviously show the impact of social considerations”). Pound’s relationship with Legal Realism, of course, was anything but uncomplicated. Compare Roscoe Pound, Call for a Realist Jurisprudence, 44 Harv. L. Rev. 697 (1931) (qualifiedly praising the Realist movement) with Karl Llewelyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931) (responding to Pound’s alleged distortions of the Realist movement). For a summary of the Progressive approach to public policy, see Susan Rose-Ackerman, Rethinking the Progressive Agenda, The Reform of the American Regulatory State (1992).
95. For criticism of this theory of charity in its traditional form, see Atkinson, Altruism, supra note 93, at 605-09; Mark A. Hall & John D. Colombo, The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption, 66 Wash. L. Rev. 307, 364-85 (1991); and Hansmann, supra note 66, at 66-74.
tifiable by experts is in serious disfavor. As applied to the law of charity, it has been attacked as at best question-begging, and at worst a cloak for unlimited judicial discretion. The notion of public benefit could be narrowed, in the context of charitable organizations, to cover only those activities that reduce the burdens of government. This has occasionally been suggested, but is generally disfavored, for two primary reasons: It would apply rather awkwardly to the case of religious organizations, and it would undermine the pluralism and diversity that are taken to be essential features of the charitable sector.

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

A comparison with the “pure” cy pres model will clarify this point. Recall that the frustration component of that analysis is an absolute test; the threshold inquiry is whether the original charitable purpose is totally and absolutely precluded. Were it possible to come up with a viable public benefit theory of charity, the pure cy pres model would nicely complement it. Only when the donor’s purpose becomes either uncharitable or impossible to fulfill would the courts be permitted to step in with corrections, albeit only very minor ones.

By contrast, cy pres reformers want the courts to be able to step in not only when the charitable purpose has failed utterly, but also when it is not going sufficiently well, and with modifications that are not neces-

97. Compare Bob Jones Univ. v. United States, 461 U.S. 574, 590-91 (1983) (majority opinion) (verging on this approach) with id. (Powell, J., concurring) ( criticizing the majority for taking that position). See also Hall & Colombo, supra note 95, at 345-63 (rejecting this approach as an explanation for granting tax exemptions to nonprofit hospitals).
99. See Atkinson, Altruism, supra note 93, at 605 n.291 (collecting authorities).
100. See supra Part II.A.
sarily minimal. For that they need a measure of “well” which, unlike the standard of failure, cannot be directly derived from the notion of public benefit. The public benefit theory claims to give all that “pure” cy pres would require, a definition of “doing good.” What the reformed cy pres theory needs, and what the public benefit theory of charity does not purport to give, is a measure of “doing well at doing good.”

B. The Dangers of Muddling Through

There are several possible ways to apply the doctrine of cy pres in the absence of a clearly articulated standard of charitable efficiency, none of which is particularly satisfactory.

The first possibility would be to let the courts decide, making this an equitable call in the classic sense, with the attendant risk that the standard will vary with the chancellor’s foot. This may be the tack cy pres is now taking, if the resolution of the Buck Trust litigation is any indication. There the supervisory court did not merely reject the trustee’s cy pres petition requesting an expansion of the geographic scope of the trust to include the San Francisco Bay area. It took matters into its own hands, mandating that a substantial share of the trust’s income be devoted to “major... projects... located in Marin County, the benefits


There is a further problem for those willing to indulge my altruism theory of charity, briefly set out in the Appendix, as an alternative to the narrower traditional theory. Even if a viable notion of “doing good well” could be derived from the public benefit theory of charity, that would hardly be cause for celebration. Just as the purpose of charity is set by public standards in the orthodox theory of charity, so in its cy pres equivalent would the acceptable level of performance be assessed by public standards. On the one hand the public would define what the public good is; on the other, the public would define how well the public good must be performed. Consistent with my broader vision of charity, I would rather see both standards, the definition of what the public good is and the appropriate measure of how well it is being served, set by nonprofit organizations themselves, subject only to the outer limit of the nondistribution constraint that defines the frontier of the nonprofit sector. For an elaboration of that perspective in the theory of cy pres, see infra Part V.

102. The government official who exercises this power has traditionally been the chancellor, but there is no reason it could not be located elsewhere. Thus, for example, in England much of the chancellor’s traditional cy pres power has been placed by statute in an administrative body, the Charity Commissioners. See supra note 5. Wherever the power is located, however, the problem addressed in the text will remain: How can the exercise of this power be subjected to principled limits?

from which will inure not only to Marin County but [also to] all of humanity.”

As John Simon saw the matter:

The result allows an agency of the state to become the grant-making supervisor, thus undermining the decentralized, or “privatized,” structure so carefully nurtured in our legal order.

... The superior court has removed from the Buck Trust management and reserved to itself the right to decide how a major part of Beryl Buck’s legacy will be used to help the nation or the world. ... Philanthropy has “gone public” with a vengeance.

Nor is “going public” the worst of it. The trial court “rejected the trustees’ assessment of efficiency,” and in its place “substituted its own philanthropic preferences.”

Cy pres has not only gone statist; it seems to be going standardless as well.

The second possibility would be a “know it when we see it” standard based on the judge's assessment of public sentiment as to charitable performance, rather than the judge's personal preferences on that score. This judicially administered, populist cy pres would add little practical limit to judges’ discretion, and would introduce another evil. Its very populism runs counter to the notion that charities are to be laboratories of countermajoritarian experimentation in social betterment.

