

Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment

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The cat is out of the bag: Donors are fast discovering what was once a well-kept secret in the philanthropic sector—that a gift to public charity donated for a specific purpose and restricted to that purpose is often used by the charity for its general operations or applied to other uses not intended by the donor. In most states, the Attorney General is the agent for enforcement of such gifts (an arrangement that recognizes the public's role as the ultimate beneficiary of any public charity). But Attorney General offices are beset with difficulties that make it virtually impossible to monitor how each charity administers its restricted gifts, leaving the charities, for the most part, on the honor system. Donors—whose restricted gifts play a vital role in the charitable sector as a source not only of funding but also mission—are increasingly aware that their restrictions are

ignored. Frustrated by lax enforcement mechanisms, donors (and their families) are pursuing standing to enforce their restrictions.

In *Smithers v. St. Luke's/Roosevelt Hospital*¹, the donor's widow succeeded in obtaining standing, even after the Attorney General had entered into a settlement agreement with the Hospital. Donors with their restricted gifts (often representing their personal beliefs and social agenda) keep the charitable sector vital and ensure its diversity. Such restrictions exist in perpetuity, however, and can result in an effective privatization of a charity's mission, especially if the charity is not free to interpret a restriction in response to change. Even though such restrictions are legally binding on the charity, the Attorney General in the exercise of her prosecutorial discretion can effectively allow certain restrictions to lapse, thus preserving the autonomy of the charity. Thus, *Smithers* has enormous implications for the autonomy of charitable organizations and their capacity to respond independently to change.

Not only is the cat out of the bag, but the genie is also out of the bottle. To appreciate the significance of the holding in *Smithers*, we must see it in the context of a larger movement by donors who are seeking not only standing, but all sorts of empowerment with respect to recipient organizations. The 1990s saw the advent of venture philanthropy. A new breed of philanthropist aimed to apply the practices of venture capitalism to charitable giving, with the idea being that the donor would "invest" in a charitable project that promised a high "social return." The object of the venture philanthropist was not simply to write a check, however. This new type of donor wanted to stick around, offering strategic advice to make certain the project came to fruition. Charities were to be accountable to the donor for delivering measured results (although the rigorous metrics necessary to gauge success in this area were never forthcoming). Organizations or projects that did not measure up were to be disqualified for grants in the future.² Some have called this "engaged grant-making;" others, sheer hubris, noting that charities need money, not advice from people with little experience in the charitable arena or with a particular type of program.³

Brink Smithers, the donor of the restricted gift at the center of *Smithers*⁴, made the first installment of his gift to establish the Smithers Center at St. Luke's/Roosevelt Hospital long before the

1. 723 N.Y.S.2d 426, 427 (N.Y. App. Div. 2001).

2. Geoffrey Colvin, *The Gift of Arrogance*, FORTUNE, Dec. 24, 2001, at 50.

3. *Id.*

4. *Last of the Giants Dies at 86; R. Brinkley Smithers Leaves Legacy of Hope*, THE ALCOHOLISM REPORT, Jan. 1994, at 1.

advent of venture philanthropy. As the terms of his gift evidence, however, Smithers sought not only to establish a new program at the Hospital, but (like the venture philanthropists later) he also wanted to play a significant role in that program going forward. Smithers was not without expertise—at least of a sort. An extremely wealthy man, Smithers was also a lifelong alcoholic. Not interested in merely contributing money to a cause, Smithers set out to promote an alcoholism treatment modality borne of his own experience in recovery. Smithers had a revolutionary idea. In the 1950s, when Smithers began his campaign, the only program with any track record for success in assisting alcoholics was the twelve-step program offered by Alcoholics Anonymous (“AA”), an approach with origins in religious revivalism.⁵ AA worked for some people, but not for others. In Smithers’s view, alcoholism was a disease,⁶ a complex condition with multiple causes—medical, psychological, and environmental. In disseminating the disease-concept of alcoholism, Smithers affected a revolution in the treatment of alcoholism and brought about the professionalization of the field.

In 1971 Smithers pledged \$10 million to Roosevelt Hospital in New York City (which later merged with St. Luke’s Hospital to form St. Luke’s/Roosevelt Hospital) to establish an alcohol rehabilitation center. In his initial letter of intent, Smithers required, among other things, that detailed project plans and staff appointments have his approval, ensuring himself as donor a significant role in the program going forward. It is worth noting that Smithers, a man whose object was to professionalize the treatment of alcoholism, reserved for himself—a person with no professional qualifications in the field—an active role in the program. It is also noteworthy that the Hospital agreed to allow a non-medical person such control over what was to be a medical treatment modality.⁷

Going forward, Smithers’s interest and active involvement with the program did not wane. However, in-patient programs like the

5. “Twelve-steps” as a treatment modality retains traces of AA’s roots in the Oxford group, the post-World War I movement of evangelical Christian renewal. Professionals in the field still recognize that the spiritual quality is a crucial element such that recovery happens in a similar way to a conversion process. Trish Hall, *New Way to Treat Alcoholism Discards Spirituality of A.A.*, N.Y. TIMES, Dec. 24, 1990, at A1.

6. Plaintiff’s Complaint at 4, *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98); Michael Unge, *Making Her Pitch: Darryl Strawberry’s Ongoing Battle with Substance Abuse Is Just One of the Causes Adele Smithers Has Made Her Own*, NEWSDAY, Aug. 15, 1999, (Life).

7. Mr. Smithers’s continued involvement is an important point in his widow’s complaint. Plaintiff’s Complaint at 10, *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98).

Smithers Center were coming under increasing pressure from the penetration of managed care as well as Medicaid budget cuts. When the Hospital began to contemplate changes in the program (particularly the sale of a mansion on the Upper Eastside of Manhattan which served as an in-patient facility), Smithers resisted, claiming the mansion (among other proposed changes) was integral to the program under the terms of his gift.

The mansion was not sold during Smithers's lifetime, but relations between him and the Hospital continued to ebb and flow as they argued about the meaning of his restrictions. After his death, in 1995, when the Hospital announced its intention to proceed with the sale forthwith, Smithers's widow began pressing the Attorney General to prevent it. When she was not satisfied with his response, she pursued (and was granted) standing as administratrix of her husband's estate. In 2003, the Hospital settled with her out of court, agreeing to cease using the Smithers name in connection with its alcoholism treatment program and returning a large portion of her husband's gift.

Individual donors like Brink Smithers play a crucial role with respect to public charities. While the initiative to create a public charity (or to develop a new program or project within an existing charity) can come from a variety of places—private individuals, foundations, other public charities, for-profit corporations, government agencies, and (with respect to existing charities) professional staff within the charitable organization—the importance of individual donors cannot be underestimated. Of the approximately \$240 billion contributed to charity in 2003, \$179.36 billion (almost 75 percent) came from individuals—\$227 billion if you include bequests and foundations (almost 94 percent).⁸

Restricted gifts are particularly important, however. Because there is no legal requirement that public charities report all restricted gifts, it is difficult to know precisely what percentage of gifts is restricted.⁹ There are significant indications, however, that a large

8. AMERICAN ASSOCIATION OF FUNDRAISING COUNSEL, *GIVING USA 2004: Chart 2003 by Source of Contribution*, at http://www.aafc.org/about_aafc/bysourceof66.html.

9. There is much data concerning the types of activities that charitable gifts support—education, the arts, religion, etc. *See, e.g.*, JOSEFINA ATIENZA & LESLIE MARINO, *FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES* (2004); *GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2002* (Ann E. Kaplan ed., 48th ed. 2003). This data does not indicate, however, what percentage of such gifts is actually legally restricted. Furthermore, the author has discovered no organization that assembles or has assembled a comprehensive database of restricted gifts, either all of them or gifts in excess of a certain amount. *See, e.g.*, The Foundation Center's website at http://fdncenter.org/fc_stats/index.html; The Urban Institute's website at <http://www.urban.org>; The National Center for Charitable Statistics at

percentage of major gifts (that is, those over \$10 million) is restricted in some way.¹⁰ Not only are restricted gifts important because of their size, but a restricted gift—especially if it is (like the gift in *Smithers*) restricted as to mission—is much more than a source of funding: it represents a creative spark in the form of a new mission or a new interpretation of an old one coming from outside the charitable organization. Nevertheless, over time restricted gifts, which are perpetual, can have a significant effect on a charity's ability to respond to change. Endowed programs once cutting-edge become anachronistic, while other needs arise only to go unmet. The *Smithers* holding effectively casts in relief the role of donors as funders and sources of mission against the charity as it tries to keep its programs relevant. As the law currently stands, if a charity believes a restriction has become an encumbrance on its mission (broadly conceived), the charity has a choice of undertaking a lengthy (and likely unsuccessful) court proceeding to have the restriction removed, or simply ignoring it (in ways small, perhaps in ways large), trusting the Attorney General to turn a blind eye. Donor standing potentially forecloses the latter avenue and forces the charity into court. *Smithers* begs us to consider the role and legal rights of the donor, while we remain mindful of current legal mechanisms that make for—or frustrate—the autonomy of the charity.

In considering donor standing, there is one additional, quite significant consideration. Public charity occupies a large part of what is termed “civil society.” Recent studies argue that, while America was once the *exemplar par excellence* of a vital civil society (thought to be the secret of our healthy democracy), participation in all areas of American life now exhibits a marked decline.¹¹ Thus, it can be argued, given the fragile state of civil society, a liberalization of the standing rules is an important incentive to continued participation by donors—

<http://nccs.urban.org>; American Association of Fund-Raising Counsel, Trust for Philanthropy at <http://www.aafc.org>; and The Independent Sector at <http://www.independentsector.org>).

10. The biweekly *Chronicle of Philanthropy* routinely reports on major gifts in its regular column, “Gifts and Grants.” See, e.g., *\$50 million Awarded to Hospital; Other Gifts*, CHRON. OF PHILANTHROPY, Apr. 28, 2005, at 13; *\$40 Million Committed for Scholarships; Other Gifts*, CHRON. OF PHILANTHROPY, Feb. 3, 2005, at 10. A perusal of this column across of a number of issues of the journal suggests that a major gift (in excess of \$1 million) that is unrestricted is an exceptional occurrence. Indeed, if an unrestricted gift in excess of \$10 million often appears to be sufficiently noteworthy to justify mention in the table of contents of the issue. See, e.g., *U. of Notre Dame Gets \$40 Million; Other Gifts*, CHRON. OF PHILANTHROPY, Feb. 17, 2005, at 12; *Computer Entrepenuer Gives \$40 Million; Other Gifts*, CHRON. OF PHILANTHROPY, Sept. 30, 2004, at 10; Community of Christ, a religious denomination with headquarters in Missouri, has received an unrestricted donation of \$40 million; other recent gifts to nonprofit organizations and institutions, CHRON. OF PHILANTHROPY, Jan. 20, 2005.

11. ROBERT D. PUTNAM, *BOWLING ALONE* 27 (2000).

and a boon to the vitality of civil society. However, other commentators go further than merely noting a decline in participation in American society to point out that, as civil society has atrophied, institutions once at its center have become privatized. Viewed in this light, the advent of donor standing—if the result is to strengthen the hand of a private party vis-à-vis the charity—has a less salubrious import. Therefore, if the revitalization of civil society would seem to call for donor empowerment, other considerations would suggest that commensurate changes in certain doctrines governing fiduciary duty are also required so that charities have more autonomy in interpreting restrictions over time. If a mission is to be truly public, it must at some point transcend the person whose private vision was its source. By the same token, the donor in pursuit of a legacy must come to appreciate that if her charitable vision is to survive in any guise, it must over time engage or enlist the vision of other contributors, thereby potentially become something larger than itself.

A final introductory point: For the last twenty or so years, starting probably with Henry Hansmann's groundbreaking work on nonprofit organizations,¹² there have been calls for expanded standing in the charitable sector across many causes of action.¹³ It is important to note in this regard that the focus of this Article is *donor* standing. Further, no effort is made here to argue for standing for all donors—of gifts restricted and unrestricted, large and small. The examination here is exclusively on donors of restricted gifts. Finally, neither is the point here to argue that donors—even those of restricted gifts—should have standing to enforce a host of fiduciary duties, effectively making these donors into private attorneys general with all the supervisory and regulatory authority that inheres in that office. The topic at hand is the right of a donor to enforce a restriction imposed on the use of her own gift and to hold the charity accountable with respect to those fiduciary duties implicated by her restriction. Indeed, I am particularly interested in gifts like those made by Brink Smithers, those that create or endorse particular projects and programs and are thus the source of charitable mission. Furthermore, I am not interested in gifts that are restricted only in terms of the way they can be invested. Setting limits on investing differs from an affirmative, direct endorsement of a program or project. The question of standing

12. Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835 (1980).

13. See generally Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655 (1998).

for such donors (whether or not justifiable) does not have the same import for civil society.¹⁴

Part I of this Article introduces the concept of civil society and the role it plays in a healthy democracy. Information drawn from recent studies shows its erosion (including the decline of philanthropic activity). This data suggests that American civil society is now in a state of crisis with attendant privatization of a sphere that was once, in the words of one commentator, both voluntary and public.¹⁵

Part II treats the concept of a restricted gift, with special attention to its perpetual nature. Part III centers on R Brinkley Smithers, a private individual with a vision of treating a public problem—alcoholism. Through philanthropic endeavors, including a restricted gift to St. Luke's/Roosevelt Hospital (the gift at the center of *Smithers*), Smithers revolutionized the treatment of alcoholism. This Part also chronicles the tensions that arose between Smithers and the Hospital when the program needed to be rethought in light of external developments.

Part IV locates public charity in civil society, focusing on charitable mission per se, especially as it arises from the vision of private individuals (this vision often articulated in the form of restricted gifts). This Part also addresses the very limited extent to which the common law and the Internal Revenue Code frame the donor's choice of mission. Also in this Part, I examine fiduciary duty with respect to charitable mission and the limited options charities have when an endowed program must be rethought or abandoned. I am interested in the role of the charitable fiduciary (as provided in the common law and uniform acts) in realizing purposes supplied by private donors. Finally, I examine the part played by the attorney general as the traditional enforcer of charitable purposes, a legal role that recognizes the public as the ultimate beneficiary of any public charity.

14. I am also not interested in "naming gifts" per se. Admittedly, the charity's agreement to retain a donor's name on a building or a project can go hand-in-hand with an agreement to apply a gift to a particular mission (and a desire on the part of a donor that a gift should be so applied). I am interested in restrictions as to mission as distinct from naming, however, because, while restrictions as to mission may originate in individual vision, they arguably speak to a larger public object than the mere desire to ensure immortality for a name. Thus we will set aside here the problems that can ensue from an agreement to retain a donor's name on a particular building or to associate it with a particular project. For a discussion of problems with naming donations, see generally John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375 (2005).

15. Michael Ignatieff, *On Civil Society: Why Eastern Europe's Revolutions Could Succeed*, FOREIGN AFFAIRS, Mar.-Apr. 1995, at 128-136.

Part V considers the rights of donors to enforce their restricted gifts under the common law and uniform acts (setting the stage to consider the holding in *Smithers*). This Part begins by considering the normative nature of standing decisions, even though such decisions are, strictly speaking, concerned with who should bring a claim and not with the merits of it.

Part VI examines in detail *Smithers*, in which the New York Appellate Division granted Brink Smithers's widow standing. The opinion provides a scathing criticism of the part played throughout the entire matter by the New York Attorney General.

Part VII, the conclusion, argues that donors whose restricted gifts are crucial to the vitality and diversity of the charitable sector should have standing to enforce those gifts, especially now that donors are increasingly aware that such gifts are often misapplied. This Part begins by looking at certain legal doctrines (treated earlier in this Article) that might bolster the rather fact-specific holding in *Smithers*. But further, this Part also touches upon policy considerations drawn from civil society that, while justifying a liberalization of the rules for standing where donors are concerned, also argue for changes in the doctrines governing fiduciary duty to better provide for the autonomy of charitable organizations.

I. THE CRISIS OF CIVIL SOCIETY

A. Overview

In the last ten or fifteen years, civil society—the seedbed for the cultivation of democratic citizenship—has been much studied and discussed among political theorists and legal scholars. The concept (which goes back at least to the Italian Renaissance city-states) returned to political parlance more recently in the early 1990s when Eastern European activists turned to it to develop an infrastructure for dissident discussion. As part and parcel of nation building, they set about to create a civil society¹⁶—that is, a loose framework of associations and activities that would allow ordinary people to engage one another voluntarily around matters relevant and important to the commonweal, but only indirectly related to governance or the state.

16. *Id.* at 275

Civil society—a “domain whose middling terms mediate the stark opposition of state and private sectors,”¹⁷ “a space for [citizen] activity that is both voluntary and public”¹⁸—is generally thought to comprise those activities people undertake as they go about their daily business. It includes attending church or synagogue, contributing to a charity, volunteering at a hospital or in a tutoring service, serving in the parent-teacher association, or taking part in a volunteer fire department. These are activities that neither involve the government (voting or jury service, for example) nor commerce (working or shopping).¹⁹ Even though the activities of civil society are voluntary and thus “private,” they aim at modes of action founded in common ground and consensus and thus acquire great political importance—especially in a democracy.²⁰

Indeed, it has long been recognized that, in its pursuit of common ground and consensus, civil society is crucial to democracy. And the American civil society—the American democracy—was, in one age, thought to be the exemplar. Looking for the underpinnings of America’s successful experiment in self-governance, Alexis de Tocqueville in *Democracy in America* heaped encomiums on the young nation as he observed that “Americans of all ages, all stations in life, and all types of disposition are always forming associations.” The often quoted passage continues:²¹

There are not only commercial and industrial associations in which all take part, but others of a thousand different types— religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . .if [Americans] want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association.

Moreover, Tocqueville recognized that associative behavior was a quintessentially democratic activity. In tackling a civic problem, the aristocrat of that era had at hand a ready-made retinue to call upon— “a permanent and enforced association composed of all those whom he makes help in the execution of his designs.” Given the independence and equality of people in a democracy, however, to achieve any social undertaking, individuals had to come together and voluntarily unite in a plan of action.²² In a democracy, citizens would be “helpless if

17. *Id.* at 269

18. *Id.*

19. Ralf Dahrendorf has described civil society as comprising “the associations in which we conduct our lives, and that owe their existence to our needs and initiatives rather than to the state.” Ralf Dahrendorf, *A Precarious Balance: Economic Opportunity, Civil Society, and Political Liberty*, in THE ESSENTIAL COMMUNITARIAN READER 73, 81 (Amitai Etzioni ed., 1998).

20. Ignatieff, *supra* note 15, at 128-36.

21. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 517 (Penguin Books 2001) (1956).

