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C. Ronald Chester
New England Law School, Boston

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Cy Pres: A Promise Unfulfilled

C. RONALD CHESTER*

INTRODUCTION: SOCIAL ENDS OR "DEAD HAND" CONTROL?

Since the Enlightenment, the notion of history as progress has been a popular one in the West.¹ For the most part, this view has eschewed the rigidly deterministic vision which many see as characteristic of Hegel and Marx.² Cyclical views³ or the idea of history as accident⁴ are not favored in the Western democracies. Yet, in examining the halting evolution of the cy pres doctrine in America after the Supreme Court declared charitable trusts valid in 1844,⁵ one might infer that the expansion of the doctrine has been accidental, and thus subject to haphazard reversal. As once "dying" restrictions on the use of cy pres regain their strength in the modern era, one may even feel the doctrine's evolution to be cyclical. Whatever the reasons for the erratic course of cy pres in America, the doctrine presents a promise unfulfilled for those who would have expanded its use.

An appropriate starting point for this discussion can be found in two expressions of the polar forces between which the American doctrine of cy pres has vacillated over the last one hundred thirty-five years. Each was written in the period when the journal printing it was the primary source for the dominant jurisprudence of its time. We begin with the Legal Realist viewpoint of the Yale Law Journal in 1939:

[The] American application [of cy pres] should have been governed by socially desirable results rather than by historical distinctions no longer of importance . . . . [The problem is in the process of being corrected by] the highly desirable trend of the courts toward disregarding the specific fulfillment of the

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¹E. H. CARR, WHAT IS HISTORY? 144-76 (1962). Carr, once a prominent Cambridge historian mentions Edward Gibbon as a proponent of this view of history which he (Carr) shared. For an American example of this view, see Charles A. Beard’s introduction to J. B. BURY, THE IDEA OF PROGRESS ix-xl (1932).


³See CARR, supra note 1, at 145, where the cyclical conceptions of the Ancient Greeks and Romans are examined.

⁴See, e.g., Bury, DARWINISM AND HISTORY and CLEOPATRA’S NOSE in SELECTED ESSAYS OF J.B. BURY 23-42, 60-69 (E. Temperley ed. 1930). Bury, like Carr, was a noted Cambridge historian.

⁵Vidal v. Girard’s Executors, 43 U.S. 127 (1844). Once validated, charitable trusts whose purposes became impossible to accomplish could be reformed by a cy pres (Law French for "so near") use of the trust fund for a similar charitable purpose.
The author concludes by echoing Llewellyn's famous Realist dictum regarding the undesirability of covert means in changing legal doctrine: "[C]ourts in reaching results which obviously show the impact of social considerations should not continue to couch their decisions in the outmoded terminology of the eighteenth century." Thus, in applying the cy pres doctrine to charitable trusts, courts should explicitly recognize the element of social welfare in the doctrine to avoid the impression of "judicial hypocrisy."

The Harvard Law School of the 1890's was a very different place in a very different time than the Yale Law School of the socially-conscious 1930's. Yet, the individualistic jurisprudence which characterized Harvard Law School at that time still has great force today. Regarding with dismay the use of cy pres to modify charitable trusts, Joseph A. Willard suggested in the 1894 Harvard Law Review that the testator of his day, "not intending a purchase of heaven with his [charitable gift], but a specific bequest to a specific charity,"

may be presumed to have known not merely what he intended, but what he did not intend, in the case of a charity, as well as of any testamentary disposition made by him; . . . the court in imputing to him what he did not say, because he might have said it, may . . . run some risk of making him say what he would have emphatically repudiated.

Of course, the Yale commentator of forty-five years later would have cared little what a testator's specific intent was, so long as the fund from a failed charitable bequest could be applied cy pres by the court for the "common good." Nor would the Yale writer have protected an individual testator's right to control the use of property from his grave—via the so-called "dead-hand"—a principle evidently dear to Attorney Willard. He could scarcely have foreseen that, under the guise of two of the primary requirements for modification of trusts through cy pres, dead hand control would still be a reality in the 1970's. These requirements were (1) that there be a general charitable intent of the donor in addition to the specific one that has failed, and less importantly, (2) that the specific intent of the donor has become impractical or impossible of performance.
Before placing the current law of cy pres on the continuum between individual and societal control of charitable trusts, it will be necessary to review the checkered history both of charitable trusts and of the application of cy pres in America.

1800-1844: ACCEPTANCE OF CHARITABLE TRUSTS

To appreciate the new nation's antipathy toward charitable trusts, one must understand as Lawrence Friedman put it, that "in the early 19th century, charity was associated with privilege, with the dead hand, with established churches, with massive wealth held in perpetuity." Furthermore, what Morton Horwitz calls a "flexible, instrumental conception of law" was proving necessary to promote the transformation of the post-revolutionary American legal system. Land held in perpetuity by churches was not susceptible of being developed by private, individual entrepreneurs, thus hindering the economic development so vital to an expanding nation.

In Trustees of Philadelphia Baptist Ass'n v. Hart's Executors, the Supreme Court, per Chief Justice Marshall, repealed all English statutes, including the Statute of Charitable Uses. The Court erroneously found that the English equity courts had no inherent jurisdiction to sustain charitable trusts. It was not long, however, before influential elements of the new society discovered that restrictions imposed by this case complicated the legal status of religious bodies. Moreover, by hamstringing gifts intended for education, poor relief and other necessary social services, these restrictions proved costly to society as a whole.

