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### Ask Not What Your Charity Can Do for You: Robertson v. Princeton Provides Liberal-Democratic Insights into Cy Pres Reform

Iris Goodwin

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# ASK NOT WHAT YOUR CHARITY CAN DO FOR YOU: *ROBERTSON V. PRINCETON* PROVIDES LIBERAL-DEMOCRATIC INSIGHTS INTO THE DILEMMA OF *CY PRES* REFORM

Iris J. Goodwin\*

*This Article centers on a long-standing problem in the law of public charity: how to ameliorate the force of restrictions imposed by donors on large gifts in the face of societal change. Donors of these gifts often seek to advance personal beliefs or social agenda by limiting funds to particular programs. Under current law, such restrictions obtain in perpetuity, potentially functioning as a “dead hand” upon the charity with the passage of time. This Article explores the challenge of defining a substantive standard that acknowledges changes in social efficacy and draws upon John Rawls’s distinction between the “right” and the “good” to provide a framework to locate charitable mission, what the Author claims are private views of the public good, within liberal democracy. By way of illustration, this Article also examines the legal dispute between the Robertson family and Princeton University regarding a restricted gift given by the Robertsons in 1961. After the moment of national idealism that inspired the gift had passed, Princeton struggled to spend the gift in ways consistent with what the Robertsons claimed the language of the grant required.*

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*"Time makes ancient good uncouth."*

— James Russell Lowell from *The Present Crisis*<sup>1</sup>

## INTRODUCTION

The realm of the eleemosynary is arguably the ethical ionosphere of human endeavor. Yet the conduct of some public charities would seem to bespeak the lawless opportunism of the Wild West.<sup>2</sup> Almost weekly yet another public charity finds itself at the center of controversy, accused of dereliction from either the letter or the spirit of some precept governing the charitable sector, a veritable bad boy (or girl) upon the civic landscape.<sup>3</sup> Generally speaking, however, charitable organizations occupy a realm that is far from a legal vacuum. They are in fact subject to a complex regulatory regime, primarily under federal but also under state law. Where charities do operate under a woefully inadequate set of laws, however, is with respect to special purpose—or restricted—gifts. The law here does little to guide (and, when necessary, police) charities in their stewarding of such gifts over time.

The law is deficient with respect to restricted gifts even though they play a vital role both in the charitable sector and in the larger liberal polity. These gifts represent private preferences as to the public good that donors are seeking to realize through the charitable sector. Such gifts ensure the diversity of the projects and programs within the charitable sector, as well as social and ideological innovation within the larger liberal polity. When a donor makes a restricted gift (especially where the gift is restricted as to mission<sup>4</sup>), by means of that very restriction the donor potentially expands and enriches an organization's mission by making possible a new program or offering a timely perspective on an existing one. An ineffectual legal regime with respect to these gifts is enormously consequential. Restricted gifts are calculated by donors for their impact on mission—the *raison d'être* of charitable organizations. A legal vacuum here ramifies—in ways subtle and in ways gross—throughout the charitable organization and indeed the entire charitable sector. An invitation to lawlessness that bears directly upon charitable mission is profoundly corrupting.

1. JAMES RUSSELL LOWELL, *The Present Crisis*, in POEMS OF JAMES RUSSELL LOWELL 98 (1912).

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

3. Marion R. Fremont-Smith & Andras Kasaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995–2002* (Hauser Ctr. for Nonprofit Orgs., Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 20, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=451240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=451240).

4. Note that it is restrictions as to mission that concern us in this Article. A donor may also make an "endowment gift," a restriction which 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 this Article is not concerned with endowment gifts here.

A charitable organization recently in the headlines has been Princeton University.<sup>5</sup> Princeton was sued by the Robertson family, donors to the Woodrow Wilson School, who decades ago made a gift to Princeton in support of the School.<sup>6</sup> In 1961, when President John F. Kennedy challenged the nation to “Ask not what your country can do for you . . .”<sup>7</sup> Charles and Marie Robertson responded with deep patriotism to create the Robertson Foundation to support the Woodrow Wilson School at Princeton. The \$35 million grant was, at the time, the largest single gift of its kind ever to have been made by an individual to a university.<sup>8</sup> Consistent with the patriotic impulse that motivated the grant, the Robertsons directed that Foundation funds be used to establish a graduate program that would educate students for careers in the U.S. civil service, especially in international affairs.<sup>9</sup> In 2002, however, the Robertson family filed suit against Princeton, alleging that the University had failed to comply with the specified purpose of the gift and, further, that in the interim Princeton had applied the subject funds (valued in June 2008 at almost \$800 million and representing 6% of Princeton’s endowment)<sup>10</sup> to projects and programs far outside the compass of the grant.