22. *Id.* at 513-17.

they did not learn to help each other voluntarily.”²³ In short, “[a]mong democratic peoples associations must take the place of the powerful private persons whom equality of conditions has eliminated.”²⁴

Tocqueville’s comparison is provocative, but the larger, more fundamental question is how associative behavior facilitates the functioning of the democratic state. Tocqueville himself finally turns to the issue, claiming that the basic willingness to associate, so essential to problem-solving in a democracy, develops upon frequent use. Civic activity—that is, activity through extra-political associations—encourages activity that is purely political: “Men chance to have a common interest in a certain matter. It may be a trading enterprise to direct or an industrial undertaking to bring to fruition; those concerned meet and combine; little by little in this way they get used to the idea of association.”²⁵ In short, cooperation facilitates trust and, as new problems arise, in turn facilitates further cooperation.²⁶

As important as civil society might have been as an underpinning of the democratic state in the past, it is even more important in a contemporary democracy, especially modern day America, which is large, anonymous, and constantly changing. The claim is made, however, that in America civil society has essentially vanished. However exemplary the associative tendencies of the early nineteenth century Americans, civil society in America today is waning. Furthermore, as these mediating institutions have eroded, what has been left behind (so the argument continues) are the two overgrown, polar extremes—a gargantuan government (which few trust) and an anarchic market fueled by the greed of isolated individuals.²⁷ This is a serious problem.

23. *Id.* at 514.

24. *Id.* at 516.

25. *Id.* at 517.

26. Stephen Macedo, *Community, Diversity, and Civic Education: Toward a Liberal Political Science of Group Life*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 240 (Ellen F. Paul et al. eds., 1996). Civil society can have a dark side, however. Not only does civil society potentially create a venue for organizations (such as the Ku Klux Klan or Nazi Party) that foster bigotry or other antidemocratic values, but some commentators note that contemporary civil society tends to discourage participation by political moderates and draw forth those with radical and uncompromising views. MORRIS P. FIORINA, *EXTREME VOICES: A DARK SIDE OF CIVIC ENGAGEMENT*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 395, 395-423; YAEL TAMIR, *Resisting the Civic Sphere*, in *FREEDOM OF ASSOCIATION* 214, 219-20 (Amy Gutman ed., 1998). At least one rejoinder to this objection is that the radicalization of contemporary civil society is an aspect of its decline. Benjamin Barber, *An American Civic Forum: Civil Society Between Market Individuals and the Political Community*, in *THE COMMUNITARIAN CHALLENGE TO LIBERALISM* 269, 269 (Ellen Frankel Paul et al. eds., 1996).

27. Barber, *supra* note 26, at 269.

Robert Putnam, in *Bowling Alone*²⁸, has documented that in the last third of the twentieth century, Americans have indeed lost their penchant for forming associations, their once native inclination to get involved. Putnam shows the decline in America of what he calls “social capital,” the willingness to cooperate—to join. This erosion is serious enough—is consequential enough—to be seen as a watershed in American history.

For the first sixty or seventy years of the twentieth century, Americans were drawn into deeper and deeper engagement in their communities. A few decades ago, however, this trend reversed.²⁹ In discussions of participation, it is now a commonplace to note that voting is down. But participation in everything else, from parent-teacher associations to bowling leagues, is also down by at least 40 and 50 percent.

Putnam’s insight is that social networks, even at their most informal, are a form of capital, like physical capital or human capital. Like tools and training that enhance individual economic productivity, social capital has powerful, exponential downstream social effects. Social capital creates social value. The social networks and the norms of reciprocity involved in engagement of virtually any stripe fuel engagement in other spheres of civil society. People who attend parent-teacher association meetings are more likely to contribute to charity; people who contribute to charity are more likely to vote and to join the volunteer fire department, and on and on. In that sense social capital is closely related to what some have called “civic virtue.” Understanding such activities as a form of “social capital calls

28. Putnam, *supra* note 11.

29. PUTNAM, *supra* note 11, at 27. Putnam’s claims have spawned a veritable industry of social scientists pressing his data and otherwise challenging his claims. *See generally* PETER F. DRUCKER, *THE NEW REALITIES: IN GOVERNMENT AND POLITICS/ IN ECONOMICS AND BUSINESS/ IN SOCIETY AND WORLD VIEW* (1989); EVERT CARLL LADD, *THE LADD REPORT* (1999). Ladd points out (among other things) that while the Elks and Boy Scouts are less prominent than they were fifty years ago, the Sierra Club is much more so. Putnam has not been undone by his critics, however. While he concedes that new mass-membership organizations such as the Sierra Club, the American Association of Retired Persons, and the National Organization of Women have political impact, these organizations are comparatively deficient to more traditional organizations especially when it comes to generating social connections among the rank and file important to fostering an engaged citizenry. According to Putnam, the majority of members of these new mass organizations do little more than pay dues and read the occasional newsletter. Robert D. Putnam, *BOWLING ALONE, REVISITED, THE RESPONSIVE COMMUNITY* 18-33 (Spring 1995); *see also* Theda Skocpol, *Recent Transformations in Civic Life, in CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 461-509 (Theda Skocpol & Morris Fiorina eds., 1999) (placing Putnam’s observations in a larger context of (among other things) changing race relations and gender roles but echoing his concern that mass organizations tend to foster a passive citizenry).

attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations.”³⁰

The erosion of social networks and, most importantly, the norms of reciprocity that inhere in civil society have disastrous consequences for democracy. Activities that would otherwise aim at modes of action founded in common ground and consensus fall back into the private sector where they remain private, perhaps even idiosyncratic, but in all events unmediated by common concerns or public norms.³¹

B. The Decline in Philanthropic Activity.

Each year, articles in *The Chronicle of Philanthropy* and other such publications announce new records for charitable dollars raised. There is no doubt that total giving in current dollars has risen steadily for as long as records have been kept.³²

If we compare our giving to our income, however, trends are dismaying. In the 1990s Americans donated a smaller share of their personal income to charity than at any time since the 1940s.³³ In the last decades of the twentieth century, despite increasing prosperity, the generosity of the average American declined significantly. Because real personal income is now more than twice that of the generation that came of age in the 1940s, Americans today are, in absolute dollars, contributing more than Americans did then.³⁴ In relative terms, however, spending for others has lagged well behind. The long-term trends in personal philanthropy thus bespeak the evolution of other aspects of American civic engagement.³⁵

The argument could be made, however, that charitable giving is not the sort of activity at the heart of civil society. Social capital refers to networks of lateral relationships—what Putnam calls “doing *with* other people” as opposed to “doing *for* other people. Altruism, the claim could be made, is not part of social capital. Putnam does not discount it, however. “As an empirical matter,” he says, “social networks provide the channels through which we recruit one another for good deeds, and social networks foster norms of reciprocity that encourage attention to others’ welfare.”³⁶ Thus “volunteering and

30. *Id.* at 19.

31. Barber, *supra* note 26, at 271-72.

32. PUTNAM, *supra* note 11, at 122.

33. *Id.* at 122-23.

34. *Id.* at 126.

35. *Id.* at 123.

36. *Id.* at 116-17.

philanthropy and even spontaneous “helping” are all strongly predicted by civic engagement.”

In addition, philanthropy has a unique resonance in American civic culture. Both philanthropy and volunteering are roughly twice as common among Americans as among the citizens of other countries. The roots of this generosity are arguably to be found at the end of the nineteenth century when helping the less fortunate became part of civic duty and a new rationale for altruism was born. In his 1889 essay “The Gospel of Wealth,” Andrew Carnegie proclaimed great wealth a sacred trust, a stewardship to be administered by its possessor for the good of the community. Thus giving time and money to help others is arguably a peculiarly American trait.³⁷

Finally, the claim has been made that a certain kind of civic imagination is the single most important mark of the effective citizen and that indeed it is the purpose of civil society to foster this imagination. Through civic imagination empathy develops and private interests then stretch to encompass the interests of others. Civic imagination allows us to see that the wants and needs of others are similar to our own. It permits a private self to empathize with the interests of others, not as an act of altruism but as a consequence of self-interest imaginatively reconstructed as common interest.³⁸ In this respect we can return to Tocqueville and his observation that

Americans enjoy explaining almost every act of their lives on the principle of self-interest properly understood. It gives them great pleasure to point out how an enlightened self-love continually leads them to help one another and disposes them freely to give part of their time and wealth for the good of the state.³⁹

II. RESTRICTED GIFTS

A. Overview

Many gifts to charity are not restricted. We have all dropped a quarter in the Salvation Army pot at Christmastime or a dollar or two in the collection plate at a house of worship. These gifts—with no conditions attached—go toward the general operating expenses of the charity to be used as those in charge see fit, for any purpose consistent with the charity’s mission (as described in its constitutive documents).

Many gifts are restricted, however. Such gifts are significant in the charitable sector not only because many of them are often quite

37. *Id.* at 117.

38. Barber, *supra* note 26, at 279.

39. PUTNAM, *supra* note 11, at 117.

sizeable, but because the restriction—if it pertains to mission (and it is gifts that restrict or influence mission that concern us here⁴⁰)—contains an idea emanating from a private individual with respect to existing or future charitable programs or projects. The gift can be a founder’s gift—which means that it funds a new charitable organization with its own mission. Or, it can be a gift to an existing charitable organization, either to fund an existing mission or project, or to fund a new mission compatible with the charity’s overall purposes (like the Smithers gift to St. Luke’s/Roosevelt Hospital). In all events, however, a restriction attached to a gift requires that the charity segregate the donated funds in its financial records and employ them only in ways consistent with the donor’s directions.

Sometimes a charity solicits a gift for a particular purpose or project, but whether the charity approaches the donor or the donor approaches the charity, restricted gifts are particularly appealing to people who want to advance deeply-held personal beliefs or social agenda. Such donors play a vital role in ensuring the continued diversity of the voluntary sector and the timeliness of its various missions. When a donor creates a new organization, she is likely to do so because she wants to pursue programs and projects yet to be undertaken by another charity. When a donor makes a restricted gift to an existing charity, if the gift is made in support of an existing project, it represents a continuing endorsement of that project from an individual outside the organization; if it is to support a new project—especially one which emanates from the donor—it is a creative spark coming into the institution from the outside that serves to expand and enrich the charity’s mission.

B. In Perpetuity

Validation and innovation notwithstanding, restricted gifts can present charities with a problem as time marches on. The effectiveness of the voluntary sector depends in large part on the ability of charities to respond to the changing economic and social needs of society. Endowed programs and projects that are groundbreaking in one era can become ridiculous or even bizarre in another.⁴¹

40. A donor may also make an “endowment gift,” a restriction that limits the charity to spending only the income from the gift. (Expenditures of income may or may not in turn be limited to a particular purpose.) Some endowment gifts may also limit the ways that funds can be invested in the future. Note, however, that I am not concerned with endowment gifts here.

41. Also when charities confront difficult times and unrestricted funds are not sufficient to support the organization’s other activities, trustees, directors, or others in charge are tempted to “borrow” from well-endowed restricted funds to avoid eliminating other programs. Michael M.

Restrictions, once accepted by a charity, remain in perpetuity, however dated and ineffectual the endowed programs may have become. While many interests in the law must terminate in some finite period of time, there is an exception for interests that are charitable. In the same way a charitable organization can go on forever, so do restrictions placed on the use of funds.⁴² Thus, as time marches on, a restricted gift often functions vis-à-vis the charity as a “dead hand.”

While the litigation concerning the Buck Trust and the Barnes Foundation, respectively, are the current favorites of commentators who would decry the wastefulness of charitable assets now misapplied due to changed circumstances, the example of Smithers is also at hand. By the 1990s, a comprehensive program that had once revolutionized the treatment of alcoholism arguably needed to be rethought. Among other issues, managed care had intervened to render an in-patient alcohol treatment facility economically problematic. Furthermore, by then, alcoholics were likely to be cross-addicted to other drugs so the Smithers mission needed to expand to treat other forms of addiction. Nevertheless, for the Smithers Center, as for the Buck Trust and the Barnes Foundation, once accepted by the charity, the restrictions were binding in perpetuity.

1. Cy pres and Administrative Deviation

Thus, when a charity would like to free restricted funds for other projects and purposes, the avenues of legal relief are few. The charity can pursue cy pres relief or relief under the closely allied doctrine of administrative deviation. But as will be more fully discussed below,⁴³ cy pres is a narrow doctrine providing only a modest remedy and administrative deviation has an even more limited application. Cy pres and administrative deviation are saving devices, and what is saved in either case is donor intent.

Schmidt & Taylor T. Pollock, *Modern Tomb Raiders: Nonprofit Organizations' Impermissible Use of Restricted Funds*, COLO. LAW., Sept. 2001, at 57.

42. Note that the directors of charitable corporations in most states have more latitude to change the corporation's mission whereas trustees of a charitable trust cannot. But restricted gifts to a charitable entity—whether formed as trust or as a corporation—are governed by law of trusts so that restricted gifts to a charitable corporation place the directors in the role of trustee with respect to those funds and thus the directors operate under the same constraints with respect to a restricted gift as would the trustees of a trust. “Ordinarily the principles and rules applicable to charitable trusts are applicable to [gifts to] charitable corporations.” AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 348.1 (4th ed. 1988). This paper thus makes frequent reference to the law of trusts, including both the *Restatement 3d of Trusts* (or to the *Restatement 2d* for those provisions as yet unpublished in the *Restatement 3d*) and *Scott on Trusts*.

43. See *infra* Part III.B.

2. UMIFA and Statutory Relief

The Uniform Management of Institutional Funds Act (“UMIFA”)⁴⁴ was drafted by the National Conference of Commissioners on Uniform State Laws and, when adopted by a state, provides a procedure whereby the charity may approach the donor to seek her consent in a complete or partial release from a restriction. This procedure only goes so far, however.⁴⁵

The purpose of UMIFA was to provide, among other things, a method of releasing restrictions on the use of funds by donor acquiescence or court action.⁴⁶ Under the statute, the organization may release the restriction after obtaining the consent of the donor. If the charity cannot obtain the donor’s consent (whether because of the donor’s death, disability, unavailability, because the donor cannot be identified, or because she simply withholds consent), the governing board may apply to a court for release of the restriction. A court considering a release of the restriction, however, is constrained by a need to find that the restriction is obsolete, inappropriate, or impracticable. Moreover, even on such a showing, the court cannot change an endowment fund to a non-endowment fund and cannot authorize the charity to use the restricted gift for purposes other than the eleemosynary purposes of the organization. UMIFA then provides no relief in the event the charity in question wants to close its doors or where a nonprofit entity wants to become a for-profit entity (as in the case of a hospital conversion).⁴⁷

44. UMIFA governs funds held by an “institution,” which under the act means “an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes.” An “institutional fund” is a fund held by an institution for its exclusive use, benefit, or purpose. UNIF. MGMT INST’AL FUNDS ACT § 1(1)-(2) (1972).

45. Schmidt & Pollock, *supra* note 41, at 60-61.

46. The stated objectives of UMIFA are (1) a standard of prudent use of appreciation in invested funds; (2) specific investment authority; (3) authority to delegate investment decisions; (4) a standard of business care and prudence to guide nonprofit governing boards in the exercise of their duties under UMIFA; and (5) a method of releasing restrictions on the use of funds or selection, if investments, by donor acquiescence or court action. Item (5) is most relevant to a charitable organization’s duties and obligations concerning restricted gifts. Item (1) is relevant also, however. Another question that besets charities with respect to restricted gifts is the question of appreciation on restricted funds. Most donative instruments are silent on this issue. There is little to no case law on this issue and state law is largely silent. UNIF. MGMT INST’AL FUNDS ACT prefatory note (1972).

47. Schmidt & Pollock, *supra* note 41, at 61.

C. Charity a Trustee

Charities can be organized as trusts or (what is more likely) as corporations. This is significant because in most states directors of charitable corporations can, if their charters permit, change the purposes of the organization. Directors of a charitable corporation are given such latitude because the entity holds those corporate assets outright. Trustees are almost never so empowered, however, because property is held in trust.

The question arises as to whether the directors of a charitable corporation can divert restricted funds to a more timely or relevant project. Whether the charity is formed as a corporation or as a trust, however, restricted gifts to a charitable entity are governed by the law of trusts. Thus a restricted gift to a charitable corporation places the directors in the role of trustee with respect to those funds so that the directors operate under the same constraints with respect to a restricted gift as would the trustees of a trust.

The effect of allowing charitable corporations to be subsumed under the more conservative law of trusts, rather than placing trusts under the more flexible law of charitable corporations, is to eliminate yet another potential avenue of flexibility for the charitable entity in handing restricted gifts over time.

III. R. BRINKLEY SMITHERS

A. The Man and his Idea

R. Brinkley Smithers was a private individual with an idea about treating a public problem—alcoholism, the nation's third major health problem after heart disease and cancer.⁴⁸ The son of one of the founders of IBM, Smithers was an extremely wealthy man. He was also a life-long alcoholic. He once quit a job, so he said, because it got in the way of his drinking.⁴⁹ An early believer in the disease-concept of alcoholism, he used his own recovery as a springboard for forty years of activism in the addiction field, donating millions of his personal fortune to launch some of the premier institutions in the field of alcohol and drug rehabilitation: the National Council on Alcoholism and Drug Dependence, the R. Brinkley Smithers Institute for Alcoholism Prevention and Workplace Problems at Rutgers and

48. *Last of the Giants Dies at 86*, *supra* note 4, at 1.

49. *The Last of the Big Ones*, ALCOHOLISM AND DRUG ABUSE WKLY, Jan. 1994, at 1.

Cornell Universities, and most importantly for this Article, the Smithers Alcoholism Treatment and Training Center at St. Luke's/Roosevelt Hospital in New York City.⁵⁰

Smithers did not just contribute money to the cause. Smithers set out to promote an alcohol treatment modality borne of his own experience and effort in recovery. Shortly after his own recovery began, he was introduced to Marty Mann, the first woman member of Alcoholics Anonymous and founder with Smithers of what was eventually to become the National Council of Alcoholism and Drug Dependence. In the 1950s and 1960s, Smithers and Mann, together with a short list of other people, set about to disseminate the disease-concept of alcoholism and, in doing so, brought about the professionalization of the field of alcoholism treatment. In their view, alcoholism, understood as a disease, would submit to scientific study, like any other disease. Treatment modalities might then improve and recovery prove less elusive for thousands of individuals.⁵¹

In the 1950s, when Smithers began his campaign, the only program with any track record for success in assisting alcoholics to overcome addiction was the twelve-step program offered by Alcoholics Anonymous, an approach to the condition which had its origins in religious revivalism.⁵² In contrast, while an AA-like self-help and support program (with a goal of complete abstinence) lay at the heart of the treatment modality that Smithers came to advocate, the treatment favored by Smithers also involved medicine, psychotherapy, and other biomedical interventions. In Smithers's view, alcoholism was not a moral problem or a character defect, but a disease,⁵³ a complex condition with multiple causes—medical, psychological, and environmental.