The third possibility, a compromise measure, might be called conservative reformed cy pres. This possibility implicitly takes account of the evils of unrestrained judicial and populist cy pres. Simes seems to have taken this position, arguing that charities should be reformable as

104. Simon, supra note 3, at 665 (quoting the court’s Order No. 23259 (July 31, 1986, Cal. Super. Ct., Marin Co.).
105. Id. at 660.
107. See Schrag, supra note 3, at 583 (“As the intent of the settlor becomes less determinative of the trust's uses, the bias of the trustee or of the state becomes more controlling.”).

In commenting on the version of this paper presented to the New York Nonprofit Forum on April 16, 1992, Marion Fremont-Smith and Daniel Kurtz objected that the Buck Trust case is anomalous, both in the extent to which the court and state attorney general were at odds and the extent to which the court indulged its own substantive preferences as to the use of trust assets. Both are well versed in the typical role of attorneys general in initiating the application of cy pres; Fremont-Smith wrote the now-classic account of charitable regulation, MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT: STATE AND FEDERAL LAW SUPERVISION (1965), and she and Kurtz headed, respectively, the branches of the Massachusetts and the New York Attorney General's offices in charge of overseeing charities. But even though, as they quite rightly point out, attorneys general typically play a larger and more donor-deferential role than the courts, that only presses us back to the other side of the problem, the lamentable tendency of attorneys general to seek the application of cy pres only in truly egregious cases of waste.
“inexpedient” whenever “the amount to be expended is out of all proportion to its value to society.”

“Out of all proportion” seems aimed at restricting courts to dealing only with waste that is truly egregious, judged by a standard on which no reasonable people would disagree.

The problem with this “inexpediency,” lowest-common-denominator standard is that it concedes a very large amount of arguable waste to the dead hand. This amount is less than that allowed by pure cy pres, with its threshold of impossibility, but much more than reformed cy pres would have to concede if it could formulate a clear standard of efficiency to rein in judicial discretion. Conservative reformed cy pres makes an awkward alliance with the dead hand, the very force cy pres reform promised to combat, in an effort to protect the diversity and independence of the charitable sector from judicial excess. Thus, for example, in responding to the charge that charitable efficiency under an intuitively utilitarian standard would suggest serving the needs of starving Ethiopians and East Indians before relatively well off indigents in the San Francisco Bay area, John Simon invoked the orthodoxy of deference to the dead hand: Cy pres modification should leave a trust as close as possible to the donor’s original intent.

There is, finally, a fourth response to the lack of an objective criterion of efficiency, the response this Article recommends. This suggestion neither cedes unlimited discretion to supervisory courts nor defers unduly to the dead hand. It instead suggests that reformers look for guidance to charitable trustees. This approach has been discussed to a promising but as yet limited extent, suggesting that the opinion of

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108. Simes, supra note 6, at 139. “Inexpediency” is Professor Simes’s equivalent of contemporary reformers’ “inefficiency.”
110. Id. at 658-61.

Scott envisioned the trustees as having both an advisory role and a veto power over liberalized cy pres:

I would contend . . . that even if the precise purposes for which the property was given are not actually impossible of accomplishment, even if changes are not imperatively demanded, yet if the trustees consent to certain changes, and the court is of the opinion that such changes are not unreasonable in view of the general purposes of the donors and of the changes time has brought to pass, in view, in short, of all the circumstances, the court should authorize such changes. I contend, in other words, that the consent of the trustees is a most important factor in determining what changes are justifiable. The trustees are peculiarly fit to determine such questions. They hold and administer the property; they and they alone represent both the donors and the beneficiaries.

Austin Wakeman Scott, Education and the Dead Hand, 34 HARV. L. REV. 1, 17 (1920) (footnotes omitted). See also DiClerico, supra note 2, at 179, 197 (adopting Scott’s position).

The power I am recommending should not be confused with the present power reserved to community foundations by their own charters to alter the terms of funds entrusted to them.
trustees deserves deference, but on only two fairly narrow grounds. Sometimes trustees are said to be in a position to know what the donor would have wanted in the event of unforeseen circumstances short of impossibility. Alternatively, they are said to be particularly expert in determining whether charities of the kind they serve are performing up to an objectively verifiable standard of efficiency. On the first view, the trustees are proxies for donor intent; on the second, for societal standards of charitable efficiency. Although this focus on trustees so far has been derivative and by default, it holds promise for a deference to trustees that is radically direct. That is the possibility explored by the remainder of this Article.

V. Reforming Cy Pres Reform—The Sectarian Alternative

Traditional cy pres reform has reached an impasse. Deference to dead hand control and the absence of a clear standard of charitable efficiency hem cy pres reformers in on two sides. On the one side, deference to the dead hand requires reformers to limit the scope of their reform to intent-honoring changes, even if those changes leave charitable assets in uses no living person sees as socially optimal. But if reformers ignore (or stretch) donor intent to permit socially optimal changes, they run into a problem on the other side: the absence of a clear standard of efficiency to guide judicial trust reform concedes excessive discretion to the courts. Conferring standardless reform power on the courts, as instrumentalities without having to seek court approval under the cy pres doctrine. BOGERT & BOGERT, supra note 10, § 329, at 465-66, 467; Norman A. Sugarman, Community Foundations, in 3 RESEARCH PAPERS: SPECIAL BEHAVIORAL STUDIES, FOUNDATIONS, AND CORPORATIONS 1689, 1693 (1977). For one thing, the reserved power of community foundations must be triggered by a frustration of donor intent, and is thus not nearly as expansive as the power I would give charitable trustees. More fundamentally, donors in effect elect to subject their gifts to the amending power of community foundations in their very decision to make gifts to organizations with such a power explicitly spelled out in their charters. By contrast, the power I recommend would inhere, by operation of law, in all donee organizations.