Judges such as Henry Baldwin and James Kent began arguing for a pragmatic, permissive legal doctrine which took account of contemporary practice. To those who countered that law had always been suspicious of perpetuities and that a charitable trust was indeed perpetual, these judges replied that the public received sufficient benefit from charitable bequests to warrant liberal interpretations. Moreover, they stressed the legal right of testators to control property beyond the grave, claiming that the power to make charitable bequests with the expectation that they be faithfully executed was within an individual's property rights. Ironically it was this stand in favor of the "dead hand"

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thesis on the cy pres doctrine, published under the above title. Also author of NEW YORK EVIDENCE (1959), LAWYERS IN INDUSTRY (1956) and STATE LAWS ON EMPLOYMENT OF WOMEN (1953), she has served as Vice President of the Women Lawyers Association of the State of New York.

1L. FRIEDMAN, A HISTORY OF AMERICAN LAW 223 (1973).
6Id.
that later deterred the expansion of the social usefulness of charitable be-
quests which had been made possible by free application of the cy pres
document.19

Still, opposition to philanthropy persisted among an influential group
of judges and legislators. For example, St. George Tucker, James
Madison, Thomas Jefferson and other secular-minded and progressive
Virginians felt charities symbolized advancing clerical power in society,
threatening the rights of future generations.20 Justice Story believed that
charities trampled individual rights by depriving heirs of their property.
He complained of the lack of safeguards, such as the mortmain statutes
in England,21 against the making of unwise charitable gifts. “We are in
some danger,” he felt, “of having our most valuable estates locked up in
mortmain, and our surplus wealth pass away in spurious or mistaken
charities, founded upon visionary or useless schemes. . . .”22 Coupled with
the fear of clerical control and the power of the dead hand to pass pro-
perty away from the living, was a fear of corporations in general, because
of their impersonal nature and perpetual life.23

While fear of the consequences of permitting property to pass from
general circulation into the hands of perpetual charitable associations
argued against permissive charity policy, religious teachings,
humanitarian and social needs argued-for it.24 The time when the balance
turned in favor of the charitable trust is generally marked by the case of
Stephen Girard’s will, Vidal v. Girard’s Executors,25 in which Supreme
Court support for charitable trusts was finally affirmed. While the
majority of states were happy to embrace this judicial blessing of the
charitable trust, a more restrictive attitude toward the device remained
important in states like Virginia, New York and Maryland.26

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19See Conclusion infra.
20MILLER, supra note 17, at 42-43.
21Id. Edward I passed the Statute of Mortmain in 1279 to prevent the church from
owning more land. This statute declared that all land thereafter conveyed to the church or
monasteries would be forfeited to the king. The clerics subsequently evaded this statute
by developing the “conveyance to uses,” a forerunner of the modern trust.
Despite Story’s protests, the Statute of Mortmain was never held applicable in America.
Nevertheless, the fear of vast wealth held in perpetuity caused legislatures in some states
to pass statutes restricting transfers to charity by gift, conveyance or will. Typical of
these prohibitions are the restrictions remaining in seven states on the percentage of the
estate which can be left to charity and the making of such bequests within a short time
before death. See DUKEMINIER & JOHANSON, FAMILY WEALTH TRANSACTIONS 340-41 (2nd.
ed. 1978).
22Review, Reports of Cases Adjudged in the Court of Chancery of New York, 11 N. AM.
REV. 140, 147 (1820) (unsigned), attributed to Justice Story by MILLER, supra note 17, at
43-44.
23MILLER supra note 17, at 47.
24Id. at 49.
2543 U.S. 127. The testator was a native of France who immigrated to the United States
before 1776 and settled in Philadelphia. He became a prominent banker and philanthropist,
and died a widower without issue in 1831, leaving real and personal property valued at ap-
proximately $6,700,000. See id. at 128.
26See, e.g., Fifield v. Van Wyck’s Ex’r, 94 Va. 557, 27 S.E. 446 (1897); Holmes v. Mead, 52
attempts have been made to expand the usefulness of charitable trusts through devices like cy pres, lingering doubts have resurfaced, particularly in these states, as to the advisability of allowing perpetual charities at all.

1844-1900: THE CHARITABLE TRUST COMES OF AGE

Before the 1850's there had been very few charitable trusts created in the United States and fewer still had been allowed to stand; thus, there had been only the most occasional demand for the application of cy pres. When the demand had arisen, the courts of a large majority of states were extremely hostile to the doctrine. Of the fifteen states which had had the occasion to consider cy pres by 1860, the courts of ten states had either condemned or repudiated its use. One cause of this antagonism was the mistaken notion that the doctrine could be exercised only by means of the uncontrolled prerogative of the sovereign. Thus, the use of the so-called prerogative cy pres was heartily resisted in a new nation fresh from its triumph over monarchical authority. In fact, Chancery had long exercised an equitable or judicial cy pres which attempted to effectuate the intent of the donor rather than the arbitrary wishes of the sovereign. It was this judicial cy pres power which eventually found root in America.

As the fortunes amassed in the industrial revolution began to accumulate and the need for effective mechanisms to control the use of these new forms of wealth became manifest, charitable trusts themselves slowly gained favor. In the main, this was because courts saw that by encouraging private contributions, they were reducing the expenses of government. Thus, courts began to declare charitable trusts “favorites of the law” and employed liberal rules of construction to support them. Still, this was the era of rugged individualism, and the intent of the donor was paramount. Charitable trusts were construed by detailed inquiries into the state of the testator’s mind and his wishes at the time of the making of the gift, instead of being seen in light of changing societal con-

N.Y. 332 (1873); Wilderman v. Mayor of Baltimore, 8 Md. 551 (1885).

For an example, see Moore’s Heirs v. Moore’s Devises and Ex’rs, 34 Ky. (4 Dana) 354, 366 (1836); see also DiClerico, Cy Pres: ‘A Proposal for Change, 47 B.U.L. REV. 153, 167 (1967).