B. The Gift

In 1971 Smithers announced his intention to make a gift of \$10 million to Roosevelt Hospital in New York City. (In October, 1979, Roosevelt Hospital merged with St. Luke's Hospital to form St. Luke's/Roosevelt Hospital.) The purpose of this gift was to

50. *Id.* Smithers also used his influence to the field's benefit as well, including making some well-timed phone calls to get then-President Richard Nixon to change his mind and sign the original legislation creating the NIAAA in 1970. *Id.*

51. *The Last of the Big Ones*, ALCOHOLISM AND DRUG ABUSE WKLY, Jan. 1994, at 1.

52. Hall, *supra* note 5, at A1. ("Twelve-steps as a treatment modality retains traces of AA's roots in the Oxford group, the post-World War I movement of evangelical Christian renewal. Professionals in the field still recognize that the spiritual quality is a crucial element such that recovery happens in a similar way to a conversion process.")

53. Unge, *supra* note 6, (Life).

establish an alcohol rehabilitation center. In 1971, when Smithers made the first installment of the gift, approximately \$3 million, he accompanied it with a letter of intent. The letter clearly announced Smithers's expectation to engage with the Hospital on a continuing basis both in the development of the program and in maintaining its integrity: "Money from the \$10 million grant will be supplied as needed. It is understood, however, that the detailed project plans and staff appointments must have my approval."⁵⁴ Principal and income from the gift were to be used exclusively to support the Center and its program.⁵⁵

It is ironic that, by the terms of his gift, a man whose object was to professionalize the treatment of alcoholism reserved for himself—a person with no professional qualifications in the field—such an active role in the program. It is also remarkable that the Hospital agreed to allow a non-medical person such control over what was to be a medical treatment modality.⁵⁶

The gift was made in stages. After the 1971 gift, Smithers gave another \$2.2 million in 1973. In 1982 he gave \$525,000. The gift was finally completed in 1983 with \$4.2 million.

C. *The Program*

Smithers believed that the treatment of alcoholism proceeded best in a tranquil setting far removed from traditional hospital detoxification wards. Thus the 1971 letter of intent also directed that endowment funds be used to acquire a facility physically separate from the Hospital to house the Smithers Center with its program. Significantly for the case that ensued, the 1971 letter⁵⁷ also required that the purchased property be considered part of the Smithers Center

54. Plaintiff's Complaint at 6, *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98). Mrs. Smithers's appeal to the Appellate Division was from a decision sustaining a motion to dismiss. Therefore, the complaint's allegations were deemed by the Appellate Division to be true. While the Appellate Division denied a motion for leave to appeal to the Court of Appeals and the case was settled out of court, had the remand gone forward, the plaintiff would still have had to prove her case. See also Kathleen Teltsch, *\$4.3 Million Is Given for Alcoholism Program*, N.Y. TIMES, Jan. 29, 1984, at A24 (discussing Mr. Smithers's dispute with the hospital).

55. Plaintiff's Complaint at 8, *Smithers*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98).

56. Mr. Smithers' continued involvement was an important point in his widow's later legal argument. Plaintiff's Complaint at 10, *Smithers*, 723 N.Y.S.2d 426.

57. The Attorney General asserts in his brief to the Supreme Court of NY County that, while various versions of a letter of intent were circulated between the parties, none was ever signed. Defendant Attorney General's Memorandum of Law in Support of Motion to Dismiss at 4, *Smithers*, 723 N.Y.S.2d 426.

endowment. Thus, while the letter did not preclude the future sale of the property, the letter required the proceeds of any such sale to remain part of the Center's endowment.

In April 1973, the Hospital used \$1 million of the first installment of the gift to purchase an art-deco mansion at 56 East 93rd Street in Manhattan.⁵⁸ Later in the year the Smithers Alcoholism Treatment and Training Center opened there. With vaulted ceilings, French doors, wood-paneled counseling suites, and an outdoor stone terrace for relaxing, as Smithers had wanted, the environment was the antithesis of the sharp-edged clinical wards of a hospital.⁵⁹

Also consistent with Smithers's views, the Center put in place a three-step treatment process. The first step, detoxification, was to occur during a five-day hospital stay in which alcohol was removed from the alcoholic's body. In the second phase—a 28-day period—the patient moved from the hospital into the controlled but dignified community of the mansion. There the alcoholic learned to live without alcohol and other addictive drugs. Finally, the third phase consisted of follow-up outpatient care which allowed the recovering alcoholic to move out of the mansion and into the world.⁶⁰

The reputation of the Smithers program grew quickly and served the privileged alongside the impoverished. Joan Kennedy, Truman Capote, Darryl Strawberry, Dwight Gooden,⁶¹ John Cheever,⁶² Wall Street execs, and mafia chieftains were all treated along with hundreds of Medicaid patients.⁶³ Subsequently the Smithers program became the model for some of the nation's most respected alcohol treatment programs, including the Betty Ford Center in California.

D. Smithers's Continued Involvement

Disagreement between Smithers and administrators about the Center's operation soon materialized. In July, 1978, when only slightly half of the gift had been completed, Smithers wrote a letter to the Hospital stating that he did not intend to complete it. Indeed,

58. *Smithers*, 723 N.Y.S.2d at 427.

59. Lynda Richardson, *Clouds Over Future of an Alcoholism Treatment Center*, N.Y. TIMES, Jan. 28, 1999, at B9.

60. Unge, *supra* note 9, (Life).

61. Jennifer Steinhauer, *Addiction Center's Director Quits in Treatment Debate*, N.Y. TIMES, July 11, 2000, at B2.

62. Katherine E. Finkelstein, *Spence School Gets Treatment Center Mansion*, N.Y. TIMES, May 19, 1999, at B8.

63. William Sherman, *Tony Rehab Center Sold for \$17M*, DAILY NEWS, Apr. 14, 1999.

Smithers was quoted in the press at the time as saying that the Hospital would have to sue him to collect the balance of the pledge.⁶⁴

Smithers also continued to involve himself in the details of the program. For example, in June, 1979, Dr. LeClair Bissell, then running the Center, resigned after a lengthy conflict with Smithers. They disagreed about the type of patient the Center should treat. Smithers was interested in helping people “from my walk of life” and employed alcoholics, insisting that “[r]ich people have more problems than poor people.” Bissell wanted a variety of people to be in treatment together.⁶⁵ Soon after Bissell resigned, her successor established an intensive, five-evening per week program for employed alcoholics and their families.

Fortunately for the relationship between the Smithers Center and its patron, Roosevelt Hospital merged with St. Luke’s Hospital in 1979. With the merger came changes in the personnel managing the Hospital. The new president persuaded Smithers to complete his pledge,⁶⁶ giving him oral assurances that the Hospital would adhere strictly to the terms of his gift (according to Mrs. Smithers’s Complaint),

Such oral assurances notwithstanding, Smithers accompanied the final installment of \$4.2 million (made in 1983) with another letter of intent. Smithers underscored his requirement that contributed funds inure only to the benefit of the Center by stipulating that “any unused income remaining at the end of each calendar year is to be accumulated and added to principal.” Principal was to be expended only for remodeling the mansion or areas occupied by the program in hospital buildings. With respect to charges against income, “only expenses directly attributable to the Smithers Center should be considered.” Furthermore, the Smithers Center could be charged for overhead by the Hospital, “not on an arbitrary basis,” but only to the extent that such charges were fair compensation for services rendered to the Smithers Center.⁶⁷

E. Controversy over Selling the Mansion

The real crisis with respect to Smithers’s restricted gift erupted when, in 1995, St. Luke’s/Roosevelt decided to sell the mansion and move the Smithers Center into a hospital ward. Brink Smithers had

64. Teltsch, *supra* note 54, at A24.

65. *Id.*

66. *Id.*

67. Plaintiff’s Complaint at 16, *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98).

died on January, 11, 1994, but his widow, Adele Smithers, took up the battle to preserve the program as her husband had conceived it.

In March, 1995, one month before a fundraising gala (which had been organized by Mrs. Smithers at the request of the Hospital) for the purposes of refurbishing the mansion, the Hospital notified her of its decision to sell and directed her to cancel the benefit. Brink Smithers had been dead for fifteen months.

The question of selling the mansion had arisen before during Smithers's life, and at least according to the Attorney General,⁶⁸ Smithers had actually approved an earlier proposal to sell it. In November, 1981, Smithers wrote a letter to the Hospital recognizing that the wellbeing of the Smithers Center was deeply connected to that of the Hospital. "I know how hard up St. Luke's/Roosevelt is," it stated, "and I have no objection to the sale of the building."

Whether or not Smithers approved the sale of the mansion in 1981 or would have approved it in 1995, by the latter date a plausible case could be made for the Hospital's position. By then, many were questioning whether stand-alone treatment facilities such as Smithers (which primarily offered inpatient care) were financially feasible in an era when insurers were increasingly unlikely to cover their services.⁶⁹ In-patient programs like Smithers were coming under increasing pressure from the growing penetration of managed care and Medicaid budget cuts. Many institutions and programs were consolidating services, restructuring their operations and, in many cases, closing down.⁷⁰ Clearly the relocation of the Smithers Center from the mansion into the Hospital would make the program less expensive to run in a managed care environment.⁷¹

F. The Attorney General

However Smithers might have viewed the sale had he been living when the Hospital made its decision, there is no doubt Mrs. Smithers opposed it. Indeed, when she finally filed suit against the Hospital in 1998, she tried to enjoin the sale, claiming the sale was

68. Defendant Attorney General's Memorandum of Law in Support of Motion to Dismiss at 4, *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (No. 604578/98).

69. *Legal Battle Leaves Future of Treatment Center Uncertain*, ALCOHOLISM & DRUG ABUSE WKLY, Oct. 19, 1998, at 1.

70. Esther B. Fein, *Smithers Alcoholism Unit to Leave Its Eastside Mansion*, N.Y. Times, March 17, 1995, at B2.; *In Wake of Addiction Treatment Center's Closing, Smithers Expands, Renovates Without Funds; Money Goes to Care*, PR NEWSWIRE, Nov. 17, 1994.

71. *Legal Battle Leaves Future of Treatment Center Uncertain*, ALCOHOLISM & DRUG ABUSE WKLY, Oct. 19, 1998, at 1.

proscribed by the terms of the gift. Her campaign to preserve what she viewed as her husband's legacy began, however, in 1995 with a complaint to then-Attorney General Dennis Vacco. Notwithstanding the changing environment with respect to fees for medical services, the Hospital's decision to sell the mansion, with its implication that the Smithers program was not financially feasible as it was, raised Mrs. Smithers's suspicions regarding the Hospital's financial accounting for the Center's endowment. Mrs. Smithers began to press the Hospital, and her concerns only deepened when it came forward with information. It appeared that years before Smithers's death, and into 1995, the Hospital had diverted endowment funds for its general operating expenses.

Mrs. Smithers presented the Attorney General with the evidence she had gathered. The Charities Bureau (a division of the Attorney General's office) found that the Hospital had taken \$5 million from the Center's endowment without her husband's consent and without court authorization. The Attorney General demanded the Hospital restore the endowment and, in August, 1995, the Hospital returned the \$5 million, but no return of lost income or appreciation was required.⁷²

Dissatisfied with the Attorney General's performance, in January, 1996, Mrs. Smithers successfully persuaded the Surrogate's Court in Nassau County, New York, where her husband's will had been probated, to appoint her Special Administratrix of her husband's will for the specific purpose of pursuing enforcement of the terms of her husband's gifts to St. Luke's/Roosevelt Hospital.

The Attorney General continued to attempt to bring the parties together. In July, 1998, after three years of negotiations with Mrs. Smithers and the hospital, the Attorney General entered into a pre-litigation settlement agreement with the Hospital. The Hospital agreed to add \$1 million to the Smithers Center endowment if it should sell the mansion. The mansion was then on the market with an asking price of \$20 million. While the figure of \$1 million was sufficient to restore to the endowment the 1973 purchase price of the mansion, it deprived the Smithers Center of any capital gain on the sale.⁷³

72. Fein, *supra* note 70, at B2.

73. William Josephson, *Guiding Practitioners and Fiduciaries on Charities*, N.Y.L.J., Dec. 3, 2001, at 1.

G. Mrs. Smithers Files Suit

Still dissatisfied, Mrs. Smithers filed a Complaint in Supreme Court, New York County, in September, 1998, asking the court to enjoin the Hospital from selling the mansion and relocating the Smithers program without court approval, to direct specific performance of the terms of the Smithers gift, and to remove the Hospital as administrator of the Smithers program. The Hospital and the Attorney General argued that Mrs. Smithers had no standing to bring the suit and the court agreed. The Supreme Court granted the Hospital's (and the Attorney General's) motion to dismiss.

Mrs. Smithers appealed. She moved the Appellate Division for a stay to prevent the sale of the mansion or to enjoin disbursement of the proceeds. The new Attorney General, Eliot Spitzer, recently elected, reevaluated the case and (in an about-face from his predecessor) joined in her motion. The Appellate Division refused to enjoin the sale of the building but did enjoin the disbursement of the proceeds in the event of a sale. In Spring, 1999, the mansion was sold for almost \$15 million.

While the appeal was pending, the Charities Bureau engaged in intensive settlement negotiations among the three parties. As a consequence, the Hospital agreed with the Attorney General to allocate to the Smithers endowment the entire net proceeds from the sale, as well as the income lost on the \$5 million. The Hospital also warranted that it had not misappropriated funds from any other of its endowments. In the opinion of the Attorney General, this settlement mooted Mrs. Smithers's case by substantially achieving the relief she had sought.⁷⁴ Nonetheless, in July, 2001, in a groundbreaking decision, the Appellate Division reversed the court below and granted Mrs. Smithers standing in the case against St. Luke's/Roosevelt Hospital, remanding to the Supreme Court for a trial on the merits. The court noted that it was owing to Mrs. Smithers's vigilance alone that the Attorney General discovered the Hospital's misappropriation of the endowment funds.⁷⁵

74. *Id.*

75. Mrs. Smithers's vigilance with respect to her husband's legacy was also apparent in the summer of 2000. Dr. Alex DeLuca, the medical director of the Smithers Center, began to make referrals to Moderation Management, an organization aimed at helping problem drinkers control their alcohol consumption. Moderation Management conceived itself as an alternative to the abstinence urged by Alcoholics Anonymous. DeLuca did not offer Moderation Management as a treatment modality at Smithers. Rather, in keeping with the ethical and legal requirement of informed consent, he thought it proper to discuss alternatives such as controlled drinking with patients not fully committed to quitting. Dr. DeLuca's views were first disclosed in the July 10th issue of *New York* magazine. The next Sunday the Smithers Foundation (headed by Mrs.

In October, 2003, Mrs. Smithers and St. Luke's/Roosevelt Hospital entered into a settlement agreement. The Hospital agreed not to use the Smithers name in connection with any of its programs or treatment modalities. The Hospital also agreed to allow \$5 million of the mansion sales proceeds to remain in escrow until the Smithers family could establish another substance abuse program with a free-standing rehabilitation unit in New York.⁷⁶

IV. PUBLIC CHARITY IN CIVIL SOCIETY

As we learned in Part I, civil society—a domain containing thousands of independent organizations—facilitates democracy by providing a forum for free discussions and a proving ground for social innovation. In doing so, civil society plays a mediating role between the individual and the state. The goal of this Section is to understand what is necessary for certain institutions—public charities in particular—to play this mediating role.

In civil society, the challenge for any charity (as a mediating institution) is to maintain an appropriate relationship not only with the state whose statutes and common law principles are a necessary background to association-building, but also the persons or donors who have established the charity (and may continue to engage it going forward). While it is not clear in the case of a mediating organization that it must be completely independent of the state and of the

Smithers) placed a full-page ad in the New York Times denouncing the moderation management approach and stressing that the foundation no longer has a direct connection to the Smithers Center:

The Christopher D. Smithers Foundation's philosophy and mission is rooted in the conviction of R. Brinkley Smithers, our founder and benefactor of the program at St. Luke's-Roosevelt, that alcoholism is a disease that requires abstinence-based treatment, and that controlled drinking . . . is not possible where the disease of alcoholism exists." "Using the Smithers name in conjunction with this type of treatment is an abomination, an insult and a disgrace to the memory of R. Brinkley Smithers.

Steinhauer, *supra* note 61, at B2.

A few days later, the Hospital released a terse statement that said that the Smithers Center had a "long and proud tradition of treating alcoholism by advocating total abstinence. Since Dr. Alex DeLuca does not support the program philosophy, we have accepted his resignation." Steinhauer, *supra* note 61, at B2. DeLuca, the director of ten years, responded that "the idea that I changed Smithers into a moderation management clinic is absurd. Smithers was and is an abstinence-oriented, abstinence-based program. Abstinence is the best way. It's the safest way. But it's not necessarily everybody's way." *Id.*

76. William Sherman, *Rehab Center on the Mend With \$8M Settlement*, DAILY NEWS, Oct. 22, 2003, at 55.

organization's individual patrons,⁷⁷ it is clear that it cannot be controlled by either. This autonomy from any particular individual and from the state is obviously necessary in order for the charity (like any other institution in civil society) to serve as a venue for participation by free and equal people. Such autonomy is also necessary, however, for the maturation and continuing development of the charity's particular mission, which itself contributes to the vitality of civil society, so that the charity can meet the needs of the people it serves. Like any other organization in civil society, if a public charity is to fully realize its mission, it must establish and maintain a measure of independence not only from its founders and donors who form and fund it, but also from any central bureaucratic regime, whose rules frame it.

Charities have received heightened scrutiny in recent years because of perceived abuses,⁷⁸ and there is no doubt that the nonprofit sector confronts an increasingly impatient governmental apparatus eager to forestall misuse of the sector by the inattentive, the ill-informed, and indeed the unscrupulous.⁷⁹ In this era, however, charities confront a second challenge of similar or greater magnitude, in maintaining an appropriate relationship with those private parties who form and fund them. Indeed, the question of restricted gifts to public charity—and more specifically, the pursuit of standing to enforce them by donors and their families—places in high relief the question of the autonomy of the charity vis-à-vis those private parties whose funds and, perhaps more importantly where a restricted gift is concerned, whose beliefs and social agenda fuel⁸⁰ the organization in terms of money and mission. Before turning to the question of restricted gifts to public charity—and the particular problem of donor standing—we need to understand the roles that various parties play in the realization of charitable undertakings.

77. I mean "patrons" in the conventional sense of the word, that is, significant donors. I do not mean to invoke here Henry Hansmann's use of the term, which for him would include not only donors, but also purchasers of services. Hansmann, *supra* note 12, at 841.