Almost from the outset, the Robertsons and Princeton disagreed about the scope and force of the grant. But if the restrictive language spoke in any meaningful way to the establishment and support of a program to prepare students for federal service (as the Robertsons have from the outset insisted was their intent), the conflict between the parties was inevitable, especially given the cascade of events that followed shortly upon Kennedy’s call to action and the Robertsons’ gift. Within a few short years, the extraordinary moment of national idealism that had inspired the Robertsons’ gift came to an abrupt end and did so in ways that ensured employment with the U.S. government would hold little allure for young people. Not only did a charismatic young president meet his death in Dallas but, before long, both Martin Luther King and Robert Kennedy had also been assassinated.<sup>11</sup> Further, the mire of Vietnam and embarrassment of Watergate were soon at the center of national consciousness so that distrust of the government and disaffection with its policies became rampant, especially among young people. At the same time, there were new and increasing opportunities for public service through nongovernmental organizations.<sup>12</sup> These and other developments in the larger world suggested that “service” in international affairs could be rendered—and was perhaps best rendered—in ways that did not directly involve the government.

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5. John Hechinger & Daniel Golden, *Poisoned Ivy: Fight at Princeton Escalates over Use of a Family’s Gift*, WALL ST. J., Feb. 7, 2006, at A1.

6. *Id.*

7. Geoff Mulvihill, *Donors’ Family Sues Princeton over Use of Gift*, PHILA. INQUIRER, Jul. 4, 2004, at B4.

8. *See id.*

9. *Id.*

10. *See* Hechinger & Golden, *supra* note 5, at A1.

11. Mulvihill, *supra* note 7, at B4.

12. *See id.*

Like so many disputes between donors of restricted gifts and their recipient charities, the contest between the Robertsons and Princeton has settled out of court. In December of 2008 the parties agreed to settle the suit that had lasted five and a half years and cost the parties \$80 million in legal fees and expenses. The case remains important, however, as no case or controversy better illustrates the important role that restricted gifts play in maintaining the diversity of projects and programs within the charitable sector or demonstrates the particular inadequacies of the current law of restricted gifts in guiding charities in their stewardship of such gifts. As one family's response to Kennedy's challenge to the nation, the Robertson gift is a quintessential example of a private view of the public good. Like so many donors of restricted gifts, the Robertsons were motivated by a deeply held personal belief and hoped by means of their gift to bring about a change in societal norms, i.e., to encourage Woodrow Wilson School students to undertake careers in federal service, and further, to make such careers broadly popular. Be that as it may, a restricted purpose, if ground-breaking when the gift is accepted by a charity, often functions as a "dead hand" upon the charity with the passage of time. The sort of challenges to the implementation of a restricted purpose gift that typically require decades to ripen, however, in the case of the Robertson gift, quickly emerged with the cascade of events in the larger world that ensued upon the funding of the Robertson Foundation. These events compressed into a few years the sort of challenges to the implementation of a restricted purpose gift that typically require decades to ripen.

The contest between the Robertsons and Princeton also remains important because the Robertsons were uniquely situated to hold their recipient charity to legal account. When the Robertsons made the gift to Princeton, they created a separate organization—the Robertson Foundation—to serve as an administrative conduit for their grant, and, further, they retained on the Board a number of seats for family-designated trustees. While most donors do not have standing to sue their recipient organizations regarding the application of restricted funds, when the dispute between the Robertsons and Princeton finally came to a head, the family-designated trustees (in their capacity as trustees) had standing to bring suit against their Princeton-designated co-trustees. The Princeton-designated trustees, as a majority of the Board, were responsible—so the Robertsons claimed—for the application of funds. So, even though this case was not litigated to conclusion, the pleadings on both sides are a treasure trove of arguments providing rare insights into the challenges of realizing a particular restricted purpose over time and the attendant temptation on the part of a recipient organization to circumvent a charitable charge.

In the annals of commentary on the charitable sector, the observation that there is a certain lawlessness afoot with respect to restricted gifts is not new. For several decades those studying the charitable sector have acknowledged two problems in the governing legal regime, the concerted effects of which constitute an invitation to casual treatment of restrictive language. The first and most fundamental problem resides in the substantive law. Under the common law, whereas most legal interests must terminate within some period of time, restricted gifts obtain in perpetuity. The only avenue of legal relief from restrictive language

is under the equitable doctrine of *cy pres comme possible*.<sup>13</sup> Under *cy pres*, where the timeliness of a restriction is at issue, the charity must show that the purpose has become either “impossible” or “impracticable” (with the latter having been construed by the courts as tantamount to the former). *Cy pres* then is a narrow and unyielding doctrine that affords a charity no relief upon the mere passage of time and the attendant accretion of challenges in realizing a particular mission.

There is no doubt then that, under current law, restricted gifts have a significant effect on an organization’s ability to respond to change within the context of its overall mission. Whatever the law might require, the charity can only be loath to stand by and watch as endowed programs once cutting edge become anachronistic, while other needs arise only to go unmet. But as it works out, relief (of a sort) from the strictures of donative language is available by virtue of the second inadequacy of the governing legal regime: the standing rules are such that enforcement of donative language is lax to nonexistent. In most states, the only party assured standing to hold charities to account, the state attorney general, is usually short of staff and funds, with many pressing concerns aside from charities and the restrictions to which their endowments may be subject.<sup>14</sup> Therefore, if a charity believes a restriction has become an encumbrance on its mission (broadly conceived), under current law the charity has a choice of undertaking a lengthy (and likely unsuccessful) court proceeding to have the restriction removed, or simply ignoring the restriction (in ways small, perhaps in ways large) and gambling that the attorney general will turn a blind eye. No better inducement to noncompliance could be devised than the law as it currently stands. Sporadic enforcement of an unyielding and impractical requirement invites self-help.