111. See Scott, supra note 110, at 17; Simon, supra note 3, at 658-61.

112. Scott considered this position and rejected it out of hand: “I would not contend that absolute power should be given to the trustees to divert charity funds to any charitable purpose they may select.” Scott, supra note 110, at 17.

This approach is adumbrated, but never made wholly explicit, in Simon, supra note 3, at 658-60. Nothing that Simon says there indicates that he has yet despaired of giving content to the reformist notion of charitable efficiency, or that he would grant as much discretion to trustees as I suggest in the next section. The contrary position is quite clear in his writing, id., and he has reaffirmed it to me in conversation. But that suggestion is entirely consistent with his general description, id., of the third sector’s mediating position between the purely private and the purely public.

113. For my reasons for choosing this term, see infra text accompanying note 122.
of the state, jeopardizes the much-vaunted independence of the third sector.

A. Transcending the Old Dilemmas

The focus on trustees, sharpened by Simon, offers a way between the horns of this dilemma. As we have seen, Simon's outlook is constrained by what he describes as "the binary," private versus public perspective, which views trustees as merely proxies for donor intent or publicly determined social good. But it is quite easy to transcend the dilemma by viewing trustees as an independent, third locus of control.

On the one hand, this approach would directly and immediately eliminate the primary problem of dead hand control—the need to deal with changed circumstances—by placing ultimate decisions about changing the use of charitable assets in the hands of living trustees. Full legal title to property in charitable trusts could be given to trustees, in a new, but still fiduciary, capacity. Trustees would be legally empowered to use the assets committed to their management in whatever way they determined would most advance the public good, limited by what the state defines as charitable through common law, legislation, or administrative regulation, as well as by extralegal mechanisms to enforce donor intent.

On the other hand, this approach would avert the primary problem of judicial control—the absence of an objective definition of charitable efficiency. For one thing, trustees would not need such a definition to guide their actions. They could make their own judgments as to efficiency based on the donors' wishes; on universal, societal standards; or on their own standards, limited, to the extent they themselves deem fit, by deference to the expressed wishes of donors. Nor would trustees need an objective definition as protection from judicial overreaching. Since the trustees would be the ultimate arbiters of charitable efficiency, courts could not, under an ill-defined standard, impose their own judgments arbitrarily.

It bears emphasizing that this approach would not eliminate the regulatory role of either the state or private donors. The state, for its part, would continue to perform two critical policing functions. First, the state would establish and patrol the outer limits of charity, as it traditionally has. The new freedom of charitable trustees to change the use of the assets in their hands would still have to operate within whatever the

114. See Simon, supra note 3, at 653-57.
115. See supra Part III.
state determined the bounds of charity to be.\textsuperscript{117} The trustees of a charitable hospital, for example, could decide to devote the assets of their organization to community health centers,\textsuperscript{118} or even to funding scholarly research on the cy pres doctrine. But they could not simply settle the organization's debts, disband, and divide the net assets among themselves. To do so would transgress even the widest imaginable parameter of charitable purposes, the nondistribution constraint itself.\textsuperscript{119} The state's second policing function would be to continue to set and monitor standards of fiduciary duty, the duty of care and the duty of loyalty. The latter would be particularly important; without constraints on self-dealing, the assets of charities would simply be the private property of trustees.\textsuperscript{120}

Nor would donors be left entirely out of the picture. The restrictions donors place on their gifts would still carry moral weight. Donors would, moreover, still have nonlegal means of enforcing their wishes, not least of which would be the threat, implicit or explicit, of cutting off future support.

B. Creating New Opportunities

The suggested approach, the sectarian alternative, will avoid problems to which reformed cy pres analysis is inherently subject. There is, however, a more positive way of seeing things. On this view, we would turn the assets of charity over to trustees, not in default of finding a way to give greater control to the donor or the state, but as an affirmative choice based on both political and economic grounds.

\textit{(1) Political Opportunities}

The political argument in favor of the sectarian approach embodies a perspective on social order that is distinct from the liberal individual-
ism underlying "pure" cy pres and from the communitarianism underlying most previous efforts at cy pres reform. Unlike the liberal individualism of the former, sectarianism does not take the preferences of donors as sacrosanct. Unlike the communitarianism of the latter, sectarianism does not seek a definition of charitable efficiency common to all citizens of the state and therefore administrable by courts as the citizens' proxy. Instead, sectarianism places primary reliance on charities themselves as intermediaries between the individual and the state, bodies that may entertain quite different visions of charitable efficiency. Control over the disposition of charitable assets would move from the courts, which now act as dual custodians of individual donor wishes and community-wide notions of charitable efficiency, to the charities themselves, a locus between individual donors and the political community.

I call this intermediate position "sectarian" to highlight qualities that strike me as essential and desirable in charitable organizations: devotion to the public good, rather than the good of themselves or their members, and commitment to a vision of the public good that is not shared by all citizens of the state. The term "sectarian," of course, has negative connotations as well, and I use the term as an implicit warning against the dangers inherent in sectarian groups: parochialism, exclusivism, and hegemony. But at their best, such groups embody and inspire a constrained optimism: optimism, in their active commitment to conferring benefits beyond their membership, yet constrained, in their tacit concession that such commitment is not now shared by society as a whole. While we await the millennium of universal civic virtue, we would do well to strengthen these congregations that promote the public good here and now. One step in that direction would be to give them an added measure of freedom from donors and the state.