78. For very recent evidence of the scrutiny, see *Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities: Hearing on Nonprofit Abuses Before the Finance Comm.*, 108th Cong. 137-222 (2004) (opening statement of Hon. Charles E. Grassley, Chairman, Comm. on Finance); *Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities: Hearing on Nonprofit Abuses Before the Finance Comm.*, 108th Cong. 121-32 (2004) (statement of William Josephson, Assistant Attorney General-in-Charge, Charities Bureau, New York State Dep't of Law) ("Josephson says some Tax-Exempt Boards are Inattentive, Ill-informed.").

79. GILBERT M. GAUL & NEILL A. BOROWSKI, *FREE RIDE: THE TAX-EXEMPT ECONOMY* 6-10 (1993).

80. Public Charities are also funded with fees for services and government grants, among others.

The primary challenge of this Section is to appreciate the central role that individuals as donors play in the charitable sector, especially as they through the making of restricted gifts become a source of mission. Furthermore, donors play a crucial role in the charitable sector in ensuring the extraordinary diversity of mission.

Beyond the role of donors, we also want to understand the role of the charitable fiduciary in providing for the independence of the charity. The state Attorney General is also important in this regard, especially in her role as the enforcer of charitable gifts, the traditional vindicator of the interest of the public as the ultimate beneficiary of the charity, and the only party with who is certain to have standing in any enforcement proceeding. As prelude to all this, however, we must first see how the law, especially Internal Revenue Code and accompanying Regulations, frames the choices that donors make.

A. Legal Rules that Frame Donors' Choices

1. Organizations in the Nonprofit Sector: The Litmus Test

Variiously termed the nonprofit sector, the third sector, the independent sector, the charitable sector, the voluntary sector, the philanthropic sector, and indeed the civil society sector, this domain of American life is extraordinarily diverse, giving rise to schools and universities, religious institutions, hospitals, family foundations, and everything from the Red Cross to the local country club. The single attribute that organizations here have in common, however, the essential rule that sets the boundary between the non-profit and the for-profit world, is what Henry Hansmann has called the "nondistribution constraint." A nonprofit organization is barred from distributing any of its net earnings to any individual (such as a director, trustee, or officer) who exercises control over it. It is not that a so-called "nonprofit organization" cannot earn a profit, that is, an annual accounting surplus. Any such surplus, however, cannot be distributed to anyone controlling the organization. Even though the organization may be incorporated, a nonprofit can issue no stock or other indicia of ownership that will give anyone a simultaneous share in both profits and control.⁸¹ This "nondistribution constraint" is usually imposed on the institution by the legal instrument under

81. Hansmann, *supra* note 12, at 838-39. Obviously, any surplus can be used by the organization to purchase goods and services; if the organization is not only a nonprofit entity, but also a charity, any surplus can also be distributed to beneficiaries of the organization.

which it is organized under state law—the “charter” if it is a nonprofit corporation or the “deed of trust” if it is a charitable trust.

2. Public Charity

The focus of this Article is a particular type of nonprofit organization, the “public charity,” as the term is defined under Section 501(c)(3) of the Internal Revenue Code (“the Code”). Over the years, the Code has come to play a central, if not the most significant role in regulating and fostering the nonprofit sector. The Code provides an elaborate system for classifying nonprofit organizations, the essential groundwork for granting to any organization tax-exempt status, arguably a form of government subsidy.⁸² This classificatory regime is also the foundation for the maze of charitable deduction rules that apply to donors and provide a significant incentive for the support of the charitable sector by private individuals.⁸³

3. A “Public” Mission?

Once an organization subjects itself to the nondistribution constraint, the limitations on the purposes for which a public charity can be formed—the mission it undertakes—are modest. Whether the point of reference is federal or state statutes or the common law, a charitable purpose is any lawful purpose that promotes the general welfare and does not violate public policy. Under the common law (and in common parlance), the term “charity” traditionally meant relief of the poor. Even under the common law, however, the legal definition now goes far beyond the traditional one, recognizing as “charitable” any lawful purpose consistent with public policy that promotes the general welfare. Certain commentaries analyze statutes and cases to develop a taxonomy of purposes, to arrive at categories of activities that are presumptively charitable. For example, the *Restatement* includes relief of poverty, advancement of education, advancement of religion, promotion of health, and governmental purposes, along with other purposes beneficial to the community. The *Restatement* recognizes, however, that these categories are not

82. See Gabriel O. Aitsebaomo, *The Nonprofit Hospital: A Call for New National Guidance Requiring Minimum Annual Charity Care to Qualify for Federal Tax Exemption*, 26 CAMPBELL L. REV. 75, 81 (2004) (explaining that the “Internal Revenue Code does not define the term ‘charitable’” but Treasury Regulations offer guidance as to its meaning).

83. John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641, 658-60 (1987).

exhaustive, but are merely suggestive of appropriate charitable purposes.⁸⁴

At one time most states sought to regulate charities by a statutory regime that strictly limited the purposes for which a charitable organization could be formed. Some states sought to create their own lists of permissible uses.⁸⁵ Other states promulgated nonprofit statutes restricting the purposes to those found in the Internal Revenue Code, especially in the wording of Section 501(c)(3), discussed more fully below. Today, however, as long as the entity includes the nondistribution constraint as a provision of the legal instrument under which it is organized, states increasingly permit incorporation under a broad criterion that includes any lawful purpose that does not violate public policy.⁸⁶

Thus the states have backed away from the attempt to regulate charities by limiting the purposes for which they can be formed. Moreover, the states have done this without developing any other comprehensive regulatory regime. Instead, federal law and especially the Internal Revenue Code have largely been left to regulate the nonprofit sphere. Congress has developed an elaborate classification of nonprofit organizations as a governing rationale by which the grant of tax-exempt status to certain organizations can be legally justified. The classification of charitable organizations also serves as a necessary accompaniment to the maze of rules that govern charitable deductions.

To see the ways in which the choice of mission is framed under the Code, it is important to grasp the broad outlines of Congress's regulatory regime. The operative statute is Section 501, and Congress starts by parting the waters with two major types of nonprofit organizations—"mutual benefit" organizations and "public benefit"

84. RESTATEMENT (THIRD) OF TRUSTS § 28 (2001). For the point that the list is not exhaustive, see Comment a.

85. See, e.g., FLA. STAT. ANN. § 496.404(1) ("Charitable organization" means any legal person established for "any benevolent, educational, philanthropic, humane, scientific, artistic, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or other eleemosynary purpose . . .").

86. Hansmann, *supra* note 12, at 839-40. In many states (including New York until 1993), state officials such as a judge, the attorney general, or the secretary of state, had substantial discretion to review and reject a nonprofit organization's charter, a discretion that could be used to reject any charter stating purposes that violated state public policy. Of course, this policy invited exercise of highly subjective judgments on the part of the officials. See, e.g., *State ex rel. Grant v. Brown*, 313 N.E.2d 847, 848 (Ohio 1974) (upholding the secretary of state's decision to reject a charter for a charity with the purpose promoting homosexuality as a valid lifestyle, even though homosexual acts between consenting adults were no longer criminal offenses in the state).

86. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (a)(2), § 29 (2001).

organizations.⁸⁷ Mutual benefit organizations have the primary purpose of furthering some particular common goal of their members. The goal can be social, as in the case of a country club or fraternal lodge, or economic, as with labor unions or professional associations. In all events, however, the primary purpose of the organization does not extend beyond its membership. On the other hand, public benefit organizations (which include public charities) must meet a number of tests. These tests require that the organization's purposes fall into one or more categories that by implication will ensure that the organization serves a class of beneficiaries that extends beyond its membership. I will turn to these tests momentarily. Here, however, one cannot overlook the significance of this initial fork in the road: while both mutual benefit organizations and public benefit organizations are tax exempt for income tax purposes (and in this way are subsidized by the government), only contributions to public benefit organizations are eligible for the charitable income tax deduction.⁸⁸ The donor is thus provided with a governmental inducement to support public benefit organizations that is unavailable for mutual benefit organizations.

To turn to the particulars of a qualifying mission, under Section 501(c)(3), public benefit organizations must be "organized and operated exclusively" for one or more of eight specified purposes: (1) religious; (2) charitable; (3) scientific; (4) literary; or (5) educational purposes, (6) for testing for public safety; (7) to foster national or international amateur sports competitions. . . ; or (8) for the prevention of cruelty to children or animals. . . ."⁸⁹ The list is a guide, however, and not meant to be exhaustive, as evidenced by the inclusion of the term, "charitable," a category the boundaries of which are not clear on its face and a term that Congress has never defined. Furthermore, the Regulations interpret the term "charitable" expansively, referring to its "generally accepted legal sense," and thus give the term a meaning

87. 26 U.S.C. § 501 (2005). These categories are not universally accepted by the states, but do appear in the California Nonprofit Corporations Code, CAL. CORP. CODE § 9910 (West 2004), and the ABA's Revised Model Nonprofit Corporation Act.

88. 26 U.S.C. § 170 (2005).

89. *Id.* at § 501(c)(3). Note that Congress also requires, among other things, that the nondistribution constraint be imposed on any organization aspiring to being deemed a public benefit organization. In addition to having a qualifying purpose, the organization must also demonstrate that no portion of the "net earnings" of the organization inures to the benefit of any private shareholder or individual. Further, the organization must show that (1) no "substantial part" of its activities may consist of certain activities aimed at influencing legislation; and (2) the organization does not participate or intervene in any political campaign on behalf of any candidate for public office. (Terms in quotation marks represent terms of art subject to elaborate rules in the Code and the accompanying Regulations, but are not relevant for purposes of this Article).

“within the broad outlines of ‘charity’ as developed by judicial decisions.”⁹⁰ The term thus covers, according to the Regulations, such divergent activities as relief of the poor and distressed; promotion of social welfare; advancement of religion, education and science; promotion of health; erection of public buildings; and lessening of the burdens of government. For federal tax law purposes, “charitable” then has an expansiveness that can encompass changing societal needs and aspirations.⁹¹

In addition to having a qualifying charitable mission (a fairly easy test to meet), to be a public benefit organization, the Regulations go further and, among other provisions, require that the legal instrument under which the organization is created direct that, in the event of dissolution of the organization, charitable assets must be distributed to another organization qualifying under Section 501(c)(3) in furtherance of its exempt purposes.⁹² Thus upon dissolution, charitable assets cannot be distributed to members (as they could in the case of a mutual benefit organization) or revert to donors (a point to which I will return when I consider the remedies available to a donor upon misapplication of a restricted gift).

So far, I have been setting forth the two essential requirements under the Internal Revenue Code and the accompanying Regulations for all public benefit organizations: a qualifying mission and a provision with regard to the disposition of assets upon dissolution of the organization. This Article now turns to a distinction within the category of public benefit organizations and hones in on the attributes of the public charity *per se*.

The category of public benefit organizations includes not only public charities but also private foundations. Most private foundations receive their support from a single individual or family group,⁹³ who often play an active role in the administration of the foundation. Furthermore, most private foundations do not conduct

90. Treas. Reg. 1.501(c)(3)-1(d)(1) & (2) (2004).

91. Treas. Reg. 1.501(c)(3)-1(d)(1) and (2) (2004). The “charitable” requirement also encompasses a broad public policy limitation that is superimposed over the list of exempt purposes in 26 U.S.C. § 501(c)(3). A public benefit organization must serve a public purpose, and any organization that is operated for illegal purposes or engages in activities contrary to a clearly established public policy will be disqualified. The Supreme Court applied the public policy standard in *Bob Jones University v. United States* to deny income tax exemption to a racially discriminatory religious school. 461 U.S. 574, 605 (1983). It is not clear based upon the holding in this case whether this limitation extends beyond racial discrimination in education.

92. This is the “organizational test” under Treas. Reg. 1.501(c)(3)-1(b)(4).

93. Myreon Sony Hodur, *Ball Four: The IRS Walks the Kansas City Royals*, 19 HASTINGS COMM. & ENT. L.J. 483, 498 (1997). For-profit corporations can also be contributors to private foundations.

active charitable programs but rather are simply charitable conduits, making grants to other nonprofit organizations (usually public charities), qualified individuals, and government entities.⁹⁴ By contrast, public charities usually engage in active programs and receive broad-based public or sometimes governmental support.

In 1969, Congress, through the federal tax system, subjected private foundations to a complex regulatory regime for the purpose of eliminating perceived abuses by the wealthy families who contributed to them and controlled them. Because private foundations were usually not only family funded but also family controlled, and because they usually did not engage in active programs, gifts could be made to them (and a charitable income tax taken by the donor) while the donor or her family continued to control the gift by running the foundation. By controlling the grant-making, the donor effectively controlled when and if the gift entered into the stream of active charitable use (that is, when the gift would finally be distributed to a charitable organization with an active program or to an individual grantee for an appropriate purpose). Also, while assets were held by the foundation, they appreciated income-tax free, potentially making the foundation a source of power and influence by the donor or the donor's family.

To stem these perceived abuses, Congress imposed special requirements on private foundations. The first requirement provides an incentive to foundation managers to make grants, thus presumably getting charitable assets into the hands of those who can benefit directly from them and undermining those who would try to accumulate wealth in the foundation and thereby empire-build. A private foundation now has to meet certain income distribution requirements designed to ensure that it makes regular charitable payouts and that these payouts are reasonably related to the charity's endowment. Penalties are imposed if the foundation fails to meet this requirement.

A second provision makes a private foundation moderately less attractive to donors, at least to those donors whose generosity is at least in part motivated by a desire to take a charitable income tax deduction for the gift. Stricter percentage limitations are imposed on charitable gifts to private foundations so that the income tax deduction rules applicable to gifts to private foundations are somewhat less generous than those for gifts to public charities. While gifts of cash and ordinary income property to public charities are

94. Note that an "operating foundation" directly engages in one or more active programs, spending 85 percent of its income on the active conduct of its charitable program. However, it is treated much like a public charity under the Code and the Regulations. IRC § 4942(j)(3); Treas. Reg. § 53.4942(b)-1(a)(1)(ii).

subject to an annual percentage cap of 50 percent of adjusted gross income (with a five-year carryover of any excess), the limitation applicable to private foundations is reduced to 30 percent. Similarly, while gifts of long-term capital gain property (such as stock and most real estate) to public charities are capped at 30 percent, those to private foundations are subject to a 20 percent limitation. Income tax deductions for gifts of appreciated capital gain property (other than certain publicly-traded stock) to private foundations are limited to the donor's basis in the contributed property, while taxpayers generally may deduct the full fair market value if capital gain property is donated to a public charity.⁹⁵

A public benefit organization that wants to be deemed a public charity and to avoid the onerous regulatory regime imposed on private foundations must establish that it is "publicly supported" as defined under the Regulations. Certain types of public benefit organizations are presumptively broadly supported by the public: schools, churches, and hospitals are presumed to be public charities. Other public benefit organizations that can meet one of several alternative (and fairly complicated) definitions of a "publicly supported" organization will also be deemed public charities and will avoid private foundation classification.

4. Framing a Private Vision of the Public Good

Therefore, as the law currently stands, the legal limitations on the choice of charitable purpose are minimal, so long as the public charity (like any nonprofit organization) subjects itself to the nondistribution constraint. Thus participants in civil society are the source of charitable mission and have great latitude in making their choices. Whatever the stated purpose, it must simply promote the general welfare, be lawful, and not violate public policy. Both the common law and state statutes are quite open-ended. Federal law is also quite generous with a list of purposes that is suggestive, not exhaustive, and affords a broad meaning to the word "charitable."

While the choice of mission is left largely open, however, the law does attempt to frame the choice in certain important respects. Under the income tax law and its regulations (to which the regulation

95. Note that private foundations are also subject to an excise tax sanction if they engage in various proscribed activities such as self-dealing, excessive ownership of business interests, and investments that jeopardize the organization's charitable purposes. Private foundations must comply with reporting and disclosure requirements that are somewhat more onerous than those applicable to public charities. However, gifts and bequests both to public charities and to private foundations are fully deductible for federal gift and estate tax purposes.

of nonprofits has now largely fallen), the concept of “charitable” serves to frame the choice of mission so that the purposes of the organization (and its programs and activities) are likely to extend to a broader constituency than the donors themselves (unlike a mutual benefit organization). This policy preference is underscored by the requirement that the foundational documents also include a dissolution provision (so that upon any dissolution of the organization, assets must be distributed in ways consistent with the exempt purposes and cannot go to members or donors).

This skepticism with respect to donor control was taken a step further in 1969 when Congress drew a distinction between public charities and private foundations and subjected the latter to an onerous regulatory regime: annual income distribution requirements, an excise tax on investment income, stricter percentage limitations on income tax deductions for donor contributions, and onerous reporting requirements, among other things. To avoid being deemed a private foundation, a charitable organization must demonstrate it is “publicly supported” (as per the tests in the Regulations). This requirement, of course, eliminated from the category of public charity those organizations with a narrow funding base, i.e., those supported by one person or a group of related people. The support requirement thus serves as a preventative measure, a palliative to the perceived propensity to donor control—and attendant exploitation—where there is a narrow base of funding.

B. Realizing the Mission

1. The Donor

A donor thus has enormous latitude under the law to craft a mission. And there is no question that in arriving at such a purpose for her gift, the donor contributes mightily to the vitality of civil society. In this era, the initiative to a new charitable purpose or program can come from a variety of places—private donors, foundations, other public charities, for-profit corporations, government agencies, and (with respect to existing charities) professional staff within the charitable organization. However, there can be no doubt that the diversity of the charitable sector, what one commentator has called the “natural home of nonmajoritarian impulses, movements and values,” is in the final analysis owing to individual initiative.⁹⁶ Only

96. JOHN GARDNER, FOUNDATION CENTER, *THE INDEPENDENT SECTOR IN AMERICA'S VOLUNTARY SPIRIT* 4-6 (1983).

individual donors can provide an endless stream of new perspectives on changing societal aspirations and needs, each one with the potential of yielding a new charitable mission.⁹⁷

2. The Fiduciary

Nevertheless, important though the donor may be as a source of charitable mission, charity in the final analysis is not about the donor, but is rather about the mission. To advance and achieve the charity's mission, the donor needs someone to act in the role of a fiduciary. The case for the necessity of the charitable fiduciary was best made by Henry Hansmann. In explaining the function of the nondistribution constraint, Hansmann pointed to the agency costs incurred by the donor in turning her mission (and money) over to someone else to realize her purposes. Hansmann claimed that there were significant information asymmetries inherent in the relationship between the charity and the donor—whom he characterized as a “purchaser” of the charity's administrative services. An important question is why the donor could not hire the charity to deliver the service she wants, just as she would hire any other service done. Why must the charity be a fiduciary? “The reason . . . appears to be that either the nature of the service in question, or the circumstances under which it is provided, render ordinary contractual devices inadequate to provide the purchaser of the service with sufficient assurance that the service was in fact performed as desired.” Either because the services are to benefit third parties (to whom the donor has little or no access, as would be the case with charities with large programs abroad, such as Save the Children or the International Red Cross) or because the services to be provided are complex and hard to evaluate (such as those universities and hospitals provide), the donor finds it difficult to evaluate whether the charity has done its job. In the role of fiduciary, however, the charity is able to give its donors “greater assurance that the services they desire will in fact be performed as they wish.”⁹⁸

97. David Horton Smith, *The Impact of the Volunteer Sector on Society*, in *THE NONPROFIT ORGANIZATION: ESSENTIAL READINGS* 347-55 (David L. Gies et al. eds., 1990).