Reform of the *cy pres* doctrine has not proven easy, however, especially if the object is to arrive at a legal criterion for evaluating the continued social efficacy of charitable mission, short of a determination of impossibility. The pursuit of this standard has been the preoccupation of an extensive and lengthy discussion in the legal academy as well as in the profession. Despite myriad calls for reform over several decades,<sup>15</sup> however, no one attempting to embellish the criteria of impossibility—not in the case law, not in the Restatements, not in the academic literature—has successfully addressed the issue at the heart of the problem of restricted gifts—the problem so powerfully illustrated by the cascade

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13. A Norman French phrase meaning “as near as possible.” GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 431 (rev. 2d ed. 2003); see also *infra* note 109.

14. Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 48 (1993).

15. See, e.g., LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 139 (1955); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1112 (1993); C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979); Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353 (1999); Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation*, 74 IOWA L. REV. 545 (1989); Peter Luxton, *Cy Pres and the Ghost of Things that Might Have Been*, CONV. & PROP. LAW. 107 (1983); Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 300–06 (1988).

of events that followed quickly upon the Robertsons' gift to Princeton. No one has devised a legal standard to govern the loosening of restrictive language in the face of societal change, short of a showing that the purpose of the gift has become completely impossible to achieve.<sup>16</sup>

This Article argues that the key to understanding the challenge of *cy pres* reform begins by appreciating that a restricted purpose gift typically puts forward a private vision or preference with respect to the public good (a point powerfully illustrated by the Robertson gift). So understood, such gifts can be located in liberal democracy, where we can explain the deference shown them, or at least certain types of them. We know that we are on the right track here when we further observe that, while *cy pres* relief is not available where the mission suffers upon the mere passage of time, relief is readily available where a restriction is deemed "illegal"—a ground that covers purposes that are discriminatory with respect to race, gender, and, in certain cases, religion. Interestingly, this distinction with respect to charitable mission—and the availability of a remedy in one instance but not in the other—bespeaks a distinction long recognized as fundamental in liberal thinking, the distinction between the "right" and the "good."<sup>17</sup> The categories of the "right" and the "good" resonate deeply through liberal democratic thought and have long been considered to frame the role of government in the liberal democratic polity. In a liberal democratic polity, certain individual preferences are as a matter of principle accorded deference by courts and legislatures as expressions of the "good," that is, as preferences as to the ends or fundamental purposes of life, those things or values necessary to the good life. In contrast, the "right" speaks to considerations of justice and, in particular, the regime of rights understood as the foundation of justice. It is the role of government to vindicate the right—and, no less important—to remain neutral with respect to individual views of the good. This last point has one proviso: provided the particular view of the good does not implicate or burden the right or system of justice. With respect to views of the good that burden the right, government appropriately intervenes.<sup>18</sup>

It should come as no surprise then that, consistent with the distinction between the "right" and the "good," *cy pres* relief is available to redress discriminatory purposes but not others, short of a showing of impossibility. The law enters to secure the right—that is, to modify purposes that would frustrate or undermine the neutrality of the regime of rights. On the other hand, where a charitable restriction speaks to the good, including privately envisioned priorities

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16. Commentators developed the criterion of "waste" in the wake of a 1986 holding by the Superior Court of Marin County, California, which denied *cy pres* relief to trustees of a restricted grant that had seen astronomical increase in value after the death of the donor. See *Estate of Buck*, 35 Cal. Rptr. 2d 442, 442–43 (Ct. App. 1994). The grant was restricted to the purpose of providing "care for the needy in Marin County," one of the wealthiest counties in the United States, based upon per capita income. *Id.* at 443. The court refused to grant relief under the traditional common law standard of impossibility, impracticability, or illegality. *Id.*; see also John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641 (1987).

17. WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* (1930).

18. JOHN RAWLS, *A THEORY OF JUSTICE* 291 (2d ed. 1999).



for the commonweal, the law does not enter—again, absent implication of the right.

Significantly, this deference where mission falls under the rubric of the good in the charitable sector operates to facilitate the diversity of the projects and programs there. Such deference also encourages social and ideological pluralism within the larger liberal polity. But most importantly, this deference accords with the notion of personhood at the center of liberal democracy. Where restricted gifts are concerned, there is no objective criterion of public good (consistent with liberal norms) by which to distinguish the timely from the anachronistic. In any era, one person's well-considered passion is another's tilting at windmills. The same applies to any endowed project or program over time. It is virtually impossible to provide a principled distinction between the opportune and the quixotic, short of a showing that the mission is simply impossible to achieve.

This insight into the intractable challenge of *cy pres* reform suggests that the long-sought standard will not emerge. If the law cannot provide a substantive rule for evaluating the continued social efficacy of a charitable mission, however, this does not mean that, at a practical level, the problem of restricted gifts has ceased to exist, especially given that such gifts obtain in perpetuity. It does suggest, however, that the only recourse is to a procedural solution. While it is not the purpose of this Article to develop such a solution in any meaningful way, the faint outlines of such a framework are offered as an afterthought in the Conclusion.