121. In distinguishing sectarianism from both liberalism and communitarianism, I am following Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714, 1719-22 (1988). "Normative pluralism" is her term for what I call the sectarian position; civic republicanism is the particular form of communitarianism that Sullivan distinguishes from it. I am grateful to Miriam Galston for guiding me through these distinctions.


123. The approach I advocate is aggressively sectarian: Every gift to charity either enhances an existing sectarian community, in the case of gifts to existing charitable organizations, or creates a new one, in the case of new charitable trusts. The opposite approach, evident in some cases and noted by some commentators, treats every gift to a nonprofit organization as a trust for the purpose for which the organization was organized and operating at the time of the gift. *Pacific Home v. Los Angeles County*, 264 P.2d 539 (Cal. 1953). Under this approach, for example, a California charity that operated a hospital was forbidden to rent its
There is no way to prove that this sectarian alternative is superior to the communitarian or individualist solutions, or to compromises between the two that can be offered within the framework of traditional cy pres analysis. Indeed, political liberalism in its classic form is hostile to bodies that separate individuals and the state, and preferential treatment of nonprofits has been attacked on that very ground.

On the other hand, enhancing the position of such intermediate bodies comports well with standard defenses of the third, nonprofit sector as both intermediate between and independent of the private, market sector and the public, governmental sector. By displacing state-enforced deference to donors, the sectarian approach further distances the nonprofit sphere from the two alternative spheres. Moreover, it strengthens the third sector in three related, but less obvious, ways. First, in denying state enforcement to donors' wishes, it presses donors to create or enhance alternative enforcement systems that are perforce outside the state, and thus more likely to be within the third sector itself. Second, since under the sectarian approach the donee organization will have the ultimate say regardless of the alternative enforcement mechanism, donors' dealings with them will probably involve less monologue and more dialogue. Finally, after death has removed the donor from the dialogue, deference to his or her wishes will be dynamic rather than static, permit-

hospital to a for-profit corporation and use the proceeds to finance neighborhood clinics, on the assumption that its donors had relied on a provision in its charter stating that its primary purpose was to operate a hospital. Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36, 40-41 (Cal. Ct. App. 1977). See also Holt v. College of Osteopathic Physicians & Surgeons, 394 P.2d 932 (Cal. 1964) (holding that minority trustees of osteopathy college, a charitable corporation, stated a cause of action in seeking to enjoin as a breach of trust the conversion to teaching of allopathic medicine). For a discussion of the split among courts as to whether to treat gifts to charitable corporations as gifts in trusts or as absolute gifts, see RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f; BOGERT & BOGERT, supra note 10, § 324, at 379-91, § 363, at 29-32; SCOTT & FRATCHER, supra note 10, § 348.1.


126. See Giovan Harbour Venable, Note, Courts Examine Congregationalism, 41 Stan. L. Rev. 719, 748 (1989) (urging Congregationalist churches to “develop negotiation and arbitration procedures which can effectively deal with church property disputes before resort to the civil courts becomes unavoidable”). Cf. Charny, supra note 42, at 442 (“Far from establishing a society of trusting individuals, widespread enforcement of informal commitments based on trust alone would create a dystopia of regulatory oppression.”).
ting organic development of the sectarian community in the place of dead hand direction.\textsuperscript{127}

\textbf{(2) Economic Opportunities}

In addition to these political considerations, an economic factor weighs in favor of eliminating legally enforced dead hand control. Henry Hansmann has convincingly argued that nonprofit organizations are sometimes more efficient suppliers of goods and services than for-profit firms in the face of what he calls contract failure, the inability of patrons to monitor output.\textsuperscript{128} In industries characterized by various forms of contract failure, those who patronize nonprofit suppliers are more likely to get what they pay for at the offered price. Nonprofits, forbidden by their very nonprofit status to distribute net profits to equity owners, have less of an incentive than for-profit firms to increase net revenues by trading on patrons' inability to monitor output.\textsuperscript{129}

When demand for their output is rising, however, nonprofits may not be able to expand at an optimal rate. Their sources of capital are limited to loans, retained earnings, and contributions. Unlike for-profit firms, the defining legal characteristic of nonprofit firms—the nondistribution constraint—makes it impossible for them to attract capital in the form of equity investments.\textsuperscript{130} If trustees were allowed to move as-

\textsuperscript{127} This relationship between donor and donee organization is analogous to the Roman Catholic (as opposed to Protestant) relationship between divine revelation and the believing community. In the Catholic tradition, doctrine is thought of as developing organically within the church along lines not logically inferable from the original revelation. \textsc{John Henry Cardinal Newman}, \textit{An Essay on the Development of Christian Doctrine} 3-54 (1968). In the Protestant traditions of Luther and particularly of Calvin, the original revelation is the ultimate source of authority for the community. \textit{See}, e.g., \textsc{Rolan H. Bainton}, \textit{The Reformation of the Sixteenth Century} 4-5 (1956).

This analogy was suggested to me by John Simon's observation that "[o]nce the donor is gone, the trustees serve as the donor's vicar." Simon, \textit{supra} note 3, at 658. In pursuing Simon's analogy, I do not mean to suggest that the theological and cy pres questions be answered, as well as asked, in the same way. Suffice it to say that much may turn on the one in whose stead the vicar is standing.

\textsuperscript{128} Economic theory tells us that consumers usually know what goods and services they want to buy, that they are usually able to tell whether they got what they paid for, and that competition among for-profit suppliers usually ensures that they paid the lowest possible price. Hansmann identifies three basic forms of contract failure. Sometimes patrons cannot evaluate a firm's output because it is not delivered to them, but to unrelated third parties, as in CARE's overseas relief work. Hansmann, \textit{supra} note 54, at 846-48. Sometimes patrons' payments are difficult for them to correlate with increased output because the output is a public good in the technical economic sense, like listener-sponsored radio. \textit{Id.} at 848-54. And sometimes patrons' payments are hard for them to correlate with output because the output is highly complex, like brain surgery or higher education. \textit{Id.} at 862-72.