98. Hansmann, *supra* note 77, at 503. It is the case that the donor might serve as trustee herself. However, the public support tests under the IRC will drive her to seek additional donors. The information asymmetries with respect to these donors will then force her to act in the role of a fiduciary. See also Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 237, 252-64 (arguing that the agency problem in the nonprofit area is best solved by creation of private, for-profit monitoring companies); Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 483-88 (1998).

For any charitable fiduciary, the applicable standard of duty is determined, at least traditionally, by the way the charity is organized. Charities can be organized as trusts or, more likely today in the United States, as corporations.⁹⁹ In the past, charitable trusts and charitable corporations were governed by distinct legal regimes so that the requirements of a trustee (or a director, in the case of a charitable corporation) were somewhat different depending upon whether the charity was organized as one or the other.¹⁰⁰ The two distinct sets of standards have recently tended to merge (with the corporate form—generally thought to afford the director more latitude in the performance of her responsibilities—taking precedence). Furthermore, commentators have argued that the better standard should apply whatever the form of charitable organization—trust or corporation.¹⁰¹ While the differing standards are still sufficiently in play that they warrant attention, as a matter of terminology, the discussion that follows groups trustees of charitable trusts with directors and officers of charitable corporations under the term “charitable fiduciaries.”

If the standards for charitable corporations are generally thought to afford the director more latitude in the performance of her responsibilities,¹⁰² in either venue there is a duty of loyalty, a duty of care, and a duty of obedience to the donor’s mission. I will first attend briefly to the duties of loyalty and care, and then turn to the most important one for our purposes, the duty of obedience.

a. Loyalty

The duty of loyalty requires that a trustee or director place the interests of the charity first, before her own, and thus administer the organization solely in the interests of the charitable beneficiaries. Traditionally there can be no dealings *quid-pro-quo* between a trustee and the charity. Any such transactions will constitute “self-dealing” and a breach of the duty of loyalty. Neither the fairness of the

99. James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L. J. 617, 618 (1985).

100. Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1415 (1998).

101. Clearly when courts address the question of standing to enforce fiduciary duty (as distinct from the substance of those duties), courts do not distinguish between charitable trusts and charitable corporations. See Atkinson, *supra* note 13, at 663.

102. The greater flexibility in the corporate charity standards is perhaps because they draw heavily upon for-profit corporation law where trustees are given greater latitude to respond to the dynamism of the market and because the profit-motive provides a more objective measure of performance. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L. J. 937, 956 (2004).

transaction nor the good faith of the trustee is relevant. Any self-dealing transaction may be voided, with the trustee having to disgorge any profit back to the charity and, if there is a loss, the trustee is strictly liable.¹⁰³

More recently, the standard of loyalty under traditional charitable trust law has been criticized as out of touch with the workings of charitable boards. Individuals are often asked to serve on charitable boards because they have access to expertise or other resources that the staff of the charity could not otherwise readily obtain. The presence on the board of talented or well-connected people can substantially reduce transactions costs for the charity. Accordingly, at least where the more liberal charitable corporations law is concerned, statutes and case law often provide that any transaction between a trustee and the charity can be evaluated by a “fairness” test. These “interested transactions” standards permit the director to disclose her interest to the board, in which event the board votes (with the interested director abstaining) to allow or disallow the transaction.¹⁰⁴

b. Care

Questions of proper exercise of care often arise where investment performance has been disappointing,¹⁰⁵ but the duty of care is directed at a trustee’s or director’s decisionmaking across all aspects of her responsibility. A trustee or director is to be diligent, careful, and skillful in her role. The focus of any inquiry is the manner in which the fiduciary exercised her responsibility, rather than the correctness of her decisions. Moreover, the fiduciary is to do her job as though she were acting for herself (an “ordinary prudent person”), even though (given the duty of loyalty) she is not. Again, charitable trust law is less forgiving, holding trustees to an ordinary negligence standard. The charitable corporations law generally propounds a gross negligence standard and provides a safe harbor in the form of the business judgment rule.¹⁰⁶

103. Nina J. Crimm, *A Case Study of a Private Foundation’s Governance and Self-interested Fiduciaries Calls for further Regulation*, 50 EMORY L.J. 1093, 1139 (2001).

104. Brody, *supra* note 100, at 1427. Many jurisdictions have “interested transactions” statutes or case law that provide a procedure for legitimizing certain interested transactions between fiduciaries and a nonprofit organization.

105. Margaret E. McLean, *Employees Stock Ownership Plans and Corporate Takeovers: Restraints on the Use of ESOPs by Corporate Officers and Directors to Divert Hostile Takeovers*, 10 PEPP. L. REV. 731, 737 (1983).

106. Brody, *supra* note 100, at 1425. The best judgment rule provides that if a director has made a decision by informing herself in good faith without a disabling conflict of interest, there

c. Obedience

The duty of obedience requires adherence to the purposes of the charity as stated in its constitutive documents or in the terms of particular gifts.¹⁰⁷ As such, this duty has direct bearing on any mission prescribed by the donor when a gift is made.¹⁰⁸ While this is no doubt welcome news to the donor who has just made a gift and to the public whose current aspirations and needs she has just engaged by stipulating a mission, it is important to consider that charitable entities exist in perpetuity, and their purposes are presumably perpetually binding as well. The question that arises is what latitude trustees or directors might have to interpret an organization's purposes in order to develop them, to bring them to fruition over time, and indeed to ensure their relevance as times change.

In the case of a charitable trust, the duty of obedience is part and parcel of the requirement that the trustee adhere to the terms of the trust agreement without deviation. For trustees who think that the purposes of the charity as stated in the constitutive documents or a restriction attaching to a particular gift has come to frustrate what they believe to be the donor's larger or true objectives, there are few avenues of legal relief.

3. Cy pres

The trustees can approach a court of equity, asking it to modify the mission (or, in the case of a restricted gift, the restriction) under the doctrine of *cy pres comme possible*.¹⁰⁹ *Cy pres* is recognized in nearly all American jurisdictions,¹¹⁰ but while it is almost universally accepted, it is a narrow doctrine.¹¹¹ It is also a doctrine that, in attempting to strike a balance between public good and the donor's

will be neither judicial inquiry nor liability even if the action was unfortunate for the organization or its membership. This safe harbor does not encompass breaches involving bad faith, criminal activity, fraud, or willful and wanton misconduct.

107. Atkinson, *supra* note, 13 at 661.

108. SCOTT, *supra* note 42, § 164.1.

109. Norman French phrase meaning "as near as possible." GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 431 (Rev. 2d ed. 2003).

110. SCOTT, *supra* note 42, § 399.2.

111. A party seeking application of the *cy pres* doctrine must demonstrate three criteria: (1) the donor created or intended to create a trust for charitable purposes; (2) the specific purpose of the trust is impossible or impracticable to carry out; and (3) the donor manifested a general charitable intention. If these criteria are satisfied, the court may apply the property to a charitable purpose that is closely related to the spirit of the donor's intent, provided that the donor did not expressly state how to dispose of the property if the trust failed. SCOTT, *supra* note 42, § 399 (stating presence of valid gift over makes *cy pres* inapplicable when charitable trust fails).

intent, inclines decidedly toward the donor.¹¹² To begin with, courts traditionally grant cy pres relief only where the charitable purpose becomes impossible, impracticable, or illegal to fulfill.¹¹³ The narrowness of the criterion of impossibility or illegality is intuitive, but “impracticability,” as interpreted by the courts, is equally unyielding. According to the *Restatement (Third) of Trusts*, a purpose becomes “impracticable” when “even though it is possible to carry out the particular purpose of the [donor], . . . to do so would not accomplish the [donor’s] charitable objective . . .” Thus, neither the concept of impossibility nor impracticability, as understood in the law, readily expands to provide relief where there is significant opportunity cost to the charity and the public because a mission has become anachronistic.¹¹⁴

In addition, for cy pres to be applied, the charity must demonstrate that the donor had a general charitable intent. That is to say, the charity must demonstrate from the language in the donative instrument that, in addition to the precise purpose specified there, the donor had a broader charitable intent in making the gift. In short, the charity must show that the donor implicitly consented to the change the charity wants to make.¹¹⁵

While the distinction between specific charitable intent and general charitable intent seems simple enough, differentiating between the two in practice is a challenge.¹¹⁶ For this reason the question of general charitable intent is at the center of most cy pres litigation.¹¹⁷ Some courts strictly adhere to the four corners of the donative instrument, while others take a more generous approach, determining intent from the nature of the gift, the charities in which interest was expressed, the donor’s religion, and even her social,

112. For a historical perspective on the reluctance of American courts to apply the cy pres doctrine, see Edith L. Fisch, *Judicial Attitude Toward the Application of the Cy Pres Doctrine*, 25 TEMP. L. Q. 177.

113. See RESTATEMENT (THIRD) OF TRUSTS § 67 (2001) see also Schmidt & Pollock, *supra* note 41, at 57.

114. The commentators in the *Restatement (Third)* have recently added an additional avenue of relief, providing that cy pres relief is also available where it would be “wasteful to apply the trust’s property to the designated purpose.” In the comments to Section 67, however, this potential expansion to the doctrine of cy pres is quickly circumscribed: “It is not sufficient merely that it can be demonstrated the the trust funds could be better spent on some other purpose.” RESTATEMENT (THIRD) OF TRUSTS, § 67, cmt. c.

115. Once the restriction were shown to be impossible, impracticable, or illegal, if general charitable intent could not be established, then the gift would fail and the funds would revert to the donor (or her estate, if she were no longer living). SCOTT, *supra* note 42, § 399.

116. SCOTT, *supra* note 42, § 399 (distinguishing between general charitable intent and specific intent complex process).

117. EDITH FISCH, CHARITIES AND CHARITABLE FOUNDATIONS § 723, at 553-66 (1974).

economic, and political attitudes. Thus, even where courts stay within the four corners of the document, they have been known to construe its language liberally. For example, the fact that a donor has given property for a specific purpose does not in and of itself preclude a finding of general charitable intent.¹¹⁸ Furthermore, if the instrument is silent as to what happens upon failure of the gift or indicates no preference for one purpose over another so long as it was possible to apply the property to that specified purpose, courts are likely to find that the donor expressed a general charitable intent.¹¹⁹

Finally, the relief is almost certain to be modest at the end of the day. Even if the charity can demonstrate that the purpose has been frustrated to the degree required under the law and, further, that the donor had a magnitude of charitable intent that transcended the narrow purpose in the donative instrument,¹²⁰ equity will then permit the charity to substitute another charitable object, but only one that approaches the donor's original purpose as closely as possible—thus the name for the proceeding, *cy pres*.¹²¹ In modifying the restriction, the court must follow the donor's original purpose as closely as possible, so the degree of change must be relatively small.¹²² At the end of the day, the doctrine of *cy pres* is a saving device, and what is saved is donor intent.

Recent commentators have decried the waste and inefficiency that result in the charitable sector when funds restricted to a purpose that, while not “impossible” or “impracticable” to continue pursuing, represents considerable opportunity cost to the charity, given changed circumstances. Some have argued for expanding the *cy pres* doctrine so that courts could more readily redirect restricted assets in accordance with the more flexible concept of “efficiency.” Not all commentators are on board with the idea of expanding the doctrine, however. As one has noted, much of the demand for reform around

118. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2001) (noting use of specific terms does not indicate absence of general charitable intent). When a trust instrument contains phrase like property shall be devoted “forever” to a particular purpose, or that property shall be devoted to that purpose “and no other purpose,” it does not always indicate absence of a general charitable intent. *Id.* These terms may merely emphasize the donor's intent that property should not be applied to any other purpose so long as it is possible to apply it to the specific purpose. *Id.*

119. *Id.* (listing factors that courts may consider in determining a donor's probable wishes in event trust impracticable).

120. There is in effect an additional requirement for a court to apply the doctrine of *cy pres*: if the these criteria are satisfied, the court may apply the property to a charitable purpose that is closely related to the spirit of the donor's intent, provided that the donor did not expressly state how to dispose of the property if the trust failed. SCOTT, *supra* note 42, § 399 (stating the presence of valid gift over makes *cy pres* inapplicable when charitable trust fails).

121. BOGERT ET AL., *supra* note 109, § 431.

122. RESTATEMENT (THIRD) OF TRUSTS § 67 2001).

the criterion of efficiency runs aground because there is simply no consensus as to the meaning of “efficiency” or “public good.”¹²³ He proceeds to argue that considerations of efficiency are a “slippery slope,” opening the way to the exercise of unfettered judicial discretion.¹²⁴ Moreover, the public benefit theory does not go far enough in its claim to provide a definition of “doing good.”¹²⁵ “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.’”¹²⁶ The same commentator has himself suggested that the solution to the problem of restricted gifts is to relieve charitable trustees of the duty of obedience altogether, so that any restriction on mission is merely precatory. Trustees would then be free to redefine the organization’s mission (and redeploy any restricted gift) at will, constrained only by such nonlegal concerns as fundraising in the future, once they have been brave enough to “bite the hand that feeds them.” I will return to this suggestion at the end of this Article.¹²⁷

Under charitable corporations law, there is marginally greater latitude, depending upon the state. This may be because charitable corporations law is taken from for-profit corporations law (where a less rigorous standard of fiduciary duty is necessary for reasons implicit in Hansmann’s discussion of the agency costs associated with charitable organizations) or because, in the instance of charitable corporations, the duty of obedience was only relatively recently added to loyalty and care as a third fiduciary duty.¹²⁸ For a long time, obedience was subsumed under the duty of loyalty (and some commentators still leave it there or prefer it as an aspect of the duty of care).¹²⁹ Whatever the reason, in some states, directors of charitable corporations can, if their charters permit, change the purposes of the organization. Where directors of a charitable corporation are given such latitude, the rationale is that the entity holds those corporate

123. Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1139 (1993).

124. *Id.*

125. *Id.*

126. *Id.*; see also Wendy A. Lee, Note, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173, 201-02 (2000) (recommending that donors be clearer in expressing their intent to assure their exact wishes are carried out properly).

127. Atkinson, *supra* note 123, at 1139.

128. DANIEL KURTZ, BOARD LIABILITY 84-90 (1988).

129. Brody, *supra* note 100, at 1406.

assets outright, unlike a trust where the trustee holds assets only in a fiduciary capacity.¹³⁰

Although some states may accord directors a measure of autonomy in interpreting the charity's mission, the commissioners who drafted the Revised Model Nonprofit Corporation Act were ultimately uncomfortable with the idea of allowing a corporate charity to alter its purposes without applying to court for cy pres relief: "[T]hose who give to a home for abandoned animals do not anticipate a future board amending the charity's purpose to become research vivisectionists."¹³¹ Ultimately the Revised Act fell back to a more conservative standard, taking the position that where assets of a charitable corporation were concerned, trust law was applicable.

4. Administrative Deviation

Closely allied to cy pres is the doctrine of administrative deviation. Unfortunately, however, this doctrine will not readily afford a charity relief from an antiquated mission. Administrative deviation allows a court to alter the administrative or procedural provisions of a gift and will be applied when "it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the [donor] and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the [gift]."¹³²

It could be said that cy pres applies to the modification of the gift's purposes, while deviation applies to required aspects of its administration. In practice, however, the distinction can be more difficult to draw. For example, even where the sale of property is precluded, deviation has been used to escape these restrictions and allow the property to be sold.¹³³ Strictly speaking, however, in applying the doctrine of deviation, a court cannot change the original charitable objective of the donor or divert the gift to an entity with a purpose different from the purpose set forth in the donative instrument.¹³⁴

130. See *Attorney General v. Hahnemann Hosp.*, 494 N.E.2d 1011, 1019-21 (Mass. 1986) (holding that the board of trustees of a hospital was permitted to amend the articles of organization to authorize the sale of all of the hospital's assets).

131. Brody, *supra* note 100, at 1460-61.

132. RESTATEMENT (THIRD) OF TRUSTS § 66.

133. JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 215-17 (2d ed. 2000).

134. *Id.* at 341.

C. Enforcing the Mission

1. The Attorney General

The person who almost universally has standing to hold trustees and directors accountable is a state official, the attorney general. The state's interest in public charities and its right to enforce gifts to them has historical roots deep in the common law with the concept of the Crown as *parens patriae*. So conceived, the Crown had the burden of facilitating the alleviation of suffering among its most vulnerable subjects,¹³⁵ and, as its agent, the attorney general had an exclusive duty to enforce charitable gifts.¹³⁶ The common law principles asserted by the attorney general on behalf of the Crown were carried over to the American colonies, and later the states stepped into the role of *parens patriae*, authorizing their respective attorneys general to enforce charitable gifts.¹³⁷

This governmental interest in the enforcement of public charities continues today with the attorney general acting for the state and the common law remaining an important source of the attorney general's authority. *The Restatement (Second) of Trusts* concludes that "a suit can be maintained for the enforcement of a charitable trust by the attorney general or other public officer."¹³⁸ Today, common law precepts are generally supplemented by state statutes authorizing the attorney general to enforce charities (such provisions to be found either in charitable trust statutes or in the enumeration of powers of the attorney general).¹³⁹ Under these provisions, the attorney general

135. "[E]ven before the enactment of the Statute of Charitable Uses in 1601 suits were brought by the Attorney-General to enforce charitable trusts." SCOTT, *supra* note 42 § 391.

136. Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 40 (1993). For the origins of the role of the Attorney General as enforcer of charitable gifts under the common law, see GARETH JONES, HISTORY OF THE LAW OF CHARITY, 1532-1827 47-56, 59-64, 70-96, 134-154 (1969); David Villon Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 J. LAW & PUB. POL'Y 131, 138-45 (2000).

137. Blasko et al., *supra* note 136, at 40-41.

138. RESTATEMENT (SECOND) OF TRUSTS § 391; Blasko et al., *supra* note 136, at 43. (At publication of this Article, the *Restatement (Third)* was incomplete and provisions relating to the enforcement of charitable trusts had not yet been published. Accordingly, with respect to enforcement issues, citation here is to the *Restatement (Second)*.)