FISCH, supra note 12, at 115 n.1.

For an example of an outrageous use of prerogative cy pres, see Da Costa v. De Pas, 27 Eng. Rep. 150 (Ch. 1754) in which a legacy left by a Jew to establish a Jesuba (an assembly for reading the law and instructing people in Judaism) was held illegal because it promoted a religion contrary to that of the established church. It was within the power of the Crown, the court held, to dispose of the bequest for the instruction of foundlings in the Christian religion.

FISCH, supra note 12, at 56.


ditions. Courts of the period would thus encourage gifts to charity by sustaining the trust, but were reluctant to interfere with the plan of the donor by applying cy pres. Only six states expressly applied cy pres for the first time between 1860 and 1900.

In some degree, late nineteenth century jurists felt that cy pres contradicted the spirit of democratic institutions. This attitude stemmed from Locke's view of the natural right of property: "The [State] cannot take from any man any part of his property, without his own consent." Support for this proposition can also be found in Blackstone's Commentaries, which championed respect for private property, even at the expense of community needs.

A few representative cases are illustrative of the prevailing mood. Harvard College v. Society for Promoting Theological Education held that a court could not substitute a new scheme merely because the trustees believed that it would be a better or more convenient one than the settlor's. To the same effect are White v. Fish and Merrill v. Hayden. As late as 1923 a Connecticut court could be heard to express the dominant sentiment of these decisions:

No public benefit, no increased beneficence, no advantage to religious activity, can justify a court in making over the wills or contracts of men, in the conviction that changed conditions make this, if not necessary, at least highly desirable.

Though much of this decision-making was due to the lingering distrust of charitable trusts in general, one theory is that many courts declined to use cy pres in order to make testators secure in making their particular charitable gifts; without the fear that their specific intent would be upset by a court applying cy pres, testators would, under this theory, be more likely to make charitable bequests. Though the age of great foundations was yet to come, part of the public had already begun to lay moral claim to "conscience money" from the barons of finance, oil and steel. Massachusetts courts in particular began to apply this money to public purposes through the use of cy pres, a doctrine which came to be seen as

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34Fisch, supra note 12, at 120 n.14.
3969 Mass. (3 Gray) 280 (1855). The Theological Society had brought a bill in equity requesting that donations made to Harvard College for theological instruction and held by the college in trust for the benefit of the divinity school be transferred to the Society or to an independent Board of Trustees.
4033 Conn. 30 (1852).
4286 Me. 133, 29 A. 949 (1893).
44First Congregational Soc'y v. City of Bridgeport, 99 Conn. 22, 37, 121 A. 77, 82 (1923).
45See Bradway, Tendencies in the Application of the Cy Pres Doctrine, 5 TEMP. L.Q. 489, 528 (1931).
essential to the health of any long-term charity.\textsuperscript{42}

The Massachusetts doctrine springs from the great case of \textit{Jackson v. Phillips}.
\textsuperscript{43} Francis Jackson had died in 1861 leaving money to trustees to be used to create a public sentiment that would put an end to Negro slavery; the trustees were to use another part of the fund for the benefit of fugitive slaves. Since slaves had been legally freed as a result of the Civil War,\textsuperscript{44} by 1867 these objectives could not be literally carried out. Despite the demands of the settlor's heirs, the court refused to dismantle the trust and directed the cy pres use of the fund for welfare and educational work among freed slaves and other New England blacks.\textsuperscript{45}

According to Lawrence Friedman, this gave the old English doctrine a "new and different life, as an adjunct of the law of dynastic charities."\textsuperscript{46}

In late nineteenth century New York, however, the charitable trust itself was still in difficulty. When Samuel J. Tilden, Democratic candidate for President in 1876, left a portion of his millions to fund a public library for the City of New York, the New York Court of Appeals in \textit{Tilden v. Green}\textsuperscript{47} struck down the trust for want of distinguishable beneficiaries.\textsuperscript{48} Because of the public outcry at this outrageous decision, remedial legislation for such gifts was passed by the New York legislature in 1893.\textsuperscript{49} What changed minds in New York, according to Friedman, was the realization that, when the Tilden trust failed, "no dead hand became richer [though its relatives did]; but the city itself was the poorer."\textsuperscript{50}

\textsuperscript{42}\textit{Friedman, supra} note 13, at 370.
\textsuperscript{43}\textit{96 Mass. (14 Allen) 539} (1867).
\textsuperscript{44}\textit{U.S. CONST. amend. XII, §1}.
\textsuperscript{45}This favoring of charity over the "dead hand" of the testator was not, however, extended in Massachusetts to include so-called "secret" trusts in favor of a charity. The leading case is \textit{Olliffe v. Wells}, 138 Mass. 221 (1881).
\textsuperscript{46}\textit{Friedman, supra} note 13, at 371. By "dynastic charities," Friedman means the perpetual charities founded by the "new dynasts" of the late nineteenth century, whose wealth was tied up not in landed estates as in eighteenth century England, but in trusts containing stocks and bonds.
\textsuperscript{48}The 35th article of the Tilden will directed his executors and trustees to procure the incorporation of the "Tilden Trust" with capacity to establish and maintain from the residue of his estate a free library and reading room in New York City. If incorporation was not achieved or if the trustees and executors deemed it "inexpedient" to convey the residue to the trust, then they were directed to apply it to "such charitable, educational and scientific purposes as... will render the said... property most widely and substantially beneficial to the interests of mankind." \textit{130 N.Y.} at 44-45, 28 N.E. at 881.