\textsuperscript{129} Hansmann, \textit{Nonprofit Enterprise, supra} note 54.

\textsuperscript{130} Hansmann, \textit{Exempting Nonprofit Organizations, supra} note 66, at 54. \textit{Cf.} Kanter &
sets from the charitable purposes to which they are presently devoted to new ones, a significant new source of capital would be available. Within the field of charity, capital would be free to move where rising consumer demand suggests it is most needed.\footnote{131}

VI. Problems with the Sectarian Approach

Whether legal enforcement of dead hand control can be removed without damaging the cause of charity is addressed in Part III; whether it should be removed to advance that cause is addressed in Part V. Even if both questions are answered affirmatively, in favor of the sectarian alternative to traditional cy pres reform, several subsidiary questions remain. They are the subject of this Part.

A. Membership or Citizenship First?

Eliminating the legal enforcement of dead hand control raises the more general issue of the proper scope of state review of the internal affairs of charitable and other nonprofit organizations. The examples presented so far tend to minimize this problem because they assume that the charity is a small organization governed by relatively few trustees, acting unanimously, or at least without serious discord. These assumptions are, unfortunately, somewhat misleading. Charitable organizations are sometimes large and complex, with multistate operations and a multitude of local affiliates, as in the case of religious denominations and federated charities like the United Way.\footnote{132} And sometimes, alas, the...
constituents of such charitable communities treat one another less than charitably.

How is the state to respond to a charge by one of the organization's constituents that another has violated the organization's own internal regulations? What if, for example, someone argues not that a donation is being illegally diverted from its original purpose, but that the decision to change the use was not made in accordance with the organization's own procedures for making such decisions? This, as others have noted, is an ancient, and perhaps intractable, problem. It poses a trilemma with the autonomy of private, nongovernmental organizations on the first side, the sovereignty of the state on the second, and the civil rights of individual citizens on the third.

These problems cannot be fully resolved here. For present purposes, the best that can be done is to point out that eliminating legal enforcement of use restrictions does not require a resolution of the broader issues. The sectarian alternative would remove only one substantive issue from state determination, leaving donors and others with grievances against nonprofits recourse to the civil courts for procedural complaints and even substantive complaints that do not bear on changes in the use of donated property for charitable purposes. Indeed, the sectarian alternative presupposes that the state will continue to set and enforce the standard fiduciary duties of care and loyalty.

Search Papers: Philanthropic Fields of Interest 1353, 1363-65 (1977) (describing the relationship of the United Way of America, as the national coordinating body, to its autonomous, separately incorporated local affiliates).

134. For an analysis of the surprisingly convoluted question of who has standing to sue charities under these and other circumstances, see Mary Grace Blasko Et Al., Standing to Sue in the Charitable Sector (forthcoming 1993).

135. The internal affairs of religious organizations have particularly bedeviled the civil courts. See Ira Mark Ellmann, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes, 69 Cal. L. Rev. 1378 (1981). The title of Ellmann's article is an allusion to the Roman proconsul Gallio's refusal to hear charges brought by Jewish religious authorities against the apostle Paul, as reported at Acts 18:14-16:

Gallio said to the Jews, "If it were a matter of wrongdoing or vicious crime, I should have reason to bear with you, O Jews;

[But since it is a matter of questions about words and names and your own law, see to it yourselves; I refuse to be a judge of these things."

And he drove them from the tribunal.

Id. at 1380. The classic article on the general problem is Zechariah Chafee, Jr., Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1936). For a more recent treatment, see Note, Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963).

136. Thus, in the case of Paul, the Roman proconsul might claim to waive Rome's sovereign right to hear Paul's case, thus recognizing the autonomy of the Sanhedrin, but denying Paul any claim he might have asserted as a Roman citizen to a civil trial. When Paul was ultimately granted his appeal to Caesar, Acts 25:12, the latter's sovereignty and the former's civil rights were vindicated at the expense of the Sanhedrin's autonomy.
B. Paradoxical (and Perverse) Effects on Innovation

Might the elimination of legally enforceable dead hand control, calculated to allow charities greater flexibility and wider room for innovation, actually produce the opposite effect? This potential problem has two aspects: one facing innovative donors seeking to found new charities, the other facing new organizations seeking donations.

The problem for innovative donors is that once they themselves cease to control the organizations they create, as they must at death, they will under my proposal have no legal assurance that their innovative charitable wishes will continue. Here we find a dilemma: either hope, as present law implicitly does, that innovative ideas will not become obsolescent, or hope, with my proposal, that the trustees of innovative donors will continue in the spirit of their founders.

This dilemma has no perfect solution. But resting the hope of innovation on charities themselves at the very least has time on its side. Even the most original ideas will inevitably become timeworn, particularly in the details of their implementation. The more innovative donors, those who have created the great charitable foundations,\[137\] seem to have realized this. Their charitable foundations tend either to have statements of purpose virtually coterminous with the outer limits of charity, like the Rockefeller Foundation's "advancement of humanity,"\[138\] or to specify particular charitable purposes that cover a wide front, like education, health care, or the arts.\[139\] Perhaps, too, donors endowing large foundations anticipated that, at least with respect to organizations of the magnitude they created, informal controls would satisfactorily secure their wishes.\[140\] Finally, in return for permitting donors to devote societal resources to purposes at the farthest margins of charity, it does not seem too much to ask that donors leave behind a cadre of supporters willing to

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137. For a defense of private foundations as significant sources of innovation, see FREMONT-SMITH, supra note 107, at 49-53 (discussing the role of foundations in a pluralistic society); John G. Simon, Charity and Dynasty under the Federal Tax System, 5 PROB. LAW. 1 (1978).