139. *E.g.*, Illinois Charitable Trust Act, 760 ILL. COMP. STAT. 55/12 (2004). New York also confers broad authority on the attorney general to supervise the administration of charitable assets. N.Y. EST. POWERS & TRUSTS LAW §§8-1.1(f), 8-1.4. Section 8-1.1(f) expressly provides that the attorney general shall represent the beneficiaries of disposition for religious, charitable educational, or benevolent purposes and that it shall be the duty of the attorney general to enforce the rights of such beneficiaries by appropriate proceedings in the courts.

can institute appropriate proceedings to secure compliance with statutory norms or ensure proper administration of charitable organizations. The attorney general is deemed an interested party, represents the beneficiaries, can intervene, or is generally authorized to bring enforcement actions. State codes that do not explicitly mention attorney general regulation of charities usually at least preserve the common law power of the attorney general.¹⁴⁰ State nonprofit corporation codes also allow for attorney general enforcement. Furthermore, the Revised Model Nonprofit Corporation Act gives wide supervisory and enforcement powers to the attorney general, who may seek injunctive or other relief and may intervene as a right in any proceeding affecting a nonprofit corporation. Thus both charitable trusts and charitable corporations are usually statutorily subject to the attorney general's jurisdiction.¹⁴¹

In short, now as in earlier times, it is the role of the attorney general to enforce donor intent: "Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose."¹⁴²

The current rationale for state supervision of public charities through the office of the attorney general is of a piece with the historical one. Today, the beneficial interest in a charitable organization is deemed to reside ultimately in the community (an indefinite class¹⁴³) with charitable property devoted to the accomplishment of purposes that are ultimately beneficial to the community at large. So, just as the Crown's interest in charitable gifts was part and parcel of its responsibility for the needs of the community, the state, through the attorney general, now operates to preserve and vindicate the community as the ultimate beneficiary of a charitable organization.¹⁴⁴ Today, the attorney general in promoting

140. Blasko et al., *supra* note 136, at 45; see *In re Nevil's Estate*, 199 A.2d 419, 422-23 (Pa. 1964) (preserving this power for the attorney general). Only a few states, notably Alaska and Louisiana, are completely silent.

141. Blasko et al., *supra* note 136, at 46.

142. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f; see *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 431-32 (N.Y. App. Div. 2001) (underscoring this point); *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997) (same); see also Attorney General's Memorandum of Law in Support of Motion to Dismiss at 4, *Smithers*, 723 N.Y.S.2d (N.Y. 2001) (No. 604578/98).

143. It is axiomatic that ascertained trust beneficiaries having a real interest in the trust have standing in all matters involving the construction of a trust, charitable and otherwise. RESTATEMENT (SECOND) OF TRUSTS § 346.

144. James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 259 (2003).

accountability by charities and fiduciaries and enforcing the purposes of the trust or corporation represents the state and public. The common law duties of the attorney general reflect the expectations of society that there should be a single evolving duty to carry out the charitable purposes of the organization, that it is necessary to keep trust property productive, and that trustees should be prohibited from diverting charitable funds for improper purposes of self-dealing.

Be that as it may, while the attorney general has authority to enforce the purposes of a charitable organization, this duty to protect the public interest with its broad investigatory and supervisory powers, does not confer a right to manage the charity in its everyday affairs. "Courts have denied the attorney general authority to intervene in suits contesting wills involving charities, to enforce obligations owing to charities, to intervene or appear for the establishment of an invalid charitable trust, or to authorize deviations from trust provisions."¹⁴⁵

Despite the grand policy objectives that lay behind making the attorney general the enforcement vehicle for gifts to public charities, over the last twenty-five years the claim has been made that attorney general supervision of this sector is more theoretical than real. During this period, charities have been the subject of increasing interest by the public and the media. Both the extraordinary potential of this sector to contribute to the commonweal and the abuses that thwart its potential have been recognized. In this context, much has been written about the inadequacies of attorney general oversight. Attorney general offices, the claim is made, are usually understaffed and underfunded. Most have many pressing concerns aside from the oversight of charities.¹⁴⁶ Only thirteen states have departments within attorney general offices specifically devoted to charities.¹⁴⁷ Admittedly, these states are home to 55 percent of charities in the United States and have 65 percent of national charitable revenues. But while New York, for example, assigns approximately fourteen attorneys and six accountants to charities regulation, even if the office had three times the staff, it would still be overburdened. There are so many not-for-profit organizations in New York that the staff cannot review all the annual reports they receive.¹⁴⁸

145. Blasko et al., *supra* note 136, at 47.

146. *Id.* at 48.

147. James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 262 (2003); PETER SWORDS & HARRIET BOGRAD, NONPROFIT COORDINATING COMM. OF NY, NONPROFIT ACCOUNTABILITY (1997), available at <http://www.charitychannel.com/forums/cyb-acc/accept.html>.

148. Blasko et al., *supra* note 136, at 48; Fishman & Schwarz, *supra* note 133, at 257.

There are also possible conflicts of interest. Lack of money, coupled with the obligation to discharge other important duties invites—indeed necessitates—selective prosecution.¹⁴⁹ To compound the problem, attorneys general are political officials, often with significant political aspirations. Supervision, when forthcoming, can be skewed by the self-interest of an elected official.¹⁵⁰ The construction of the language governing large charitable gifts often involves political considerations, among them the fact that the large charitable organizations that often result from such gifts create employment and relieve state government of obligations that it would otherwise undertake.

During this period there have been various proposals to deal with the limitations of attorney general enforcement, the goal being to improve the mechanisms and thereby to assure a high level of performance by nonprofits. The creation of a new agency at the state level has been suggested by one commentator. A state board of charities would then have “primary responsibility for supervising charities and for administering the various state controls over their operation.”¹⁵¹ Beyond commentary, a few states “have attempted to legislate alternative systems for enforcing charities.”¹⁵² But despite the problems with attorney general supervision and government-sponsored experimentation in a few states, in the end, the main responsibility for state enforcement continues to rest with the attorney general.

2. Private Attorneys General

Another possible way to supplement attorney general supervision is to expand individual standing. Individuals who have an interest in the outcome of a charitable proceeding—potential beneficiaries, past beneficiaries (such as school alumni or former hospital patients), fee-paying patrons (such as current students or patients), even donors—potentially have reasons to monitor a

149. FISCH, *supra* note 117, at 567-70.

150. Atkinson, *supra* note 13, at 692-93.

151. Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfilled State Responsibility*, 73 HARV. L. REV. 433, 476 (1960).

152. Blasko et al., *supra* note 136, at 50. In some states different state officials are invested with enforcement powers. For example, North Carolina and North Dakota allow district attorneys to sue as well as the attorney general. *See* N.C.G.S.A. § 36C-4-405A; N.D. Cent. Code § 59-04-02. Arizona grants standing to county attorneys (*see* Ariz. Rev. Stat. Ann. § 44-6553B), while Missouri allows suits by circuit attorneys (*see* Mo. Ann. Stat. § 352.240). Such states have thus tried to increase charitable enforcement by expanding the roster of those state officials with standing. Georgia makes the State Revenue Commissioner, rather than the attorney general, the official responsible for administration of charitable trusts. (*See* Ga. Code Ann. § 53-12-116.)

particular charity, especially if accorded the legal right to bring suit against it if wrongs are discovered. Indeed, given that the public is the ultimate beneficiary, some have called for granting standing to any member of the general public.¹⁵³

Traditionally, however, the law has been chary in according standing to private parties. Reasons for this reluctance were articulated long ago by Chief Justice Marshall in *Dartmouth College*.¹⁵⁴ According to Marshall, notwithstanding the interests of the public at large in the charity, the state has a preclusive power of enforcement: private citizens or organizations could not sue to enforce charities. His opinion is important not so much because it decided who can represent the interest of the charitable beneficiaries, but because it decided who cannot. Other than the attorney general, only persons with a special and definite interest, such as directors, have standing to institute a legal action. The general public lacks such an interest. The rationale for this limiting the right to sue public charities was, according to Marshall, a fear of unreasonable and vexatious litigation by persons who had no legally cognizable interest in the outcome, and who had nothing material at stake in the litigation.¹⁵⁵ Conceptually a public charity is for the public benefit and therefore must be protected from harassment and loss. Strict standing rules were thus designed to present “vexatious” litigation by “disinterested” parties.

More recently, the New York Court of Appeals in *Alco Gravure v. Knapp Foundation* stated that “standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General in order to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations.”¹⁵⁶ The principle set forth by the *Alco Gravure* court seeks to avoid opening the door to unnecessary litigation which is likely to deplete charitable assets and which will subject the courts to suits by third parties with no legally enforceable interest in charitable property.

A more traditional and much more conservative way of expanding standing does exist—the relator action. Largely a statutory creation¹⁵⁷, a relator may or may not have a direct interest

153. Atkinson, *supra* note 13, at 682-85.

154. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 587 (1819).

155. Atkinson, *supra* note 13, at 662 n.28.

156. *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 756 (N.Y. 1985)

157. Although a statutory creation, there is authority that, even in the absence of a statute, private actors should be permitted to file suit in the name of the attorney general. *See, e.g.*, *State ex rel Hancock v. Elwell*, 163 A.2d 342, 349-50 (Me. 1960).

in a transaction, but is permitted to institute a proceeding when that right to sue resides solely in the attorney general. The relator is essentially deputized by the attorney general and as such sues in the name of the people. Thus she is in some sense a “private attorney general.”

Arguably, the relator action encourages public spirited citizens, as the relator generally takes an active part in the proceeding.¹⁵⁸ The advantage to the state is that the relator is generally responsible for all costs of bringing the suit, allowing the attorney general to tap into private resources for expenses of litigation otherwise borne by the state. However, the attorney general retains control of the suit. Relators cannot sue without the attorney general’s approval and cannot maintain an action if the attorney general declines to proceed. Furthermore, the attorney general can dismiss or settle the case at any time. Thus the attorney general remains the ultimate protector of the public interest in charity.

Expanded use of relators could avoid the dangers of broadened standing. Extraneous factors can, however, influence the attorney general’s decision to grant or not grant relator status. Concededly, the attorney general can filter out frivolous or nuisance suits. However, she can also screen out entirely valid substantive claims by well-prepared litigants.¹⁵⁹ Furthermore, private attorneys general are unlikely to step forward in sufficient numbers to cure the deficiencies of current state supervision.

In view of the apparent lack or inadequacy of state supervision, some state courts have responded to the situation by relaxing standing requirements on a case-by-case basis under the “special interest doctrine.” This doctrine, while sometimes incorporated into charitable trust statutes, has in general passed into the common law. The key question is what “interest” a plaintiff has in a charity.¹⁶⁰

Courts that rely on this doctrine to allow private parties to sue charities basically transplant the concept of an “interest” from the law of non-charitable trusts (where a beneficiary has very well-defined interests and thus well-defined rights) into the philanthropic setting. Traditionally, in a non-charitable trust, beneficiaries and trustees have had the requisite standing to sue for enforcement of the trust.¹⁶¹

158. James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 671 (1985).

159. Atkinson, *supra* note 13, at 685.

160. Blasko et al., *supra* note 136, at 52.

161. *Id.* at 60 n.194; see RESTATEMENT (SECOND) OF TRUSTS § 200 cmts. a, e. The donor may not maintain a suit unless he retained an interest in the trust property. RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959). An incidental beneficiary cannot maintain suit either. *Id.* cmt. c.

In the charitable sector, while trustees are almost universally conceded standing to sue, beneficiaries of a charity (who are usually not identified in any governing documents and whose interest is thus unascertained) are in a much more tenuous position. Unlike the beneficiary of a non-charitable trust who is identified in the governing documents, the identity of charitable beneficiaries is by its very nature unascertained. In granting charitable beneficiaries standing, the courts have developed the concept of a special interest in a charity. Where a particular individual or a group has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number, they may come under an exception to the general rule denying standing to beneficiaries.¹⁶²

A recent examination of precedent across jurisdictions has suggested broad similarities in the justifications for finding a party has a “special interest” in a charity and thus is entitled to standing. Certain factual elements consistently influence a court’s willingness to allow a private party to sue for the enforcement of charitable obligations: the extraordinary nature of the acts complained of and the remedy sought by the plaintiff, the presence of fraud or misconduct on the part of the charity or its directors, the attorney general’s availability or effectiveness, the nature of the benefited class and its relationship to the charity, and other subjective and case-specific factual circumstances.¹⁶³

Theoretically, the “special interest” exception provides access to the courts only to those with justified involvement in the accomplishment of charitable objectives. If the private party successfully demonstrates the requisite special interest in a charity’s philanthropic goals, the action is not likely to be frivolous or needlessly vexatious. “The ‘specially interested’ plaintiff presumably is seeking to uphold the best interests of the charity, and may be able to adequately represent those interests and the interests of the charitable beneficiaries.”¹⁶⁴

162. Blasko et al., *supra* note 136, at 52.

163. *Id.* at 61.

164. *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 391. A trustee or director or other person having sufficient special interest may also qualify to enforce a charitable trust. *Holt v. Coll. of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 934 (Cal. 1964).

V. DONOR STANDING: WHERE IT STANDS

In any proceeding to construe the language of a restricted gift to a public charity, donor intent is the watchword. Rules governing the interpretation of restrictive language in a donative instrument have at their base the principle that courts should seek to implement donor intent. *The Restatement of Property (Wills and other Donor Transfers)* states that “[t]he controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.”¹⁶⁵

There is no doubt then that the persona of the donor hovers over any proceeding concerning the meaning of any restrictive language governing a charitable gift. However, this does not mean that the donor—at least the donor of a gift to a public charity—can initiate such a proceeding when she believes the express terms of her gift are being ignored by the organization on which she has bestowed her largess. At common law, a donor who has made a completed charitable contribution has no standing to bring an action to enforce the terms of her gift unless she has expressly reserved the right to do so. “Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose.”¹⁶⁶ With few exceptions, state legislatures have declined to provide the donor with statutory relief, at least where standing is concerned.

The question of donor standing to enforce a restricted gift to public charity is no mean matter. Recently there is much literature arguing for the expansion of standing to sue public charities to include various parties heretofore excluded and, depending upon the commentator, donors are numbered among them. Nevertheless, careful consideration should be given to the enlargement of donors’ rights in this regard. Recognition of donor standing potentially strengthens the hand of a private party vis-à-vis the charity after the gift has been made. Going forward, it also potentially limits the discretion exercised by certain mediating institutions—in particular,

165. RESTATEMENT (THIRD) OF PROPERTY, § 10.1 (2003). It is equally black letter law that the donor’s intention is to be determined from the text of the trust document, together with all other relevant evidence. *Id.* § 10.2. However, there is less than perfect agreement among commentators and the courts as to the extent to which extrinsic evidence may be introduced to help determine the donor’s intention. The traditional majority rule, the “plain meaning rule,” adopts the position that extrinsic evidence cannot be introduced to contradict the plain meaning of the words used in a trust.

166. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f.

the state attorney general (who is currently the only person aside from a co-trustee or director assured of standing to enforce a restricted gift¹⁶⁷) and the fiduciaries running the charity—in interpreting restrictive language over time. On the other hand, a denial of standing to any party may have real impact on the answer to any substantive question giving rise to the litigation. As one commentator put it, “The question of who should have standing to sue charitable fiduciaries ultimately comes round to what kind of charity we want to have, to what we think charity is, and what we want it to be.”¹⁶⁸

A. *Point of Housekeeping*

The question of standing is a purely formal one—concerning who should bring a claim, not whether the underlying substantive claim has merit. If this is so, to grant standing to enforce a claim (in this instance, a restricted gift) is not to adjudicate the question of whether the underlying claim (the gift) is entitled to enforcement.¹⁶⁹ By the same token, to deny standing to a particular person—a donor, for example—would not be to deny the merits of her case, but would simply be to say that this party is not the right party to assert the claim but rather that the claim is instead appropriately asserted by someone else (the state attorney general, for example). Expansion of standing to a party heretofore precluded from bringing suit, therefore, does not create a new cause of action.¹⁷⁰

To determine the appropriate party to bring a given claim, most courts examine the relationship between the person seeking standing and the claim she seeks to assert. Typically, the challenge for any plaintiff is to establish that she has something concrete or material at stake in the outcome of the adjudication at hand.¹⁷¹

While this inquiry into the connection between the would-be plaintiff and her would-be case does not yield a new cause of action, the determination of who has a stake in a law suit and how that stake is established does speak volumes about the legal process. In that regard, determinations of standing, if not substantive, are profoundly normative in that they determine who can play a part in the process.¹⁷² Moreover, some scholars (especially in the constitutional

167. Absent special circumstances or an express retention of a reversion by the donor.

168. Atkinson, *supra* note 13, at 698.

169. *Id.* at 658.

170. *Id.* at 659.

171. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1322 (1995).

172. *Id.* at 1372-74.

area) take the position that standing merely masquerades as a procedural determination, while in truth being a substantive determination as to the merits.¹⁷³

These subtle considerations bear upon our inquiry into donor standing in general and into the holding in *Smithers* in particular. Mrs. Smithers sought standing to enforce her husband's gift only after asking the Attorney General—the statutorily appropriate party—to pursue the matter. Indeed, she continued to seek standing even after the Attorney General entered into a settlement agreement with the charity. The grant of standing, at least in this instance, can be viewed as a comment by the court on the adequacy of the statutory process, at least in this instance. But further, approaching the broader question of donor standing, in determining whether a donor has something at stake in a gift (even a restricted gift) after it is delivered to the charity potentially reconfigures the relationship between the donor and the charity.

To return to the particulars of the current law with respect to donor standing, nearly all the modern American authorities—decisions, model acts, statutes, and commentaries—deny a donor standing to enforce a restricted gift to public charity absent express retention of a reversion in the donative instrument.¹⁷⁴ This resistance to donor standing in the United States can be dated at least to Chief Justice Marshall's opinion in *Dartmouth College*. Chief Justice Marshall reasoned that founders and donors had parted with their property when they gave it to the charitable corporation and had no further interest in it. He then found that, after a gift is made, the whole legal interest is in the trustees and can be asserted only by them. Unless the donor retains a special or definite interest in the gift made to charity, only the Attorney General can enforce it. Absent this retained interest, donors are identified with and personated by the trustees, and their rights are to be defended and maintained by them.

¹⁷⁵

The approach taken by *The Restatement (Second) of Trusts* is consistent with Chief Justice Marshall's opinion. A donor who has made a completed charitable contribution, whether as an absolute gift or in trust, has no standing to bring an action to enforce the terms of the gift without expressly reserving the right to do so. In the words of *The Restatement*, "A suit for the enforcement of a charitable trust

¹⁷³ *Id.* at 1326.

¹⁷⁴ The cases are legion. *See, e.g.*, *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Co.*, 697 N.Y.S.2d 56, 59-60 (N.Y. App. Div. 1999); *see also* Karst *supra* note 151, at 445-49.