The Court of Appeals found this article an invalid disposition of the residue because the object and subject of the trust were "indefinite and uncertain." The court stated that where the power is given to the trustees to select a beneficiary, the class in whose favor the power may be exercised must be designated by the testator with such certainty that a court can ascertain the objects of the power. Furthermore, cy pres could not be used to uphold a gift to indefinite beneficiaries as had been done in England for the doctrine "has no place in the jurisprudence of this state." \textit{130 N.Y.} at 45, 28 N.E. at 882.
\textsuperscript{49}\textit{Tilden Act, ch. 701, §1} (1893) (current version at \textit{N.Y. Est., Powers & Trusts Law §8.1-1(a)} (1967)).
\textsuperscript{50}\textit{Friedman, supra} note 13, at 370.
If the New York court had truly wished to effectuate the wishes of Samuel Tilden, it could have changed the details of administration of the trust through the doctrine of "equitable deviation." If even such manipulation of the mechanics of the trust would have failed to satisfy the strictures of New York law, could not the court have modified the gift for some allied purpose, thus providing benefit for more specific beneficiaries under the cy pres doctrine? Certainly it could have been shown that Tilden had possessed the general charitable intent necessary to trigger the doctrine.

Cases like Tilden make clear that bequests in the late nineteenth century were being scrutinized in far different ways depending on whether they were private or charitable. If the gift was charitable, many courts were letting it fail and go to the heirs if it was imperfect in form. Although the possibility was raised of saving gifts through finding a general charitable intent as in Jackson v. Phillips, the finding of such intent was rigidly circumscribed, in the name of protecting the testator's wishes. Since most men were regarded as selfish profit-maximizers out for their own family's private gain, the abiding spirit of the times still regarded as suspect benevolence operating for the public good.

1900-1950: THE ERA OF PROMISE

Something fundamental happened in American social thought around the beginning of the twentieth century. Faced with the grim misery of the industrial slums, thoughtful individuals began to realize that the free market was not working for all, nor in fact for the majority of people in this new urban society.

The pivotal figure of Harvard Law Dean Roscoe Pound set the challenge for American law at the turn of the century: "The problem, therefore, of the present is to lead our law to hold a more even balance between individualism and collectivism. Its present extreme individualism must be tempered to meet the ideas of the modern world."

In business, Pittsburgh steel magnate Andrew Carnegie gave credence to the notion that great wealth was a public trust to be administered not for the excessive benefit of private heirs, but for the good of the public. Though the courts were somewhat tardy in applying the notions of legal philosophers and early philanthropists, their first use of the "public trust" theory can be seen just after World War One.

Under this doctrine, it is not the purpose of the trust which has failed, requiring the funds to be put to an allied use (cy pres), but the mechanics of the trust which are inadequate, requiring changes in the trust's administration.


See, e.g., Wachovia Banking & Trust Co. v. Ogburn, 181 N.C. 324, 331, 107 S.E. 238,
The depression years of the 1930's brought the added realization that it was in the pragmatic interest of society to defuse revolutionary pressures by applying great wealth for the public benefit. One court noted, for instance, that in a society with a sense of personal responsibility for wealth "there is little temptation to the violent explosions" so prevalent in other lands.66 Another opinion, written in the depths of the Depression, speaks of the necessity of relying on private beneficence to meet some of the needs of these "troubled times."67 Against the backdrop of this awareness of the need for giving broad effect to charitable trusts,68 came the notable cy pres case of In re Will of Neher.69

In Neher, the New York Court of Appeals found the doctrine of cy pres applicable to a devise of land to a town for the building of a memorial hospital which the town was unable to erect and maintain. Actually, the inadequacy of hospital facilities had already been remedied by using the hospital of a neighboring town. Applying classic cy pres analysis, the court decided that the testator's primary intent was to create a memorial for her husband. Thus the court allowed the land to be used for a memorial town administration building, noting that where the paramount purpose of the testator is to give property for general charitable purposes, the manner of carrying the general gift into effect may be ignored when compliance is impractical.60

Neher was not an isolated occurrence. "It was during this period when 'individualism' gradually lost ground to 'public welfare,' and the clasp of the dead hand was loosened, that the cy pres doctrine began to be freely applied by the courts."61 When faced with a great increase in the amount of charitable trust property,62 a phenomenon which had been encouraged substantially by favorable tax treatment for charitable giving, the courts began to apply the cy pres doctrine liberally.63 During the period from 1900-1950, twenty-one jurisdictions expressly applied cy pres for the first time, and many statutes were passed by state legislatures expressly giving the cy pres power to courts.64

242 (1921); see also Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278 (1928), cert. denied, 279 U.S. 839 (1929).
68See generally Scott, Education and the Dead Hand, 34 HARV. L. REV. 1 (1920).
69279 N.Y. 370, 18 N.E.2d 625 (1939).
70Id. at 374, 18 N.E.2d at 626.
71Fisch, supra note 12, at 123. See, e.g., Thatcher v. Lewis, 335 Mo. 1130, 76 S.W.2d 677 (1934), noted in 35 COLUM. L. REV. 467 (1935).
73Fisch, supra note 12, at 120. For examples of this favorable tax treatment, see Revenue Act of 1926, Ch. 27, § 303(b)(3), 44 Stat. 73 (1926) (current version at I.R.C. § 2055 (estate tax deduction)); id. §214(a)(10), 44 Stat. 27-28 (1926) (current version at I.R.C. §170 (income tax deduction).
74Fisch, supra note 12, at 120 n.16.
Over the years, three primary requirements had developed for the application of cy pres. The first of these—that a valid charitable trust have been expressly created—crumbled quickly during the 1900-1950 period: courts began to imply a valid charitable trust where only a simple gift had been made to charity. The second—that the original bequest must have become impossible or impractical of application—retreated before the courts' increased willingness to discover "impossibility" when confronted with what they considered a much better use of the bequest.