139. See NIELSON, supra note 138, at 80-81, 102; Paul N. Ylvisaker, Foundations and Nonprofit Organizations, in THE NONPROFIT SECTOR, supra note 101, at 360, 374-77.

140. Their confidence in such informal control mechanisms does not appear to have been misplaced. See NIELSON, supra note 138, at 279 (describing extensive degree of influence founders of great foundations were able to exercise through such means as family control of governing boards). The creation of a charitable alter ego staffed by those loyal to the donor's vision approximates the ultimate means of informally enforcing agreements, which Kronman calls "union." In that arrangement, the central source of uncertainty of performance, the divergence of interest between the promisor and the promisee, is eliminated, not just reduced. Kronman, supra note 42, at 20-23.
carry out their instructions. If that proves to be too much for the perpet-
uation of some donors’ wishes, it should be seen less as the stifling of
innovative ideas and more as the perishing of those that are unfit. 141

The problem for new organizations seeking donations is that, with-
out the ability to make legally binding promises to use donated funds for
the purposes for which they were solicited, such organizations will be at
a disadvantage relative to older, established charities that can point to
their track record of deference to donor wishes. New organizations will
be less able to convincingly invoke informal enforcement mechanisms to
overcome potential donors’ reluctance to make what would be un-
restricted gifts to charity under the sectarian alternative.

Real though this relative disadvantage is, it must be kept in perspec-
tive. Whether or not my proposal is adopted, the central problem for
new organizations will be their very novelty and lack of a track record.
Moreover, it is doubtful that their present ability to make legally binding
commitments to devote solicited funds to a particular charitable purpose
will make up for the lack of a track record. Contributors may at most be
only cursorily familiar with the law. Even if they know the law, the costs
of enforcing it on their behalf are obviously high. And even if the cost of
enforcement is borne by the public, the prospect of catching the fly-by-
night is slim. Finally, the real deterrent to giving to such organizations
will never be that they may devote their receipts to other charitable pur-
poses, or even that their insiders will simply grab the money and run. 142
More likely, it will be the fear that, even if they are entirely conscien-
tious, they may be inept or misguided. Without a track record, new
charities have no way to overcome this fear. As long as donors act on the
ancient maxim “By their fruits shall ye know them,” transplant, upstart,
and offshoot charities will be at a decided disadvantage no matter how
well rooted their commitments are in legal obligation.

C. Skewing of Expenditures

Faced with the loss of legal enforcement of charities’ promises to use
donations as they dictate, donors might try to lock in expenditures up
front by extralegal means to avoid frustration in the future. This might
have two undesirable effects. First, this practice might divert donations

141. See Hobhouse, supra note 24, at 224 (arguing that “ironbound rules of a founder”
are more likely to discourage than encourage innovation by charitable trusts).
142. For a detailed study of extensive recent efforts at the state and local level to regulate
charitable solicitations, and the generally hostile reception those efforts have received in the
Supreme Court, see Ellen Harris et al., Fundraising Into the 1990s: State Regulation of Char-
table Solicitation After Riley, in 1 Topics in Philanthropy 1 (New York University School
from endowments to brick-and-mortar projects, as donors try to have their wishes quite literally set in concrete. Second, it might encourage present consumption at the expense of the future, as donors reason that a dollar spent in an early year cannot be diverted in a later one.

It is not likely, however, that these urges would be more likely under my proposal than under the present regime of dead hand control. Owing to the fungibility of money, "contributions earmarked for one purpose, even if scrupulously set aside, may simply free the [donee] organization to use an equivalent amount of its own funds for other purposes."\(^1\) There are, that is to say, already great incentives in favor of bricks and mortar. In addition, donors would have available to them the full range of informal enforcement techniques described above to ensure that their contributions are used as they desire.

D. Creating a Market in Obsequiousness

There is, however, a danger that donors will employ informal enforcement measures with too great an effect. So far we have assumed that trustees are committed to conscientiously balancing donor wishes against evolving social needs. Donors could, however, find trustees without a commitment to social good, trustees who, for the right price, would elevate donor wishes to absolute priority. This possibility represents a dark side of the market for reputational capital.\(^2\) For the sake of repeat business, some trustees might be eager to cultivate a reputation for faithful, even Pavlovian, responsiveness to donor wishes. The estate planning field offers some evidence of this phenomenon already. Trusts with mandatory distribution requirements can incur tax and other disadvantages.\(^3\) To avoid these, settlors sometimes write their chosen trustees legally nonbinding (but usually honored) "letters of wishes" expressing the settlor's distributional preferences.\(^4\) In the closely allied context of charitable donations, the elimination of legally enforceable restrictions could give rise to an analogous (and equally brisk) market in obsequi-

\(^{143}\) Atkinson, *Altruism*, supra note 93, at 584.

\(^{144}\) For the identification of this problem I am indebted to Harvey Dale, who pointed it out when I presented a draft of this paper to the New York Nonprofit Forum on April 16, 1992.