To concede that the only solution to the problem of restricted gifts is likely to be a procedural one does not, however, cede the high ground to those who would advocate improved enforcement mechanisms alone. There can be no doubt that improved enforcement will form an essential component of any comprehensive *cy pres* reform, but improved enforcement mechanisms alone will not suffice.<sup>19</sup> If restricted gifts are to remain attractive to charities, improved enforcement must occur within a procedural framework that allows a charity to attenuate the perpetual force of restrictive language in the face of societal change. This framework must operate to discipline the charity in its decision-making processes. Because donor-imposed restrictions guarantee the diversity of the charitable sector, a liberty to interpret restrictive language under certain circumstances should not operate as a license to apply funds with little or no regard for the donor's charge.

Part I of this Article draws upon the pleadings and evidence filed in *Robertson v. Princeton* to chronicle the dispute between the Robertson family and the University over the stewardship of their restricted gift. As a quintessential example of a private view of the public good, the Robertson gift powerfully illustrates the import of restricted gifts to the commonweal as well as the challenges faced by recipient organizations as they attempt to realize a restricted purpose over time. The Robertson grant in its idealism also nicely sets the stage to

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19. See Ronald Chester, *Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information Be Utilized Effectively?*, 40 NEW ENG. L. REV. 447 (2006).

consider the implications of nondiscriminatory restricted grants when they are located in the liberal polity as expressions of the "good."

Part II treats the concept of a restricted gift with special attention to its perpetual nature. The *cy pres* doctrine is set forth along with the problem of lax enforcement of restricted gifts, which together make for a climate of self-help within the charitable sector.

Part III introduces the concepts of the right and the good. This Article draws upon these concepts to gain insight into the disappointment and frustration experienced by the larger legal community as it has pursued a criterion by which to evaluate charitable missions, short of a finding of impossibility. While in explaining these concepts we might look to a number of sources, we draw upon the writings of John Rawls, the premier political philosopher of the second half of the twentieth century, as a recent locus for this liberal-democratic distinction. In addition, to demonstrate that we have not merely grafted the jurisprudence surrounding the right and the good onto the law of charitable mission, we examine several familiar Supreme Court opinions where a mission has been set aside where it was deemed discriminatory. The language of these cases indicates that the distinction between the right and the good is very much in play in the law of charitable mission.

Part IV concludes by offering in broad outlines a procedural framework for allowing a charity to attenuate the perpetual force of a restrictive grant in a disciplined way, giving due regard to the donor's charge, as appropriate to the time and circumstances.

## I. THE ROBERTSONS AND THEIR GIFT TO PRINCETON<sup>20</sup>

### A. The Gift

Before the twin national debacles of Vietnam and Watergate, John F. Kennedy assumed the presidency and ushered into American public life a brief era of worldly idealism. His inaugural address was a clarion call to Americans to serve their country in ways befitting the new age. Recognizing that World War II was well behind us but that the Cold War was upon us, Kennedy called on the country to embrace quintessentially American values to sustain a protracted battle with the Soviet Union and its client states. Despite the cosmopolitan tenor of Kennedy's rhetoric and persona, however, his approach to world affairs was still centered in a view of the United States as the rightful purveyor of the good life, ready to

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20. As noted at the outset, the lawsuit between the Robertson family and Princeton University was never litigated to conclusion, so the legal facts of the case have not been found by any court. The details of the dispute as recounted in this Part and indeed referenced throughout this Article are gleaned from the briefs submitted by the parties and various journals and newspapers reporting events concerning the lawsuit (as indicated in the footnotes to this Part and to other Parts). In drawing upon these materials to explore issues raised by the dispute, the author has relied upon the truthfulness and accuracy of the claims of the parties in their briefs and other evidence submitted to the court and of the reporting in newspapers and journals. She makes no representation here with respect to the truthfulness of any material presented in this Article beyond this reliance.

eliminate poverty and racism at home, and the appropriate proselytizer—even facilitator—of liberty and democracy abroad.

In 1961, Charles and Marie Robertson answered Kennedy's call with a gift to Princeton University. Believing they owed their country a "tremendous debt," and mindful of Kennedy's charge to the nation—"Ask not what your country can do for you—ask what you can do for your country,"<sup>21</sup>—the Robertsons began extensive discussions with Princeton's president Robert R. Goheen, about making a sizable gift to support the Woodrow Wilson School of International and Public Affairs.<sup>22</sup> Marie Robertson was heir to a Great Atlantic and Pacific Tea Company fortune; Charles was a 1926 graduate of Princeton College and a former Navy Intelligence officer. Princeton was a natural choice and the Woodrow Wilson School an obvious vehicle for the Robertson gift. As a result of discussions with Goheen, the Robertsons made an anonymous gift to Princeton—700,000 shares of A&P stock, then valued at approximately \$35 million—for the purpose of expanding the graduate program at the Woodrow Wilson School. The particulars of this gift became the subject of the recent lawsuit.<sup>23</sup> The gift was deemed at the time the largest single gift of its kind from any individual benefactor to a university, either public or private.<sup>24</sup>

"[We] for years had searched for a cause . . . that might serve to strengthen the Government of the United States and, in so doing, to assist people everywhere who sought freedom with justice,"<sup>25</sup> Charles Robertson stated a year later in a letter to his children explaining the gift. "We are all prone," he asserted, "to take for granted the gifts of freedom and of justice we as Americans enjoy[,] forgetting that these great privileges simply do not just happen and flourish."<sup>26</sup>

The Robertson gift was not made to Princeton outright, however. To manage the gift, Charles and Marie Robertson set up a separate charitable

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21. Mem. of Points & Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment re Fiduciary Duties & Business Judgment Rule at 16–17, *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008) [hereinafter *Mem. re Fiduciary Duties*] (quoting Letter from Charles and Marie Robertson to their children (July 3, 1962)).