Still, the troublesome requirement remained that in order to apply cy pres to a charitable trust whose specific purpose had failed, the court was required to find that the testator possessed a more general charitable intent. Though this requirement was abolished by statute in Pennsylvania in 1947, elsewhere it was not eliminated, courts refusing to apply cy pres in the absence of general charitable intent, particularly where a gift over was provided for in the instrument.

1950-1978: A PROMISE UNFULFILLED

Erosion of the Requirements for Cy Pres Application

Since the history of cy pres in America had been one of slow, but steady expansion of the doctrine, one might have anticipated the virtual elimination by modern times of all the technical requirements for its application, just as Edith Fisch proposed in the 1959 Cornell Law Quarterly. According to Fisch, the prerequisites for applying cy pres served "no useful end":

Their elimination . . . would not only render unnecessary the present circumlocutions employed to take cases outside the orbit of cy pres, but would facilitate the preservation of charitable gifts since the only question . . . would then be the proper exercise of the court's discretion [in requiring] a different mode of operation or choice of another charitable purpose [for the trust].

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[66] FISCH, supra note 12, at 139.
[67] Id. at 128, 150-51.
[68] PA. STAT. ANN. tit. 20, §301.10 (Purdon 1947)(now appearing at 20 PA. CONS. STAT. ANN. §6110 (Purdon 1975)).
[70] Id. at 277.
[71] Fisch, supra note 33, at 393.
[72] Id. One requirement that had apparently been eliminated—that a valid charitable trust be in existence (supra note 66 and accompanying text)—has been resuscitated by the
Indeed, courts in many recent cases have adopted an expansive attitude toward the requirement of "impossibility" or "impracticability" in carrying out the provisions of the trust. However, proof that this restriction still has some life is found in the 1976 California case of Mabury's Estate, which stated that the requirement was not satisfied if the impossibility might only prove to be temporary.

Much less progress has been made in modifying the rule requiring a general charitable intent by the settlor. A recent article has noted, however, that modern courts have found a general charitable intent rather easily where there is a failure of the specific charitable purpose after, rather than before, the trust has become effective. In spite of this liberalization, the article's authors thought it preferable to imply a general charitable intent in all charitable trusts in order to avoid the requirement altogether.

The Bogerts, in their monumental treatise Trusts and Trustees, have likewise called for the removal of the troublesome "general intent" rule. In their view, the rule causes many unnecessary claims by heirs or next of kin of the settlor and much expensive and time-consuming litigation:

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\text{[I]t would seem preferable either to provide that the charitable intent shall be presumed to be general unless the settlor expressly negates the application of cy pres or to follow the Pennsylvania statutory precedent [supra at note 69] and make cy pres applicable whether the settlor's charitable intent is found to be general or special.}
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To these calls for elimination of the "general charitable intent" rule, which would make the application of cy pres virtually automatic in the event of a failed charitable trust, the courts have turned a deaf ear. Though "impossibility" has become easier to find, and neither undesignated charitable beneficiaries nor the styling of the bequest as a gift rather than trust now hinder application of cy pres, the dead hand of the settlor still controls the fund through the courts' observance of his or her intent.

A possible reason for the continuation of dead hand control lies in one of the dilemmas of American democracy—the conflict between individual control over property and the use of that property for the common good.

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"Report, supra note 74, at 395, citing City of Danville v. Caldwell, 311 S.W.2d 561 (Ky. 1958)."

"Report, supra note 74, at 396."

"G.G. BOGERT & G.T. BOGERT. TRUSTS AND TRUSTEES (2d rev. ed. 1977)."

"Id. §§361-470, at 527."
Courts may be reluctant to assume a direct role in reallocating charitable funds for public purposes precisely for fear of taking one more step toward the obliteration of individual will in an increasingly socialist world. As this modern dilemma is examined, it may be asked whether individual control, however important to our system during an individual's life, should extend beyond the testator's original post-mortem purpose.

A recent article in the *Chicago-Kent Law Review* takes a critical look at Illinois' relaxation of the key cy pres requirement of general charitable intent in *In re Estate of Tomlinson*. In this case the Illinois Supreme Court allowed a bequest to the non-existent "Cancer Research Fund" to be given to the American Cancer Society despite the claims of private heirs. Recognizing this case as an example of the increasing trend in judicial decisions to favor the collective good over the individual's right to dispose of his property, the authors Gettleman and Hodgman lament that only "lip service" is being paid by the courts to individual control over private property. Because of the precedent the opinion sets, the authors would have preferred, given a decision in favor of the American Cancer Society, that it have been based on the theory of "misdesignation" of beneficiary, "which places primary emphasis on respect for the 'dead hand' of the testator." Casting the decision in terms of cy pres results "in a new system of allocation of charitable bequests administered by the courts, often with the participation of the state attorney general." One practical reason for preferring the misdesignation doctrine is that a smaller charity may be able to prove that, despite the mistake in designation, it was in fact the charity intended by the testator. Once allowed to apply cy pres to the fund, the state through its courts and attorney general are likely, in the authors' opinion, to apply it in favor of a well-established and publicly-sanctioned charity like the American Cancer Society.

The implications of this stance are fascinating. What the authors appear to be assuming—and with some truth—is that charities like the American Cancer Society or the Ford Foundation are in fact quasi-public in nature. If the state through its courts and attorney general is given

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Prior to *In re Estate of Tomlinson*, 65 Ill. 2d 382, 359 N.E.2d 109 (1976), a finding of general charitable intent had had to meet stricter standards. See, e.g., *Strand v. United (Methodist) Church of Sheldon*, 12 Ill. App. 3d 917, 298 N.E.2d 779 (1973).

free rein to change the recipient of a failed charitable trust, it is more likely to allocate the gift to one of these large quasi-public charities rather than to a lesser-known charity which has little of this public character—though the latter may in fact have been the intended recipient. What Gettleman and Hodgman may actually fear is that the expanded use of cy pres will begin to cut out truly private “small” charities altogether, with the state through its courts, attorney general and large, quasi-public foundations, actually appropriating private donations for uses sanctioned and controlled by the state. Thus, in effect, a failed charitable trust would “escheat” to the state, and “state socialism” would prevail over individual property rights in the area of so-called “private” philanthropy.