\(^{146}\) *Id.* There are, however, limits to how far this practice can be pressed. If the government can show a side agreement between the settlor and the trustee as to distributions, the distribution will be deemed mandatory and the tax advantages lost. See Estate of Skinner v. United States, 316 F.2d 517 (3d Cir. 1963); Estate of Green v. Commissioner, 64 T.C. 1049 (1975), acq., 1976-2 C.B. 2; Jerry J. McCoy, *Zing Go the Strings if You're Not Careful: Reciprocral Trusts and Other Retained Powers Problems*, 18 INST. ON EST. PLAN. ¶ 700 (1984).
ousness, where anxious donors shop for trustees with well-earned and carefully cultivated reputations for toadying. The net effect would hardly be to enhance the flexibility of the use of charitable assets.

Robotic obedience trustees probably cannot be eliminated, but their worst effects could be reduced by loosening the mainspring that drives them: the financial incentive to follow donor directives reflexively. The most intuitively appealing approach would be simply to forbid any form of payment for making discretionary expenditures as directed by the donor. Unfortunately, the practical impossibility of enforcing this approach negates its conceptual elegance. "Wink and nod" arrangements between donors and paid trustees would be hard to detect, as they are in other areas now.\(^{147}\) As long as trustees are paid to perform discretionary functions in the disposition of assets, determining whether discretion is being exercised independently of donor direction will be difficult, if not impossible. The market in obsequiousness, therefore, may have to be combatted with a prophylactic rule prohibiting the acceptance of compensation for exercising expenditure discretion.

A sweeping ban on such compensation would effectively forbid charities to pay their trustees at all, a harsher result than is probably necessary to address the problem of selling obsequiousness. It should be enough to target those who are the agents or employees of financial institutions, and perhaps those who serve as paid trustees in their private capacities for more than a specified number of charities. Even those within the targeted group need not be forbidden to accept compensation for exercising discretion in the investment, as opposed to the expenditure, of charitable assets. Thus, charities that find delegating investment decisions to institutional experts more economical than performing them in-house would still be free to do so.\(^{148}\)

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147. See supra note 146 and accompanying text. Such arrangements are common, for example, in "Medicaid estate planning," in which the nonindigent elderly artificially impoverish themselves with gifts to relatives to qualify for Medicaid. See Armond D. Budish, Avoiding the Medicaid Trap 40 (1990); Brian E. Barreira, An Irrevocable Grantor Trust Can Assure Eligibility for Medicaid, 16 Est. Plan. 104 (1989); Julie Kosterlitz, Middle-Class Medicaid, 23 Nat'l J. 2728 (1991); Laura Saunders, The King Lear Strategy, Forbes, Dec. 9, 1991, at 164.

148. See Scott & Fratcher, supra note 10, § 379, at 316-17 nn.6-7 and accompanying text (stating it is "not improper" to delegate the power of investment to a committee, an officer, or an outsider as long as the board itself prudently exercises general supervision over the matter). See also The Revised Model Nonprofit Corp. Act §§ 3.02 & cmt., 6.40 & cmt., 8.01 & cmt., and 8.25 & cmt. (American Bar Association 1987) (stating that investment powers may be delegated, but board members must exercise care in both the delegation to and supervision of the outsider); Unif. Management of Institutional Funds Act § 5 (1972) (permitting delegation to agents of the investment of institutional funds).
E. Constitutional Problems

Would the elimination of legal enforcement of dead hand control violate constitutional restrictions on the taking of private property\textsuperscript{149} or the impairment of contracts?\textsuperscript{150} Here we must distinguish between prospective and retroactive application. The latter poses the only real problems, and they can be readily overcome.

Retroactive elimination of dead hand control implicates the Takings Clause because it would technically deprive donors and their successors in interest of reversionary rights that may become possessory under present law if the donor's original charitable purpose fails.\textsuperscript{151} Even if this deprivation were held to be a taking requiring just compensation, that would not impose much of an impediment to the reform suggested here. The likely value of these reversionary interests would be low, given the remote prospect of their ever becoming possessory,\textsuperscript{152} and could thus be acquired in eminent domain or analogous proceedings at little cost.\textsuperscript{153}

The present scope of the Contracts Clause is less certain than that of the Takings Clause,\textsuperscript{154} but should pose no insurmountable hurdles to the

\textsuperscript{149.} U.S. Const. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

\textsuperscript{150.} U.S. Const. art. I, § 10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ... ").

\textsuperscript{151.} Scott and Fratcher deal dismissively with Takings Clause objections to traditional cy pres reform: "The legislature has power, of course, by general acts to liberalize the doctrine of cy pres, applicable to all trusts, whether created before or after the enactment." SCOTT & FRATCHER, supra note 10, at 556 n.7. But what I am suggesting is much farther-reaching than what they have in mind. Compare Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12-13 (1990) (recognizing that reversionary interests in abandoned railroad rights of way may be protected by the Takings Clause) with Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 642 (1819) (holding that donors' "descendants may take no interest in the preservation of" the funds given to the college).

\textsuperscript{152.} This is all the more true now that the federal tax laws forbid the retaining of partial interests in donated property except in narrowly circumscribed circumstances, including when the likelihood of reversion is remote. Treas. Reg. § 1.170A-1(e) (1992).

\textsuperscript{153.} There should be no problem with the constitutional requirement that takings of private property be for a "public use"; that requirement is now deemed coterminous with the states' very broad police powers. See Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984). Moreover, special legislation could perhaps empower charities themselves to exercise this power. The legislature may constitutionally delegate their power of eminent domain to private corporations and individuals. See JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 3.21[2] (rev. 3d ed. 1992) [hereinafter NICHOLS']. This would further minimize the role of state agencies in the management of charitable assets in the post-cy pres world. For the proposition that delegation of the power of eminent domain to private corporations is well settled law, see Boom Co. v. Patterson, 98 U.S. 403, 406 (1878), and NICHOLS', supra, § 3.21[2].