22. The Robertsons' gift did not create the Woodrow Wilson School of Public and International Affairs. See Mulvihill, *supra* note 7, at B4. The School was founded in 1930 as part of Princeton University. *Id.* Originally offering only a small interdisciplinary program for undergraduates, a graduate professional program was added in 1948, and the School was renamed in honor of Woodrow Wilson, former President of the United States and of the University. *Id.* Both programs existed at the time of the gift. *Id.*

23. See generally Complaint, *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008); Defendant's Amended Answer, Affirmative Defenses, and Counterclaims for Declaratory Relief, Nature of Counterclaims, *Robertson*, No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008) [hereinafter Defendant's Amended Answer].

24. Fred M. Hechinger, *Gift of 35 Million Goes to Princeton*, N.Y. TIMES, Aug. 6, 1961, at A1.

25. Mem. re Fiduciary Duties, *supra* note 21, at 16–17 (quoting Letter from Charles and Marie Robertson to their children (July 3, 1962)).

26. *Id.*

organization<sup>27</sup> with a seven-member board, four to be chosen by Princeton<sup>28</sup> and three by the family.<sup>29</sup> By granting Princeton the right to appoint a majority of the trustees, the family ceded control of the gift to the University, albeit subject to a restricted purpose. The Robertsons had no plan to disappear, however. Seemingly anticipating the entrepreneurial philanthropists of the 1990s,<sup>30</sup> the family retained three seats on the Board, clearly planning to stick around after their gift was made and ensure the family a significant, on-going role in the administration of the gift

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27. In 1961, the Internal Revenue Service granted the Robertson Foundation section 501(c)(3) tax-exempt status. In 1969, however, Congress amended the Internal Revenue Code to add 509. *See* I.R.C. § 509 (1969). The enactment of subparagraph (a) of section 509 resulted in classification of section 501(c)(3) organizations into two categories—public charities and private foundations. Among other differences, public charities must demonstrate a broad base of support, while private foundations usually have a narrower base of support, often only one family. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, *TAXATION OF NONPROFIT ORGANIZATIONS, CASES AND MATERIALS* 391–96 (2003).

The advent of section 509 resulted in the creation of a new sub-category of public charities known as “supporting organizations.” Supporting organizations are deemed public charities whether or not they are able to demonstrate a broad base of public support, but they are deemed public charities because of their relationship with another organization, a public charity, which can demonstrate the broad base of support that is otherwise requisite to the status. Supporting organizations (such as the Robertson Foundation) are organizations which are “operated, supervised or controlled by” another public charity, “supervised or controlled in connection with” another public charity, or “operated in connection with” another public charity. Following the 1969 amendments, attorneys for the Robertson Foundation (as was required under the new Regulations) submitted to the Internal Revenue Service a “notification of Foundation Status” in which they—consistent with the application to be deemed a “supporting organization” (and thus a public charity rather than a private foundation)—declared on behalf of the Foundation that:

- (i) the Foundation is operated exclusively for the benefit of Princeton University (ii) the Foundation is “controlled by Princeton,” (iii) the University’s requirement of “effective control of the Foundation” in order to “undertake the long term commitment involved in the project” was “agreed to by the donors,” and (iv) the Foundation is a public charity within the subcategory of “supporting organizations,” and not a private foundation.

Defendant’s Amended Answer, *supra* note 23, at 41.

28. The original bylaws required that the Princeton members be the persons from time to time holding the position of President of Princeton University and the Chairmen of the Executive and Finance Committees of the University Board of Trustees. The fourth Princeton member was to be appointed by the President of Princeton. Defendant’s Amended Answer, *supra* note 23, at 38. The bylaws were most recently amended in 1987 to permit the President of Princeton to select three of the Princeton members from the pool of current and former Trustees of Princeton University. *Id.*

29. The bylaws provided that the family members were to be selected by Charles and Marie Robertson during their lifetimes and, after their deaths, by their descendants. *Id.*

30. For the advent of “venture philanthropy,” see, e.g., Geoffrey Colvin, *The Gift of Arrogance*, *FORTUNE*, Dec. 24, 2001, at 50; Erin Kelly, *Having Your Cake and Donating It Too*, *FORTUNE*, Jun. 12, 2000, at 306; Sara Steindorf, *Clout of Women Donors Climbs*, *CHRISTIAN SCI. MONITOR*, Dec. 6, 1999, at 16.