Return of the Dead Hand

Fear of the courts’ interference with a testator’s intent may be behind recent decisions refusing cy pres application in some important jurisdictions. The 1976 California case of Mabury’s Estate\(^8\) in preliminarily refusing to apply cy pres, did so by reviving the nearly moribund requirement of “impossibility.” Since the Mabury testamentary trust was to accumulate income until one of two named contingencies occurred,\(^9\) it had been argued that a provision of the Tax Reform Act of 1969 imposing up to a 100% rate of tax on accumulated distributions\(^10\) made the trust purpose impossible and therefore subject to the cy pres power. The appeals court ruled to the contrary that whatever “impossibility” existed was only temporary, and that the testator’s purpose would not become impossible until there had been a definitive ruling by the federal courts that this trust was subject to the tax.\(^11\) If the trust were held to be subject to the tax, thus removing the impossibility bar, the court still expressly reserved the power to inquire whether there was a general charitable intent before applying cy pres. The hesitancy to apply cy pres in this case is remarkable in light of the previous eagerness of California courts to use the doctrine.\(^12\)

New York, a jurisdiction long suspicious of charitable trusts themselves, has exhibited no reluctance in blocking cy pres application by the failure to find general charitable intent. One recent example was

\(^{9}\)I.R.C. §4942.
\(^{10}\)I.R.C. §4942.
\(^{11}\)I.R.C. §4942.
\(^{12}\)Trust income was to accumulate until after the death of testator’s sister and when either (1) the Christian Science Church published a certain book as official church literature or (2) 21 years had expired after the death of the survivor of a certain three living persons, the income was to be distributed.

\(^{8}\)See also, Plechner v. Widener College, Inc., 569 F.2d 1250 (3d Cir. 1977); In re Estate of Vanderhoofven, 8 Cal. App. 3d 940, 96 Cal. Rptr. 260 (1971); Estate of Faulkner, 128 Cal. App. 2d 575, 275 P.2d 818 (1954).
the *Matter of Syracuse University*, in which the University was denied permission to apply *cy pres* to a gift in trust to the Medical College of Syracuse University after that College had ceased to exist and became part of the State University of New York. The court held that the testator had no general charitable intent to benefit Syracuse University, beyond the specific intent of funding a medical college there.

Continuing this pattern is the more recent case of *DePew v. Union Free School District*. The *DePew* court, in a remarkably hidebound decision, gives the dead hand firm control by ruling that the trial court should attempt to discover whether the testator had a general intent to benefit education in a particular school district or whether he wished the benefit to be limited to the use of the bequeathed land as a school. Thus, in order to discern the actual intent of the testator, the trial court was instructed to consult school minutes and diaries dating from the time the bequest was made in 1852. Had it taken the time, the *DePew* Court would likely have echoed sentiments expressed by the Wyoming Supreme Court in another charitable trust construction decision, also rendered in 1973:

> The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and painstaking expression of the use and purposes to which [his assets] shall be devoted. A settlor must have assurance that his solemn arrangements and instructions will not be subject to the whim or suggested expediency of others after his death.

Even more surprising is the most recent attempt to apply *cy pres* in the jurisdiction which gave the doctrine its first substantial life. In *First Church of Somerville (Unitarian) v. Attorney General*, the Supreme Judicial Court of Massachusetts refused to find any general intent to

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93 N.Y.2d 665, 171 N.Y.S.2d 545 (1958). To similar effect was *In re Jones' Estate*, 201 Misc. 881, 108 N.Y.S.2d 812 (Sur. Ct. 1951), in which the court refused to save the gift to the defunct, unincorporated 89th St. Church, despite the *cy pres* petition of its parent, the incorporated Low Dutch Church of Harlem, Inc., because no general charitable intent was shown; testator's intent was solely to benefit the 89th St. Church.


First Nat'l Bank & Trust Co. v. Brimmer, 504 P.2d 1367, 1371 (Wyo. 1973). This action was brought by the trustee of a fund which provided scholarships for children from Cheyenne and Casper, Wyoming, for attendance at either the University of Wyoming or Casper Community College. The trustee sought to apply the fund to children from these communities who wished to attend Laramie County Community College. Since the original trust purposes had not become impossible or impractical to fulfill, the trustee sought the alteration via the doctrine of equitable deviation. *See supra* note 51. Even this modest change was denied by the court for the reason stated in the quotation to which this note refers.


benefit the Unitarian religion in the will of the testator despite the pleas of the appellant Unitarian Universalist Association:

On the contrary, we conclude that the intent of the testator in this case was to support the particular Unitarian church which he had helped establish and, in the alternative [via a "gift over"], to support Unitarian education at Harvard and the poor of McLean Asylum. . . .

Since the gift over was meant to take effect "if the [church] changes its religious tenets and ceases to inculcate a 'Liberal Religion,'" it became effective when "by dissolving, the [church] . . . ceased to inculcate any religion." Had there been no gift over, the court having found no general charitable intent to support cy pres might have allowed the initial gift to fail, as was done recently by the supreme court of a neighboring state despite a highly appealing fact situation for the application of the doctrine.