The retroactive elimination of dead hand control. Despite the Contracts Clause's explicit wording and obvious intent—preventing states from impairing the obligations of contracts between private parties—it is now seldom enforced unless the state itself is a party to the contract allegedly impaired. That, of course, could be said to be true of charitable gifts: the state perpetually enforces donor wishes as to the disposition of property, but only for public purposes. By removing the perpetual enforcement but letting the property remain in public use, the state would avoid the burden of its bargain while retaining the benefit.

As with the Takings Clause, however, this reneging on the state's part should be redressable by paying compensation. The Contracts Clause has long been held to permit changing the remedies available for a contract's enforcement, as opposed to the substantive terms of the contract itself. Although at some point changing remedies becomes indistinguishable from changing substantive provisions, this is hardly what is happening if full compensation is being paid donors or their successors in interest. Thus, as with the Takings Clause, the worst case scenario would be that the cy pres doctrine could be abolished retroactively, but only if frustrated pre-abolition donors or their successors were compensated.

The prospective elimination of legal enforcement of restrictions made on future gifts should present no takings problem at all. Present property owners would be left with far more latitude in the use and disposition of their property than the Supreme Court has held in other contexts to be necessary to withstand a Takings Clause attack. With respect to the Contracts Clause, prospective application would similarly pose no problem.

### VII. Conclusion

Reformers have long argued that the doctrine of cy pres is due for an overhaul. But their insistence on staying within the existing bipolar framework, balancing sacrosanct donor direction against presumptively state-determined conceptions of the public good, has limited the scope of reform to marginal tinkerings. Meanwhile the notion of charity has

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155. Id.
156. Id. at 615-17.
157. See, e.g., Andrus v. Allard, 444 U.S. 51, 66 (1979) (holding that the prohibition of the sale of Native American artifacts made from the feathers of endangered eagles is not a taking of the artifacts because their owners were left with other rights, including the right to possess and to transfer gratuitously).
158. TRIBE, supra note 154, at 614-15.
evolved away from a monolithic concept of the public good and toward an appreciation of the virtues of pluralism and diversity. The idea of state-determined performance standards is at odds with this evolution. At the same time, the need for charity to respond rapidly to social change has become increasingly clear; the tradition of rigid dead hand control is in conflict with this need. If we come to see charities as living altruistic communities acting in their own right, rather than as servants of two competing masters, individual donors on the one hand and the state on the other, the traditional doctrine of cy pres will have no role.

Or perhaps cy pres will have one final, paradoxical role—presiding over its own demise. Cy pres, formerly applied on a piecemeal basis to rid particular charities of outworn restrictions, could finally work to free the entire charitable sector from two constraints that have outlived their utility: dead hand control and statist definition of the public good. Cy pres, the ancient source of incremental charitable reform, thus contains the seeds, not so much of its own destruction, as of its own transcendence.
In an earlier piece I suggested that all truly nonprofit organizations, with the sole exception of mutual benefit organizations, embody an essential element of altruism, and that this element of altruism is a sufficient criterion of charitable status for purposes of federal income tax exemption. Part of my purpose in thus liberalizing the definition of charity was (with apologies to Chairman Mao) to let a thousand flowers bloom, to permit a broader and healthier range of experimentation in the field of charity than existing law allows.

This proposal posed a problem that I noted, but did not address at length, in the final pages of my earlier paper: What about organizations that are devoted to purposes that are not illegal, but are silly or frivolous or stupid? “It could be argued,” I admitted there, that the permissiveness of the altruism theory threatens to . . . permit a luxuriant crop of useless, if not noxious, weeds to grow in the garden of charity. This problem is compounded, so the argument would run, by the fact that the lives of charities are unlimited; mutant charities should be chopped down before they take root, not allowed to go on bearing their insipid—or baneful—fruit forever.

In response, I suggested that the vices of eccentricity would, to my mind at least, seldom overshadow the virtues of diversity. I concluded that traditional cy pres doctrine might apply as an ultimate control mechanism, but I had deep misgivings on that score:

As the list of useless purposes to be weeded out grows longer, it threatens to become a requirement that only certain favored purposes be allowed to thrive. Once the shears are in hand, all it takes is an overzealous gardener to carve the rambling vegetation of a country retreat into the strictly classical geometry of the topiary at Versailles.

The problem, I now realize, was a false dilemma. For in trimming the outer borders of charity, we need not choose between the rigor mortised hands of eccentric donors and the long (and perhaps overly energetic) arms of the state. In this Article I explore a third option, placing the fate of charitable organizations’ assets squarely in the organizations’ own hands—helping hands, I earlier hoped they would be. Thus it may be less that this discussion is an appendix to the present Article, and more that the present Article is an extended footnote to my altruism piece. I should note, however, that virtually all of the criticism of re-

159. Atkinson, Altruism, supra note 93, at 618, 630-32.
160. Id. at 636.
161. Id. at 637.
162. Id. at 638.
formed cy pres theory that I set out in Parts III and IV of this paper apply whether you accept my expansive, altruism theory of charity or the narrower, traditional theory. Rather than insist that the world be seen from my own admittedly idiosyncratic perspective, I deal almost exclusively in this Article with the standard definition of charity, amorphous and ultimately unsatisfactory though I and others believe it to be. The broader definition of charity onto which my proposal for cy pres reform might be grafted is, accordingly, buried in this appendix and in footnotes.

163. See sources cited supra note 95.