and indeed the realization of their vision.<sup>31</sup> Charles Robertson himself took the helm as Chairman of the Foundation Board. Originally called the “X Foundation” because of the family’s desire for anonymity,<sup>32</sup> the Robertson Foundation’s Certificate of Incorporation was executed on March 16, 1961, and filed with the Delaware Secretary of State on March 20, 1961.<sup>33</sup> As the means to implement the Robertsons’ charitable vision, the language of the Certificate was perfectly attuned to the tenor of the times. The Foundation’s purpose was to “strengthen the government of the United States and increase its ability and determination to defend and extend freedom throughout the world[.]” The goal was to be accomplished “by improving the facilities [at Princeton] for the training and education of men and women for government service.”<sup>34</sup> The gift would support, as part of the Woodrow Wilson School, a “Graduate School, where men and women dedicated to public service may prepare themselves for careers in government service,” with “particular emphasis” on “areas of the Federal Government . . . concerned with international relations . . . .”<sup>35</sup> Ask what you can do for your country indeed!

### ***B. Princeton’s Dilemma***

Under the law as it was then and is now, language specifying the charitable mission in the Robertson Foundation Certificate was not merely aspirational or precatory. Leaving aside the nature of the program to be supported (now a point of controversy between the parties), merely tying the gift by its terms to the Woodrow Wilson School would be sufficient to render it a restricted purpose gift. The full legal significance of such conditions is a subject that must await a later Part of this Article. At this point, however, suffice it to note that once Princeton accepted the Robertson gift subject to restriction, Princeton was bound by the terms, whatever they might be. This obligation to adhere to the terms of the grant obtained in perpetuity or until the exhaustion of the subject funds, the vagaries of time and circumstance notwithstanding. The only recourse for Princeton (or for any charity) was to apply to a court for relief under the narrow and unyielding doctrine of *cy pres comme possible*. And *cy pres* affords a charity no relief upon the mere passage of time and the attendant accretion of challenges in realizing a particular mission. Furthermore, short of the providing grounds for

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31. In a letter from Charles Robertson to his four children, Robertson stated, The purpose of this memorandum is to convey to each of you four children just how your mother and I hoped that each one of you and your children and your children’s children might be concerned and involved in furthering the growth and development of the School and particularly in advancing the support of the School by the Robertson Foundation.

Complaint, *supra* note 23, ¶ 37 (quoting Letter from Charles Robertson to his children (Nov. 27, 1972)).

32. *Id.* ¶ 27.

33. Defendant’s Amended Answer, *supra* note 23, at 38.

34. *Id.* at 38–39.

35. For the complete restriction, see *infra* note 38.

*cy pres* relief, the law offers little guidance to the charity in the temporal nuances of stewarding a mission.<sup>36</sup>

That the gift made possible a ground-breaking new program at the Woodrow Wilson School was immediately recognized. "Princeton is expected to set new patterns in the approach by American universities to the professional training of the policy-making echelons of Government," the *New York Times* wrote.<sup>37</sup> Very early on, however, it was clear that, in establishing the program and otherwise implementing the restrictive grant, Princeton and the Robertsons differed on the requirements of the governing language.<sup>38</sup>

With respect to mission itself, leaving aside other issues in contention between the parties<sup>39</sup> virtually from the creation of the Robertson Foundation, the family that was moved by great patriotism to make the gift has been insistent that education for government service—and specifically federal government service in international affairs—was the primary object of the grant. On the other hand, from the inception of the grant, Princeton has been inclined to interpret the language of

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36. See *infra* Part II.

37. Hechinger, *supra* note 24, at 1.

38. This Article does not intend to attempt to parse the restrictive grant to determine which party's position is more consistent with the language there. The locus of the restrictive language is stated in Article 3 of the Certificate of Incorporation, however, and reads as follows:

[The gift is given] to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service. . . . [In particular, the Foundation's assets can be used only:]

(a) To establish or maintain and support at Princeton University, and as part of the Woodrow Wilson School, a Graduate School, where men and women dedicated to public service may prepare themselves for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs;

(b) To establish and maintain scholarships or fellowships, which will provide full, or partial support to students admitted to such Graduate School, whether such students are candidates for degrees, special students, or part-time students;

(c) To provide collateral and auxiliary services, plans and programs in furtherance of the object and purpose above set forth, including but without limitation internship programs, plans for public service assignments of faculty or administrative personnel, mid-career study help, and programs for foreign students or officials training.

Robertson Found., Certificate of Incorporation, at 1 (July 26, 1961).