Had the gift over in First Church of Somerville been to a private individual it would have been subject to the Rule against Perpetuities. Since the church might have stopped "inculcating a Liberal Religion," at any time after the testator's death, one could not be certain that the gift over would vest, if at all, within human lives in being at the testator's death, plus twenty-one years; thus, this gift over would fail under the Rule, thus instead of deciding as it did between the unappealing alternatives...

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98Id. at 1449, 376 N.E.2d at 1230.
99Id. at 1450, 376 N.E.2d at 1230.
100In Industrial Nat'l Bank of R.I. v. Glocester Manton Free Pub. Library, 107 R.I. 161, 265 A.2d 724 (1970), a gift to a defunct nursing home was held to have been in appreciation to the home for the care given testator's father, and without general intent to help the ill and elderly.

Some recent decisions have held that the existence of any gift over blocks cy pres application. See e.g., Simmons v. Parsons College, 256 N.W.2d 225 (1977). This is simply another method of "holding the line" against the free application of cy pres made possible by loose tests of "general charitable intent." What cases like Simmons are saying is that the existence of any gift over shows there is no general charitable intent—only primary and alternative specific intents. Whether a gift over which is void because of the Rule against Perpetuities (but is nonetheless expressive of testator's intent) would by the same token be held to block cy pres application is uncertain.

The opposite rule, allowing cy pres application to the primary charitable gift regardless of a gift over, appears to be in force in England. See Hanby's Will Trusts [1955] 3 All E.R. 874, 879 (stating the rule and citing previous case to that effect); see also G.G. Bogert & G.T. Bogert, supra note 78, at 496-98 & n.28. Likewise, in England the mere existence of a residuary gift, even to charity, does not prevent application of cy pres to the original charitable bequest. Mayor of Lyons v. Advocate General of Bengal, [1875-76], 1 A.C. 91; In re Cunningham, [1914] 1 Ch. 427.

Though Simmons states the general American rule, see IV A. Scott, Trusts 3907 & nn.4 5 (3d ed. 1967), the English rule seems preferable in allowing greater flexibility to the court. A California court in effect applied the English rule in Society of Cal. Pioneers v. McElroy, 63 Cal. App. 332, 146 P.2d 962 (1944). More recently, the Massachusetts Supreme Judicial Court held that the application of equitable deviation, supra note 51, to the original charitable bequest was not precluded by the existence of a gift over to an alternative charity. This latter result is predicated on the ground that giving effect to the gift over would work a forfeiture on the primary charitable trust. See IV A. Scott, Trusts § 401.3 at 107-08 (Supp. 1979).

100This is true in Massachusetts despite statutory modifications of the Rule contained in...
native of intestacy and the attractive one of funding secondary charitable beneficiaries, the Somerville court, if faced with a void gift over, would have had to choose between cy pres application and the allowance of intestate succession. Since the Somerville court insists that "each case turns on the intent of the particular testator," it might have been forced to admit that allowing intestate succession flies in the face of such intent, whereas the use of cy pres to benefit, for example, the Unitarian Universalist Association at least gives life to the primacy placed by the testator on leaving the fund for charitable purposes.

Whether or not it denied cy pres primarily because the gift over was also charitable, the Somerville decision unquestionably favors large "quasi-public" charities (Harvard and the famous McLean Hospital) at the expense of the appellant Unitarian Universalist Association. The Unitarians, as a particular sect of the Protestant Religion, are a private charity, specifically dissociated from the state by the first amendment of the Constitution. If the chief concern of courts in this area were to become the distribution of failed bequests to quasi-public, state sanctioned charities, courts might reach the unfair position of applying cy pres where it favors these charities (as in Tomlinson), but discarding it where unnecessary to such a result (as in First Church of Somerville).

The Strengthening of Judicial Control over Cy Pres

Whether or not this tendency to favor quasi-public charities already exists, it is clear from recent cases like DePew in New York and First Church of Somerville in Massachusetts that, despite the appeals of commentators, the requirement of general intent not only remains intact but may have been strengthened. Part of the resistance to eliminating the general intent barrier may stem from the traditional fear of judges that removing the prime restriction on the use of any controversial doctrine will simply "open the floodgates." If the requirement of general charitable intent were removed, the only substantial question remaining for the court would be what other charity should now get the funds of the failed trust. Unless the testator specifically provided in the document

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At common law, if (as in Somerville) there is a gift to Charity A followed by a gift over to Charity B if a specified event occurs, the executory interest in Charity B is exempt from the Rule. 4 A. SCOTT, TRUSTS §401.5 (3d ed. 1967). The exemption does not apply if either the possessory estate or the future interest is in a private individual. Id. at §§401.6 - 401.7. In the case posited here, with the future interest in an individual beneficiary, the rule voiding the future interest is stated in cases collected in §401.6 n.3, including the leading case of First Universalist Soc'y of N. Adams v. Boland, 155 Mass. 171, 29 N.E. 524 (1892).


10U.S. CONST. amend. I.
that cy pres could not be applied, gifts over, even to charity, would not be
given effect. Thus, these alternative dispositions would only be of use if
they were similar in purpose to the original bequest and could provide the
court with useful suggestions as to how to apply the funds of the failed
trust.

Not only do courts appear to want to retain their power to decide whether cy pres shall be applied to a given trust, but they have not been ready to share this power with their legislatures. The Massachusetts legislature recently asked the Supreme Judicial Court whether it had the authority to now order that the care, custody, management and control of the Franklin Institute [established by applying the cy pres power to a fund left by Benjamin Franklin to help young artisans get a financial start in business] be transferred from the Franklin Foundation to Boston University and the City of Boston when the trust establishing the foundation expires in 1991. The court determined not only that the legislature had no authority to use the cy pres power, but that no one had the right to ask the courts to apply that power to purposes chosen by designated beneficiaries [e.g., the City of Boston] now, since the terms of Franklin's will contemplated distribution by the city government in 1991 for purposes to be chosen in 1991. Thus, not only was cy pres to remain outside the power of the publicly-elected legislature, but it could not be exercised in advance in violation of Benjamin Franklin's expressed intent. Perhaps the Massachusetts courts have understood that once they cease to be the guardians of the testator's intent, their claim to use cy pres at all will be in jeopardy; once the initial question becomes not whether to apply the doctrine, but how to apply the fund in question for the public good, one has moved into a traditionally legislative area of decision-making.