¹⁷⁵ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 566-69 (1819).

cannot be maintained by the settlor or his heirs”¹⁷⁶ *The Restatement* goes on to state, “Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose.”¹⁷⁷ The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are enforceable at the instance of the attorney general. It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift. With regard to this rule, one commentator has elaborated that, where funds are given for a charitable purpose but without a reservation of rights, “[t]here is no property interest left in the settlor or his heirs, devisees, next of kin, or legatees.”¹⁷⁸ As for any innate inclination to follow the fortunes of the charitable organization after the gift is made:

The settlor or his successors may have a sentimental interest in seeing that his wishes are respected, but no financial [interest] . . . which the law recognizes. . . and hence neither he nor they are as a general rule permitted to see the trustees to compel them to carry out the trust.¹⁷⁹

“The better reasoned cases refuse to permit the settlor during his lifetime, or his successors after his death, to sue merely as settlor or successors to compel the execution of the charitable trust”¹⁸⁰

Thus the donor has no standing to enforce the terms of his gift when he has not retained a specific right to control the property, such as a right of reverter.¹⁸¹ As a matter of common law, when a settlor of a trust or a donor of property to a charity has failed specifically to provide for a reservation of rights in the trust or gift instrument, “neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators.”¹⁸² “Where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming

176. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. e.

177. *Id.* § 348 cmt. f.

178. BOGERT, BOGERT & HESS, *supra* note 109, §415.

179. *Id.*

180. *Id.*

181. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c. By expressly reserving a property interest such as a right of reverter, the donor of the gift or the settlor of the trust may bring himself and his heirs within the “special interest” exception to the general rule that beneficiaries of a charitable trust may not bring an action to enforce the trust, but rather are presented exclusively by the Attorney General. *Jones v. Grant*, 344 So.2d1210, 1212 (Ala. 1977), *superseded by* Alabama Nonprofit Corporation Act of 1984, ALA CODE § 10-3A-1 et seq.; *Steenek v. Univ. of Bridgeport*, 668 A.2d 688, 696 (Conn. 1995); *Hooker v. Edes Home*, 579 A. 2d 608, 612 (D.C. 1990); *YMCA v. Covington*, 484 A.2d 589, 591-92 (D.C. 1984).

182. *Stjernholm v. C.I.R.*, No. 90-9012, 1991 WL 88498 (10th Cir. May 22, 1991).

under him, have any standing in court as to its disposition and control.”¹⁸³ In short, in the absence of a right of reverter, the right to seek enforcement of the terms of a charitable gift is restricted to the Attorney General.¹⁸⁴

The increased interest in the proper role of donors in the charitable sector has resulted in at least modest interest at the legislative level in strengthening donors’ hands by granting them standing. The Uniform Trust Code (“UTC”), initially approved by the National Conference of Commissioners on Uniform State Laws in 2000 (thereafter reviewed and amended in 2005), was the first attempt at a national uniform codification of the law of trusts and had the estimable goal of providing state legislatures with a model code of “precise, comprehensive, and easily accessible guidance on trust law questions.”¹⁸⁵ The commissioners liberalized a number of provisions relating to charitable gifts. Not only did they broaden the doctrines of cy pres and equitable deviation, substantially increasing a court’s authority to invoke them, but they also asserted the principle that the settlor of a charitable trust may maintain a proceeding to enforce the trust.¹⁸⁶ Comments to the rules allow, however, that the grant of standing to donors should not preclude the rights of either the attorney general or “persons with special interests”¹⁸⁷ to enforce the trust. Significantly, the UTC fails to resolve the issues created when the would-be enforcer of the donor’s charitable intent is not the donor but either the donor’s legal representative (*e.g.*, executor) or the donor’s family (as in *Smithers*).

Perhaps because so many vexing questions with respect to donor standing were left open by the UTC commissioners, the committee recently charged with revising another uniform act—the Uniform Management of Institutional Funds Act (“UMIFA”)¹⁸⁸—appears unlikely to adopt the UTC position with respect to donor standing. The UMIFA provision is likely to provide that in a

183. 5 IND. LAW ENCYCL. CHARITIES § 27 (2003).

184. *Nelson v. Cathedral of the Incarnation*, N.Y.L.J., May 2, 1991, at 27 (Sup. Ct. Nassau Co. 1991); *Matter of Swan*, 261 N.Y.S. 428, 436 (N.Y. App. Div. 1933); *Stewart v. Franchetti*, 153 N.Y.S. 453, 457 (N.Y. App. Div. 1915); *Assoc. Alumni v. Theological Seminary*, 57 N.E. 626, 627 (N.Y. 1900); *Stewart v. Franchetti*, 153 N.Y.S. 453, 457 (N.Y. App. Div. 1915).

185. UNIF. TRUST CODE, *Prefatory Note* (2000).

186. *Id.* § 405(c).

187. *Id.* § 405 cmt. The UTC does not shed further light on the issue of what sort of “special interest” will be sufficient to support standing.

188. UNIF. MGMT. OF INST’AL FUNDS ACT (Nat’l Conf. of Comm’rs on Unif. State Laws 1972). The UMIFA was initially produced at the instigation of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and it was promulgated in 1972. It has been adopted by the states in varying forms. In 2001 NCCUSL appointed a committee to revise the UMIFA and the revision is ongoing at this writing (confirm).

proceeding to release or modify a restriction imposed by a gift instrument, brought by a charity, notice need be given to the attorney general but not to the donor. The clear implication of this rule is that the donor of a charitable trust does not have standing to enforce the trust (absent, of course, a clear provision to this effect in the gift instrument). This reluctance to empower the donor is significant, especially since the committee is willing to follow the UTC commissioners in strengthening the charity's position by adopting the more liberal UTC standards for cy pres. The UMIFA, when revised, may also permit charities to do a sort of informal cy pres or equitable deviation on small institutional funds without notice to either the donor or the attorney general. Furthermore, this position, if adopted, would be a retrenchment where donors are concerned from the UMIFA as it stands. While nothing in the UMIFA should be construed to grant donors standing, current Section 7(a) (as noted above) empowers the governing board of an institution to seek a release of an onerous or obsolete restriction without resort to the courts by obtaining the donor's consent.¹⁸⁹

Finally, it should be noted that at one time the common law was more generous to founders and endowers. In the past, the courts automatically accorded them a power of "visitation" to supervise their gifts once given, treating the reservation of visitorial powers as inherent in the endowing of a corporate charity. The early cases based the doctrine on the power every one has to dispose, direct, and regulate his own property. Today, we do not recognize that property given by a donor to charity remains in any sense "his own." Nevertheless, there was a rationale for allowing such rights. A founder had a natural reason to know and care about the charity's operations. Also, permitting him to sue would not expose the charity to vexatious litigation from indifferent members of the public.¹⁹⁰

Although there are modern cases that recognize the doctrine, contemporary commentators are generally skeptical¹⁹¹ and view visitation as a "relic of earlier times," noting that, at least in its traditional form, the right posed significant problems. First, it had an indefinite scope and thus raised questions as to who had final say on the management of the charity—the founder or the charitable fiduciaries. Second, in contemporary times, when charitable programs are sophisticated and ambitious in their objectives, trustees and

189. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 999-1002 (Conn. 1997).

190. The same considerations obviously apply to the founder of a charitable corporation, but the law has been equally reluctant to give him standing to enforce the terms of his donation.

191. "The doctrine of visitation should be given a swift and statutory burial." Karst, *supra* note 151, at 446.

directors are presumed to bring a professionalism and expertise to their jobs that they should be permitted the scope of responsibility to employ. Also, the power of visitation was hereditary, passing to the donor's heirs. Over time, problems arose when heirs died out or became numerically burdensome. Finally, while it is true that founders are few and far between, the justification for permitting a founder to enforce the charitable trust is also applicable to a substantial donor. This donor is also typically more than a little interested in the charity's operation. If we permit the founder of a charity to sue to enforce the duties of the charity's managers, we must then decide whether to allow the same standing to one who is not a founder but who is instead a substantial donor.¹⁹²

B. Contract or Gift?

Conceptually, a restricted gift hovers somewhere between a gift and a contract.¹⁹³ Traditional jurisprudence has seen it as a gift, however, and subsumed it under property law (which is also consistent with allowing restricted gifts to be governed by the law of trusts). Understood as a property transaction, the transfer from the donor to the charity meant that donor surrendered control of the object *gratis* and had no legal rights with respect to it (or the charity) going forward. This was the case whatever the restriction and whatever constraints it might legally impose on the charity going forward. An exception to this (and a good property exception it was) was provided only when the donor kept an express reversionary interest (a property interest).

More recently, John Langbein, Professor at Yale Law School and one of the UTC commentators, has urged a rethinking of the law of trusts. Langbein maintains that many avenues for reform would be opened (as well as many age-old conundra resolved) if trusts were subsumed under the law of contract as the functional equivalent of a third-party beneficiary contract.¹⁹⁴ Presently, under the common law,

192. *Id.*; Atkinson, *supra* note 13, at 657.

193. It is not a conditional gift in which a performance a priori to delivery is required and such performance then constitutes consideration for the gift. In the case of a restricted gift, the performance solicited comes after delivery. It might be thought of as an inverse unilateral contract.

194. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE LJ 625, 646 (1995) ("The better view is . . . that 'the three-cornered relation of settler, trustee and [beneficiary] . . . is easily explained in the modern law in terms of a contract for the benefit of a third party.'" (quoting F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 200 (1953))); see also Ronald Chester, *Grantor Standing to Enforce Charitable Transfers under Section 405(C) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37

the settlor has no standing to enforce the trust she has created. In the words of the *Restatement (Second) of Trusts*, only the “beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust.”¹⁹⁵

Langbein’s suggestion invites a reconceptualization of the restricted gift as well so that, even if the restriction attached to the gift is not expressed in property terms (with the donor retaining a reversion in the event the restriction is violated), the terms of the gift could still be enforced by the donor. Viewed instead as the functional equivalent of a third-party-beneficiary contract, the expressed intentions of a donor-promisee and the charity-promisor become paramount and readily lend themselves to routine enforcement by the donor (as well as the charity).¹⁹⁶ According to Langbein, understood as a contract, all that matters is the intention of the parties to the “deal” respecting a particular point. If they do not articulate their intention on this matter, then the only question is which default rule captures the likely bargain they would have struck had they thought about it. When such an intention-seeking standard is applied, so Langbein argues, the parties are assumed to have intended enforcement by the donor as well as the beneficiary.

VI. *SMITHERS V. ST. LUKE’S/ROOSEVELT HOSPITAL*¹⁹⁷: THE HOLDING

In *Smithers v. St. Luke’s/Roosevelt Hospital*¹⁹⁸, the New York Court of Appeals granted standing to Mrs. Smithers, reinstating her case against the Hospital (which had been dismissed below). Writing for a three-to-one majority, Justice Ellerin stated the issue as “whether the estate of the donor of a charitable gift has standing to sue the donee to enforce the terms of the gift.”¹⁹⁹

The court below set the stage for Justice Ellerin’s groundbreaking opinion by relying on a 1985 New York Court of Appeals decision, *Alco Gravure, Inc. v. Knapp Foundation*²⁰⁰ to apply a classic

REAL PROP. PROB & TR. J. 611, 615-17 (2003) (“In the case of a trust, a contract usually exists between the grantor and trustee. The trust as a functioning entity is created according to its terms”).

195. Langbein, *supra* note 194, at 644.

196. Chester, *supra* note 194, at 615-17 (“However if one views the trust as the functional equivalent of a third-party beneficiary contract, the expressed intentions of a promisor (trustee) and promisee (grantor) become paramount. These intentions would routinely include enforcement of the ‘trust deal’ by the promisee as well as by the beneficiary”).

197. *Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001).

198. *Id.*

199. *Id.* at 427.

200. *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 755 (N.Y. 1985):

common law analysis²⁰¹ to Mrs. Smithers's petition.²⁰² The court below maintained, consistent not only with the common law but also with most state statutes, that where a restricted gift was concerned, the interest of the donor (or his representative) was not compelling absent a reversion.²⁰³ In deciding to dismiss Mrs. Smithers's petition, the court also considered (consistent with *Alco Gravure*) whether she could have been a possible beneficiary of the gift or could be said to represent the interests of possible beneficiaries.²⁰⁴

Since Mrs. Smithers was neither seeking a return of funds to her husband's estate nor was she herself a possible beneficiary of the gift, the court below found that Mr. Smithers's estate did not have a compelling interest in the gift that established the Smithers Center.²⁰⁵ Accordingly, Mrs. Smithers, as Special Administratrix of the estate, was denied standing to pursue the claim against the Hospital, and her suit was dismissed. The court also cited public policy grounds for its decision, noting in phraseology that harkened back to *Dartmouth College*, the need to protect charities from vexatious and harassing litigation by donors who (having no reversion) had no tangible stake in the outcome of the matter.

Reversing the court below, Justice Ellerin found that Mrs. Smithers had standing co-existent with that of the Attorney General. The court began by recounting the facts of the case.²⁰⁶ Interestingly enough, considering that the issue was one of Mrs. Smithers's standing and not the merits of her case, the court's first level of inquiry still went to the heart of Mrs. Smithers's case against the Hospital: whether the gift was restricted; whether the Hospital had accepted the restrictions; and, if so, whether the Hospital had violated any of the conditions of the gift. In her petition, Mrs. Smithers sought

The general rule is that one who is merely a possible beneficiary of achievable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust. . .there is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number.

201. See *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997) ("At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so.")

202. *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, No. 604578/98, slip op. (N.Y. Sup Ct. Dec. 18, 1998).

203. *Smithers*, No. 604578/98, slip op. at 6.

204. *Id.*

205. *Id.* at 8.

206. *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 427-31 (N.Y. App. Div. 2001)

to permanently enjoin the sale of the mansion on the upper east side of New York City (which housed the Smithers program and was, so she claimed, an integral part of the alcoholism treatment program created by her husband) and the relocation of the program without court approval.²⁰⁷ She also wanted specific performance of the terms of her husband's gift, *i.e.*, perpetual maintenance of a free-standing rehabilitation unit and a return to the endowment fund of all proceeds of any sale of the mansion, among other things.²⁰⁸ Thus the court was concerned with whether any restrictions inhered in the endowment funds provided by Mr. Smithers as part of the gift and whether any restriction precluded the sale of the mansion.

The court looked to two letters—one that accompanied the initial 1971 installment under Smithers's \$10 million pledge and another that accompanied the final installment in 1985. Pointing to the 1971 letter, the court asserted that Smithers intended the first installment of his gift to create an alcoholism treatment program, which was to have three stages of care—detoxification in the hospital, followed by rehabilitation in a free-standing, non-hospital setting, followed by outpatient care.²⁰⁹ With \$1 million of the first installment, the Hospital purchased the mansion to house the Smithers Center and to serve as a free-standing rehabilitation unit for the second phase of treatment.²¹⁰

The 1983 letter contained detailed restrictions on the use of the last installment of the gift. By the terms of the letter, the installment was to be used for an endowment fund to support the Smithers Center, with income to be used exclusively for the Center and any unused income to be added to principal at the end of each year.²¹¹ Principal was to be spent only for remodeling and rebuilding of any space used in connection with the Smithers Center.²¹²

The 1983 letter clearly established that at least the last installment was restricted to the use of the Smithers Center. But what of the mansion, the free-standing rehabilitation center that Mrs. Smithers alleged was central to the treatment modality? Indeed, the dissent (so the majority acknowledged) maintained that the case was only about the sale of the mansion and that Smithers had agreed to it prior to his death in a 1981 letter to the Hospital.²¹³

207. Plaintiff's Complaint at 22, *Smithers*, No. 604578/98, slip op.

208. *Id.*

209. *Smithers*, 723 N.Y.S.2d at 427.

210. *Id.*

211. *Id.* at 428.

212. *Id.*

213. *Id.* at 427-28.

Justice Ellerin allowed that in a 1981 letter Smithers stated he had no objection to the sale of the building, but she then rejected what she termed the “dissent’s categorical conclusion that this appeal concerns merely the sale of the building. . . .”²¹⁴ Justice Ellerin claimed that Smithers’s statement was made before the gift was completed and was thus appropriately viewed in the context of what followed.²¹⁵ The last installment followed a difficult period between Smithers and the Hospital in which he had been dissatisfied with aspects of the Hospital’s management of the Smithers Center, maintaining that his restrictions had been violated in spirit if not in letter. The court noted that the Hospital (seeking to obtain the last installment of the pledge) over the two years preceding the 1983 gift repeatedly assured Smithers that the terms of his gift would be strictly observed.²¹⁶ When the last installment was made in 1983, the restrictions were particularly noteworthy, according to the court. Quoting the 1983 letter, the second letter of intent, the court pointed to a provision that the terms there were to be applied to “*all aspects of the existing alcoholism program . . .*”²¹⁷ Presumably, then, by virtue of the 1983 letter, the entire gift, including the proceeds of any sale of the mansion, belonged to the Smithers endowment. Furthermore, the court maintained, “The existing rehabilitation services, which Smithers included in his definition of the Smithers Center and which the Hospital’s acceptance of the Gift encompassed, were housed in the free-standing Smithers building and, according to the complaint, were intended always to be housed in a free-standing facility.”²¹⁸ Of course, this does not resolve the question of whether the mansion could be sold. It does go some distance, however, in determining what should be done with the proceeds of any permitted sale.

As noted above, though, the issue at hand was not Mrs. Smithers’s case in chief, but whether she was entitled to standing. And so far, the facts of the case (as recited in Justice Ellerin’s opinion) are of no moment under the common law, at least not where donor standing is concerned. Not only did Mr. Smithers not retain a reversion, but the court concedes that New York statutory law (Article 8-1 of the Estates Powers and Trusts Law) designates the Attorney General as representative of undesignated beneficiaries of a charitable trust.²¹⁹ The Attorney General has power to ensure that charities use

214. *Id.* at 428.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 431-32.

an absolute gift in accordance with the donor's stated purposes.²²⁰ The question next raised *sua sponte* by the court was whether that Attorney General's right is exclusive. *Alco Gravure* (so important to the holding below) was quickly distinguished as addressing the issue of beneficiary standing, not donor standing.²²¹

To answer the question whether the Attorney General's right is exclusive, the court turned to *Associated Alumni of General Theological Seminary v. General Theological Seminary*.²²² In that case, alumni had contributed money for the endowment of a professorship on certain specified conditions and had retained the right of nomination when the chair became vacant.²²³ Disputes arose concerning those conditions, and the alumni association brought an action against the seminary. The Appellate Division found that, because the alumni association had retained the right of nomination when the chair was vacant, the alumni association had standing to bring suit as the donor of the fund.²²⁴ Finding that the seminary had violated the terms of the gift, the court directed the transfer of the fund to the alumni association.²²⁵

The Court of Appeals in *Associated Alumni* affirmed the Appellate Division's determination of the rights of the respective parties, but modified the judgment to a decree of specific performance by the seminary.²²⁶ While a reversion was required as an express condition if the gift was to return to the donor, the alumni association had not retained a reversion. The Appellate Division noted that the judgment below restored the fund to the plaintiff and in doing so practically abrogated the trust.²²⁷ The donor was not entitled to the reversion. As donor and possessor of the right to nominate the professorship, however, the donor had sufficient standing to maintain an action to enforce the trust.²²⁸

In Smithers's 1971 letter that accompanied his original gift to the Hospital, Smithers had not just described the three-stage treatment modality and provided for the free-standing rehabilitation center, but he had also retained a right of oversight, stating, "It is understood, however, that the detailed project plans and staff

220. *Id.* at 432.