39. Other issues included whether capital gains as well as income could be distributed under Article 11(c) of the Certificate of Incorporation, whether the Foundation properly retained Princeton Investment Company (PRINCO) to manage Foundation investments, whether Princeton was the "sole beneficiary" of the Robertson Foundation, and others. *Id.* at 3.

the grant capaciously, relying upon the presence there of the expansive term “government service”<sup>40</sup> so that the reference to federal service per se tended to recede into the text. Indeed, as Princeton was accepting the gift, Dr. Goheen explained its terms to the Executive Committee of the University’s Board of Trustees in words consistent with a broad interpretation of the grant: the gift would enable Princeton

to develop, in the Woodrow Wilson School, post-graduate programs of instruction that will augment the flow of well-prepared people into positions of public responsibility and set new patterns of excellence throughout the nation for the training of men and women for the public service, with particular attention to international and foreign affairs.<sup>41</sup>

From the Robertsons’ perspective, however, such characterizations of the mission did not go far enough. Only two years after the Foundation was created and financial support of the Woodrow Wilson School had begun, Charles Robertson expressed to Princeton officials “acute disappointment” that only six of the seventeen 1963 Masters in Public Affairs (MPA) graduates were going “into Federal service.”<sup>42</sup> A few years later, in 1970, a survey conducted by the Woodrow Wilson School invited Robertson’s continued objections when it revealed that, of the 229 graduate recipients of the MPA degree in the preceding ten years, only fifty-six were employed by the federal government.<sup>43</sup> Indeed a significant number had failed to enter public service at all.<sup>44</sup> As Robertson noted in his memo to the dean, eighty-seven graduates of the MPA program had instead “entered advanced study, the teaching profession, college administration, private business, journalism, law, medicine and music.”<sup>45</sup>

For the Robertsons, such results were extremely problematic. In their view, this failure to graduate students into federal service evidenced an indifference on Princeton’s part as to the niceties of the stipulated mission. Accordingly, tensions between the Robertsons and Princeton continued throughout the early- and mid-1970s, with Charles Robertson vigilantly monitoring Princeton’s performance, with a special eye to the type of employment obtained by students after graduation. During this period, University officials were apparently able to mollify him so that, notwithstanding his expressions of irritation and disappointment, he voted in unison with the Princeton-designated trustees on a number of occasions to significantly expand the graduate program at the Woodrow Wilson School.<sup>46</sup>

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40. *Id.* at 1.

41. Defendant’s Amended Answer, *supra* note 23, at 37.

42. Mem. re Fiduciary Duties, *supra* note 21, at 19 (quoting Letter from Charles Robertson to Gardner Patterson (Jun. 24, 1963)).

43. See Amended Complaint ¶ 72, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008) (quoting Letter from Charles Robertson to John Lewis, Dean, Woodrow Wilson School of Pub. & Int’l Affairs (Nov. 10, 1970)).

44. *Id.*

45. *Id.*

46. See Defendant’s Amended Answer, *supra* note 23, at 44–50.

Until 1976, however, when Robertson suffered the first of several strokes, he continued to make waves, doggedly pressing Princeton for an interpretation of the restrictive terms that recognized the primacy of education for federal service. He continued to measure Princeton's performance in light of what he took to be the rigorous—and correct—interpretation of the grant. Even as he voted with Princeton-designated trustees to expand the MPA program, he never ceased to rankle at the significant percentage of MPA graduates who failed to pursue careers in public service within the U.S. government. “[A] small output from large resources,” he continued to complain.<sup>47</sup> In a 1972 letter to Princeton President Bowen, Robertson once more scolded Princeton for not turning out enough career diplomats. Alluding to the terms of the gift, he said

The time has come to face up to the obvious fact that the School has never come within shouting distance of achieving its goal and I personally doubt that it ever will as long as it continues on its present course . . . . “Federal Government service concerned with international relations and affairs,” that was our original goal. It continues to be our goal, and it emphatically always will be our goal . . . . [The program] needs strong management, direction, and purpose, and above all, the University simply must live up to its word . . . . The University must abide by its contract . . . .<sup>48</sup>

If Princeton resisted the Robertsons' interpretation of the grant from the outset, there is no doubt that, soon upon accepting the Robertson funds and agreeing to their terms, Princeton was beset with a predicament. If the terms of the grant were binding on the University in perpetuity, time and circumstance were nevertheless likely to render this legal language controversial. And in the case of the Robertson grant, motored by patriotism and (according to the Robertsons) calculated to encourage students to federal service, the grant (so understood) became inconvenient sooner than it otherwise might have been.

Almost immediately upon the establishment of the Robertson Foundation, the world changed so that employment with the U.S. government held considerably less allure. At the time the gift was made, the nuclear standoff between the United States and the Soviet Union was particularly tense and the United States was not yet mired in Vietnam or embarrassed by Watergate. This soon changed. Furthermore, not only did the charismatic young president who had implored “a new generation of Americans” to serve their country soon meet his death in Dallas, but Martin Luther King and Robert Kennedy were also assassinated.<sup>49</sup> Distrust of the government and disaffection with its policies (and with the American polity in general) were soon rampant, especially among young people. (In fact, rumors on campus that the “X” Foundation was a “front” for the CIA prompted the Robertsons to come forward in 1973 and disclose that they were the donors.<sup>50</sup>) Also, not to be overlooked were the new opportunities for public service available in the burgeoning arena of nongovernmental organizations. By

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47. Complaint, *supra* note 23, ¶ 41

48. *Id.* ¶ 73 (quoting Letter from Charles Robertson to William Bowen, President, Princeton Univ. (Nov. 18, 1972)).

49. Mulvihill, *supra* note 7, at B4.

50. *Id.*



the early 1970s, these organizations were becoming as important in international relations as were traditional government-based agencies.<sup>51</sup> Finally, the nature of government had changed. The U.S. government began collaborating with nongovernmental organizations and private firms, outsourcing policy studies and other projects once the sole province of government.<sup>52</sup> “Service” in “international relations and affairs” could be rendered—and was perhaps best rendered—in ways that did not directly involve the U.S. government.