Franklin established virtually identical funds for the cities of Philadelphia and Boston. For the history of the Philadelphia fund and the refusal of the Pennsylvania Supreme Court to allow trust income to accumulate or to apply cy pres to the trust, see Benjamin Franklin's Estate, 27 W.N. 545, 48 Leg. Int. 136 (1891), aff'd, 150 Pa. 437, 24 A. 626 (1892). The tale of the Boston fund is still unwinding; for a summary of Massachusetts' allowance both of accumulation and cy pres, see Franklin Foundation v. Attorney General, 340 Mass. 197, 163 N.E.2d 662 (1960), recounted in Dukeminier & Johanson, supra note 21, at 1358-59.

Order No. 6664 of the Massachusetts House of Representatives, October 12, 1977.


Nonetheless, legislatures in 25 states now give the power to their Attorneys General, if written consent cannot be obtained from the donor (because of death or other cause) for removal of restrictions on a charitable fund whose purpose has failed, to bring an action for removal of the restriction. "If the court finds the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part . . . . This section does not limit the application of the doctrine of cy pres." Uniform Management of Institutional Funds Act, 7A UNIFORM LAWS ANN. §7(b)(d) (Master ed. 1978).
CONCLUSION

The progress made by courts since the 1850's in applying the cy pres doctrine to failed charitable bequests has come to a standstill in the 1970's due to the persistence of the requirement of general charitable intent, a remnant of the stress on individual property rights so prevalent in Anglo-American common law. As this author has suggested elsewhere, the delicate balance between property rights and the common good can justifiably be tilted in favor of the public when an individual attempts to control property beyond the grave, particularly when this control is to extend beyond the testator's initial post-mortem disposition. If, as the author has argued elsewhere, dead hand control over property passing to individual heirs might be limited to providing a comfortable but not luxurious living to the initial takers, and little, if anything to subsequent heirs, why not limit the testator's control over charitable bequests, by giving effect only to the initial charitable bequest? Once the original charitable trust fails, the courts (or legislature, if one prefers) should be able to apply the fund cy pres, whether or not there is a gift over and whether or not this gift over is to a charitable or individual beneficiary.

Society may be protected by denying cy pres application to the original bequest where the gift over is for a charitable purpose and by applying the doctrine where the gift over, though still valid under the Rule against Perpetuities, is not charitable. For the sake of doctrinal consistency, however, it would seem preferable to impose an across-the-board limitation on the remoteness of dead hand control, whether the failed bequest is followed by no gift over, by a noncharitable gift over which is void under the Rule, by a valid noncharitable gift over, or even by a secondary charitable gift. Once the testator expresses the primacy of his general intent via the original charitable gift, one may argue that he has put the gift within the public realm where a court should be empowered, upon failure, to apply it for a related purpose, regardless of any secondary dispositions which may have been made. In this way, a court can refuse to extend dead hand control beyond an original charitable gift which has failed over the passage of time.

Under the above formulation, courts can preserve the testator's primary charitable intent by choosing as an alternative a viable charity.
as near as possible to the one chosen as the original recipient. In making this determination, the court should face the issues raised by Gettleman and Hodgman and be wary of automatically giving the fund to a charity whose very importance has embellished it with quasi-public attributes. In applying trust funds cy pres, courts should be aware that they are functioning as distributive, not commutative, decision-makers, and be careful to allocate the assets of the failed trust as equitably and justly as possible between competing charities.

The judicial determination to apply cy pres freely upon failure of the original bequest is itself a distributive judgment. Not only should courts realize that by so doing they are directing the allocation for common purposes of assets which under the common law might have gone to secondary beneficiaries, but they should also, as the Legal Realists recommend, explicitly admit that they are doing so. At the turn of this century, Roscoe Pound realized the need to temper the extreme individualism which characterized society, as well as his law school and its jurisprudence. Modern courts, too, facing as they do both overwhelming social need and an overtaxed, even rebellious citizenry, will best serve the interests of society in the charitable trust field by applying cy pres widely and openly as a matter of public policy and by paying less regard to notions of individual intent, more suitable to a pre-industrial state.

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13 Supra note 78.
14 "Distributive" and "commutative" justice were terms first used by Aristotle and Thomas Aquinas. F.A. Hayek, The Constitution of Liberty 441 n.11 (1960). Friedrich Hayek has discussed the modern meaning of the terms in the following way:

The restrictions which the rule of law imposes upon government ... preclude all those measures which would be necessary to insure that individuals will be rewarded according to another's conception of merit or desert rather than according to the value that their services have for their fellows—or what amounts to the same thing, it precludes the use of distributive, as opposed to commutative justice. Id. at 232. ... In Aristotelian terms... liberalism aims at commutative justice and socialism at distributive justice.

Id. at 440 n.10.

Thus the distributive decision-maker centrally directs the particular distribution of wealth desired, whereas the commutative decision-maker serves only as a "referee," allowing the principles of law and economy to determine "who gets what."

15 Supra notes 7-9 and accompanying text.
16 Supra note 53 and accompanying text.
17 See, e.g., the famous California Initiative Measure, “Proposition 13,” approved by the people June 6, 1978, Cal. Const. art. 13A.