221. *Id.* at 433-34.

222. *Id.* at 432-33.

223. *Id.* at 432.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 433.

228. *Id.* at 432.

appointments must have my approval.”²²⁹ Also important to the court was Smithers’s continued involvement in the management and affairs of the Smithers Center. This retention of a right of oversight and continued involvement in the Center enabled the court to bring this case under the rubric of *Associated Alumni*. Justice Ellerin pointed out that, even though Mr. Smithers had not retained a reversion, he had retained a supervisory role with respect to the gift and indeed had served in this supervisory role.²³⁰ According to Justice Ellerin, the retention of an oversight role is sufficient to give the donor standing to enforce the gift.

The court went further in justifying the grant to Mrs. Smithers, however. The holding below had also pointed to the need to protect the charity from vexatious litigation by those who had no tangible stake in the outcome.²³¹ The court used the earlier recitation of facts, seemingly more relevant to the case in chief, to bolster its finding under *Associated Alumni*. Justice Ellerin observed that Mrs. Smithers had played a crucial role in monitoring the Hospital in its compliance with the terms of the gift—and her diligence stood in marked contrast to the efforts of and results obtained by the Attorney General.²³² Having established the force of the restrictions on the gift, the court proceeded to note the Hospital’s actions with respect to the Smithers Center—information almost entirely garnered through the efforts of Mrs. Smithers.²³³

The court recounted the Hospital’s precipitous cancellation of the fundraising gala a year after Mr. Smithers’s death. The purpose of the event was to raise money to refurbish the mansion. At that time the Hospital also announced its intention to sell the mansion and relocate the Smithers program in a hospital ward (something Smithers was particularly intent on avoiding when he created the Smithers Center) in order to reduce the costs of the program.²³⁴ Mrs. Smithers immediately became suspicious (so the court notes) and sought, and finally obtained, an accounting. In 1995, the Hospital disclosed that it had been misappropriating funds from the Smithers endowment.²³⁵ Mrs. Smithers notified the Attorney General.

229. *Id.* at 427.

230. *Id.* at 434-35.

231. *Smither v. St. Luke’s-Roosevelt Hospital Center*, No. 604578/98, slip op. at 9 (N.Y. Sup. Ct. Dec. 18, 1998).

232. *Smithers*, 723 N.Y.S.2d at 434-35.

233. *Id.* at 435.

234. *Id.* at 428-29.

235. *Id.* at 429.

The Attorney General responded by demanding the Hospital restore \$5 million to the Smithers endowment. What was not returned was the income lost during the period of what the Hospital termed a “loan.” As the court revisited the events, the pattern was then set: Mrs. Smithers would investigate the Hospital’s compliance with the terms of the gift, report her findings to the Attorney General, and the Attorney General would respond with a demand to the Hospital, but one that fell short of strict adherence to the terms of the gift.²³⁶ The court was especially contemptuous of an Assurance of Discontinuance, a settlement agreement entered into in 1998 by the Attorney General and the Hospital. Under the terms of the settlement, the Hospital agreed not to invade the Smithers endowment for any purpose other than to benefit the Smithers Center.²³⁷ The Hospital also agreed to return to the endowment \$1 million from the proceeds of the sale of the mansion.²³⁸ The Attorney General found that the terms of the gift did not preclude the Hospital from selling the building, but he did not require an allocation of the entire proceeds of the sale to the Smithers Center endowment.²³⁹ Of course, whether or not the terms of the gift precluded the sale of the building, the building was purchased with the gift, so on the basis of Justice Ellerin’s analysis of the 1983 letter of intent, the entire proceeds of the sale should belong to the Smithers endowment. It was two months after this that Mrs. Smithers commenced the lawsuit against the Hospital.²⁴⁰

Justice Ellerin further excoriated the Attorney General regarding the Assurance of Discontinuance: both he and the Hospital failed to seek court approval as required under section 522 of the New York Not-For-Profit Corporation Law.²⁴¹ Court approval was required because the Assurance contemplated the sale of the mansion, the diversion of all the appreciation realized upon the sale, and the relocation of the rehabilitation unit out of a free-standing, non-hospital environment and into a hospital ward—all of which were arguably contrary to the terms of the gift.²⁴² Furthermore, the Court noted that, just before signing the Assurance of Discontinuance, the Hospital had closed the Smithers detox unit (located in the Hospital)

236. *Id.* at 429-30.

237. *Id.*

238. *Id.* at 429.

239. *Id.* at 430.

240. *Id.*

241. *Id.* at 431.

242. *Id.*

without even informing the Attorney General.²⁴³ The Attorney General claimed to have “reasonably relied on a specific representation” made by the Hospital regarding the closing.²⁴⁴ Justice Ellerin rejoined: “It may be observed that it was only Mrs. Smithers’s vigilance that brought this to light, since apparently the Attorney General had no procedure in place by which to insure compliance by the donee.”²⁴⁵

Finally, the court claimed that Mrs. Smithers could hardly be accused of pursuing a lawsuit for vexatious reasons. Mrs. Smithers, the court found, was not an irresponsible party having no tangible stake in the matter and not having conducted appropriate investigations.²⁴⁶ Mrs. Smithers’s interest in enforcing the terms of the gift was genuine (according to the court) as evidenced by the Herculean effort she exerted in investigating and bringing the lawsuit—all done without the possibility of gain to herself. Indeed, only after Mrs. Smithers brought her suit, according to the court, did the Attorney General act to prevent the Hospital from diverting the proceeds of the sale of the mansion away from the Smithers endowment and into its general operating budget.²⁴⁷ In a final sally, the court declared the donor of a charitable gift to be in a better position than the Attorney General to be vigilant.²⁴⁸

Interestingly, the dissent agreed with the majority that, consistent with *Associate Alumni*, Smithers had retained significant control of the charitable gift and for this reason would have been entitled to standing—but, the dissent maintained, only during his lifetime.²⁴⁹ The dissent argued that the Smithers estate did not have standing as it was not the donor of the gift.²⁵⁰ Any right Mr. Smithers had to enforce his gift was personal and, as such, according to the dissent, was extinguished at his death.²⁵¹

243. *Id.*

244. *Id.* at 431.

245. *Id.*; see also *In re Estate of Smithers*, 760 N.Y.S.2d 304, (N.Y. Surr. Ct 2003), a litigation in which Mrs. Smithers, as administratrix of her husband’s will, sought to recover her legal fees in the *Smithers v. St. Luke’s-Roosevelt Hospital* lawsuit. The Surrogate Riordan awarded her fees and in his opinion stated: “This court refers the reader to the first Department’s opinion for a complete recitation of the lengthy facts. Suffice it to say, the diligence of the predecessor to the current Attorney General was far from satisfactory and was undoubtedly the salient factor in the court’s holding.” *Id.*

246. *Smithers v.*, 723 N.Y.S.2d at 434.

247. *Id.*

248. *Id.*

249. *Id.* at 441-42 (Friedman, J. dissenting).

250. *Id.*

251. *Id.*

VII. CONCLUSION

In *Smithers*, the Appellate Division of New York justified the grant of standing to Mrs. Smithers as special administratrix of her husband's estate by pointing to the supervisory right that Mr. Smithers had retained in the Smithers Center pursuant to the 1971 letter of intent that accompanied the first installment of his restricted gift. There is no doubt that this holding opens a door to donors of restricted gifts heretofore closed under the common law and the uniform acts. Justice Ellerin's scathing criticism of the Attorney General betrays, however, that the perceived deficiencies in his enforcement efforts here (together with the Hospital's egregious "borrowings" from the Smithers endowment) were no small factor in the court's decision and thereby provide grounds by which the *Smithers* holding may be subsequently distinguished. So, while the *Smithers* court has opened a door to donors that was traditionally shut, this empowerment goes only so far, in that the donor must retain, if not a reversion, then a supervisory right with respect to the program or project funded by the gift, in order to have standing to enforce her restriction. It may also be necessary for any donor seeking standing (at least under *Smithers*) to establish first that the Attorney General has fallen far short of the mark in his oversight function.

Considerations in this Article do suggest, however, a different and more generous ground on which the majority's finding in favor of Mrs. Smithers could have been decided. The retention of a supervisory right in *Smithers* allowed the Court to bring the facts there under the standard in *Associated Alumni*, creating an avenue by which the Court could rule in favor of the estate. It is worth noting, however, that in not requiring a reversion, but allowing the sufficiency of a mere supervisory right, Justice Ellerin effectively moved beyond the common law's understanding of the gift as a property transaction and took a step toward Professor Langbein's position whereby a restricted gift is subsumed under the law of contract. A thorough contract law understanding of the transaction here would have broadened the holding, however, to permit the restriction itself to provide grounds for donor enforcement, and the retention even of a supervisory right would not have been necessary.²⁵²

Furthermore, against the background of the current state of civil society with the attendant erosion of "social capital" in general and the decline of philanthropic activity in particular, a grant of

252. Langbein, *supra* note 194, at 646 ("Thus enforcing trusts is but an instance of the larger principle that third-party beneficiaries are entitled to enforce promises made for their benefit.").

standing on broader grounds can be justified as an inducement to a particular type of donor engagement within the charitable sector. As previously noted, donors of restricted gifts provide not just funding but also charitable mission.²⁵³ The latter is valuable to the charitable sector—and to civil society—because it fosters innovation and diversity there. Donor empowerment in the form of standing is an inducement to people like Brink Smithers who, out of his own experience as a recovering alcoholic, took a major public health problem, treatment of which was theretofore shrouded in moralistic mysticism, and, by means of philanthropic activity, brought an understanding to the problem such that alcoholism was recognized as a condition that could be studied and indeed treated medically. Gifts like Smithers's bespeak a kind of civic imagination where private interests stretch to encompass the interests of others; self-interest is imaginatively reconstructed as common interest.²⁵⁴

It might be argued, however, that standing is not necessary to encourage such activity or indeed such empathy. Should not the opportunity to impose a restriction—to define a charitable mission—provide incentive enough? After all, the terms are legally binding on the charity and, once accepted, they obtain in perpetuity. Why must the donor have standing as well?

Donors seeking to direct their gifts to particular ends are now aware, thanks to the publicity attending *Smithers*,²⁵⁵ that trustees can be cavalier with restrictions and that enforcement mechanisms are lax. Indeed, where restricted gifts are concerned, legal practitioners are now advising their philanthropically-minded clients to keep a reversion or, further, to include a right to standing as a term of the gift.²⁵⁶ Donors are thus speaking for themselves and taking matters

253. Recall that the focus of this Article is on gifts that are restricted as to mission. Restrictions that affect only the way gifts are invested are not treated here. *See supra* Part II.A. Recall also that this is standing to enforce the stipulated restrictions accompanying the donor's gift. This argument does not encompass other elements of fiduciary duty or other aspects or programs of the charity not within the scope of the respective donor's particular restriction. *See supra* Part IV.B.2.

254. *See Barber, supra* note 26, at 271-72 ("Civil society shares with government a sense of publicity and regard for the general good and the common weal, but unlike government it makes no claims to exercising a monopoly on legitimate coercion. Rather it is a voluntary and in this sense 'private' realm devoted to public goods.")

255. *See generally* *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (establishing that wife of deceased donor of charitable gift to the hospital to set up an alcohol treatment center had standing to sue the hospital and the state attorney general to enforce the terms of the gift and issuing a preliminary injunction to stay the disbursement of the proceeds of the sale of the building).

256. Alan F. Rothschild, Jr., *The Dos and Don'ts of Donor Control*, available at <http://www.abanet.org/rppt/publications/estate/2004/2/rothschild-DonorCtrl.pdf>.

into their own hands. It is apparent to donors (as it was to the *Smithers* court) that the donor is often in a better position to be vigilant with respect to the oversight of her restricted gift than the Attorney General.

Nevertheless, in providing a rationale for donor standing (and in recognizing that, absent an adequate default rule, donors will ensure themselves standing by other means), however, one must not overlook the serious implications that donor standing bears for the charity. First, there is the matter of vexatious litigation by parties with no stake in the outcome, the rationale for limiting standing that goes back at least to Chief Justice Marshall's opinion in *Dartmouth College*.²⁵⁷ At one level, with respect to donors of restricted gifts, this concern can be quickly set aside. While donors of restricted gifts are important to the charitable sector because of the size of their contributions and because of the charitable vision contributed along with the funds, the number of such donors is not large enough to deny them standing to enforce their gifts by reason of protecting the charity from vexatious litigation. Also, as the *Smithers* court notes, it is hard to say that, personally concerned with projects as they are, these donors have no stake in the outcome.

Concern for vexatious litigation cannot be so easily swept aside, however, if after the donor's death her heirs are also entitled to standing to enforce the terms of her gift. Given that the restriction obtains in perpetuity and heirs potentially multiply geometrically, generations later there is the possibility that the charity will have hundreds of heirs to locate and cite in any cy pres proceeding. Also, it may be doubtful whether such heirs have the interest in the project or program that the donor had. (Changes in the remedies available in any such proceeding, addressed below, may go some distance in attenuating the force of this latter concern, however.) Accordingly, while this Article makes the case for donor standing, this right should be personal to the donor and not devolve upon her heirs or her estate.

In that way, this Article parts company with Justice Ellerin and the majority in *Smithers* and sides with the dissent. While the dissent concedes that the retention of the supervisory right under *Associated Alumnae* would have entitled Mr. Smithers to standing, the dissent objects to the sleight of hand by which the court extends the grant to Mrs. Smithers as his administratrix. As the dissent notes, as the supervisory right was personal and thus was extinguished at Smithers's death, so was the right to enforce the restriction. It is also worth noting that a broader, more thorough contract analysis (relying

257. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 645-46 (1819).

upon the restriction per se and not the supervisory interest) presents the same obstacle to the holding in favor of Mrs. Smithers as did the narrower one relied upon by the court.

After the death of the donor, her restriction should become—what it is now—the point of reference in a process in which mediating institutions (charitable fiduciaries, state enforcement agents and, if necessary, the courts) supply meaning and interpretation to her vision over time. The rationale that supports the grant of standing to donors of restricted gifts does not extend to their heirs or representatives. Indeed, with respect to the latter, it is not only the concern with vexatious litigation that militates against standing. Under current law, even as donors are confronted with lax enforcement, charities are saddled with restrictions that obtain in perpetuity, with the dead hand of donor visions once vital but now without currency. To empower the donor to bring suit during her lifetime—in a period closely attendant upon the gift, is less likely to exacerbate the problem of the dead hand than a similar grant to her heirs. The grant of standing to her heirs, whether these are abundant in number or not, has much more profound implications for the autonomy of the charity. And the need to encourage participation in civil society and to foster diversity in the charitable arena does not overcome this objection.

Ultimately a satisfactory resolution to the question of donor standing implicates underlying issues with respect to the perpetual nature of donor restrictions (and the doctrine of *cy pres*) that are beyond the scope of this Article.²⁵⁸ A few observations are ready at hand, however. As the doctrine of *cy pres* currently stands, there are two hurdles that the charity must get over in order to obtain relief. The charity must first prove that the donor had general charitable intent before it ever gets to the question of whether the restriction at issue is impossible, impracticable, or illegal to perform. Regarding the first hurdle, general charitable intent, note that under the Treasury Regulations, to qualify as a public charity, the legal instrument under which the organization is created must direct that, in the event of dissolution of the organization, charitable assets must be distributed to another organization qualifying under Section 501(c)(3) of the

258. There is much literature demanding that the doctrine of *cy pres*, especially as it applies to restricted gifts, be reformed. See, e.g., Atkinson, *supra* note 13, at 687; Simon, *American supra* note 83, at 641; Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635 (1988). Others take a more conservative position. See, e.g., Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665 (1997) (urging that trustees seeking *cy pres* relief or administrative deviation also have to demonstrate "indisputable need").

Internal Revenue Code in furtherance of its exempt purposes.²⁵⁹ Thus upon dissolution, charitable assets cannot be distributed to members (as they could in the case of a mutual benefit organization) or (most importantly here) revert to donors. Without this provision in the organizational documents, gifts to the organization will not qualify for the charitable income tax deduction.

This language (which governs all the charity's assets except subsequently contributed, restricted assets) would suffice under the cy pres doctrine to establish general charitable intent. Note, however, that subsequent gifts to a public charity can qualify for an income tax deduction even when they contain much more restrictive language. Indeed these gifts can have language so restrictive that general charitable intent cannot be established and cy pres is precluded. These gifts can even contain an express reversion. A change in federal tax law to require an ultimate "gift over" to another charity qualifying under Section 501(c)(3) of the Internal Revenue Code in the event the object of a restricted gift becomes impossible, impracticable, or illegal (if such gifts are to qualify for the charitable income tax deduction) would go some distance in providing grounds for a state court to find general charitable intent upon failure of the restriction. Closing this loophole for subsequent gifts made to a public charity is likely to result in grants that are easier to subject to the doctrine of cy pres when and if the need arises.

Closing this loophole would also circumscribe the remedy available to the donor during her life. Given language that provides that the gift shall remain devoted to some charitable purposes in the event of the failure of the restriction, the donor's remedy would then only be specific performance by the donee or diversion to another charitable organization.

Finally, commentators also have a point when they call for development of a fiduciary "safe harbor" where restricted gifts are concerned, a standard that would provide trustees with a latitude of interpretation—and a measure of autonomy—to be exercised in the ordinary course, short of going for cy pres relief. If such a safe harbor were available, then a donor could monitor performance, but in challenging the fiduciaries, a donor of a restricted gift (assuming she had standing, as this Article maintains she should) would have to demonstrate not merely that the trustees had failed to adhere strictly to the terms of the gift, but that they had abused their discretion in interpreting the grant. So, for example, in *Smithers*, depending upon the standard used, the loans from the endowment might be a problem,

259. This is the "organizational test" under Treas. Reg. § 1.501(c)(3)-1(b)(4) (2005).

but (in light of changes in funding due to managed care) the sale of the mansion might not. As for the incentive for the donor (even with standing) to contribute money and mission to public charity when she faced more limited donor remedies and more liberal standards of fiduciary duty, we can only hope that participation in civil society will enable her to come to appreciate that in making a restricted gift, she sets the stage for a civic process in which she will actively participate during life, and which, after death, is likely to transcend her, as any genuine legacy must.