As President Goheen’s 1961 remarks to the Executive Committee of the Princeton Board suggest, Princeton officials were, from the outset, inclined to interpret the Robertson restriction broadly.<sup>53</sup> Furthermore, as time marched on, however, attitudes within Princeton as to the meaning of public service shifted in more principled ways, along with larger public opinion. In a confidential 1972 memorandum to Princeton’s president, Dean Lewis of the Woodrow Wilson School expressed impatience with the Robertsons’ insistence on preparing students for federal service. “What bothers me [about the terms of the gift],” wrote Lewis, is

the unspoken premise that, with respect to any American institution dealing with public affairs, the highest per-se loyalty automatically must be to the United States Government. . . . [That] is not a philosophical premise to which the Woodrow Wilson School, as an agent of general public-affairs enlightenment, really can be bound. I guess I hope the issue does not explicitly surface. But if it were to do so, the University should resist a blind commitment to nation-state parochialism.<sup>54</sup>

In Lewis’s view, no principled understanding of public service could be rooted in a preference for service in the U.S. government.

If we accept the Robertsons’ interpretation of the language in the grant, such principled internal skepticism with respect to the value of specifically encouraging students into federal employment placed Princeton in what is arguably an untenable position in its role as steward of the Robertson grant. But closely allied to the Lewis objection are other fundamental issues implicated by the Robertson mission. Conditions imposed on the gift by the Robertsons—and Charles Robertson’s persistent efforts to measure the University’s performance against his strict view of the gift—bore serious implications not only for the extent of Princeton’s efforts to recruit appropriate students and place them upon graduation, but also for decisions made by Princeton in areas that fell well within the jealously guarded province of academic freedom—namely, curriculum and academic appointments. Princeton’s dilemma was not merely “the times, they

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51. *See id.*

52. Defendant’s Amended Answer, *supra* note 23, at 44–45.

53. *Id.* at 37.

54. Mem. re Fiduciary Duties, *supra* note 21, at 27 n.12 (quoting Memo from John Lewis, Dean, Woodrow Wilson School of Pub. & Int’l Affairs, to William Bowen, President, Princeton Univ. (Jun. 27, 1972)).

[were] a-changing"<sup>55</sup>—that is, that changes in the larger world were frustrating the University's efforts to realize the Robertson mission. Rather, the changing times surfaced a more fundamental dilemma that was set upon Princeton by the Robertsons' terms.

The requirement under the grant that Princeton "establish . . . a Graduate School, where [people] . . . may prepare themselves for careers in . . . those areas of the Federal Government that are concerned with international relations" would seemingly necessitate that Princeton establish and maintain a curriculum appropriate to that end. In light of these conditions, the multi-disciplinary curriculum in the MPA program was particularly controversial.<sup>56</sup> In 1993, former Federal Reserve Chairman Paul Volcker, then a visiting professor at Princeton, raised the ante with his "A Challenge Worthy of Princeton." Volcker criticized the curriculum of the Woodrow Wilson School as

something of an intellectual hodgepodge . . . without clear focus or professional mission . . . . The curriculum is diffuse, and little directed toward [careers in] the management of government as opposed to vague public policy. And even courses directed toward the latter, of which there are many, are usually compromises with the more traditional disciplines of economics, political science, demography, etc.<sup>57</sup>

Part and parcel of this multi-disciplinary curriculum was Princeton's decision to staff courses for the MPA degree (courses funded by the Robertson Foundation through student scholarships, faculty salaries, and other contributions) almost entirely with faculty jointly appointed to the traditional academic disciplinary departments of Princeton College. In short, Princeton never developed a core faculty dedicated to the particular purpose of educating a student body specifically intent upon careers in the federal service.

Others besides the Robertsons have remarked upon the significance for the MPA program of Princeton's reliance on jointly appointed faculty. Quite recently, in 2005, with the arrival of a new dean at the Woodrow Wilson School, Princeton commissioned an outside committee to review the MPA program. Chaired by Dr. Robert Putnam of the Harvard Center for International Affairs, the Putnam Committee took particular note of the jointly appointed faculty, observing that the "school is run mainly as an adjunct to other faculties, with their own sense of a particular discipline, professional rewards and status, and preoccupations."<sup>58</sup> Because traditional academic disciplines tend to be self-perpetuating, with faculty tenured in a department controlling what will be taught there, who will be hired to teach it, and ultimately who will be granted tenure, jointly appointed faculty are often necessarily concerned with the standards of their respective academic departments. In short, in a traditional academic culture, such as existed at Princeton, the practice of making joint appointments between a professional school

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55. Bob Dylan, *The Times They Are A-Changin'*, on *THE TIMES THEY ARE A-CHANGIN'* (Tom Wilson 1964).

56. Mem. re Fiduciary Duties, *supra* note 21, at 43–44.

57. *Id.* at 42 (quoting Volcker Memo at 2–4).

58. *Id.* at 43 (quoting Putnam Committee Report at 3).

and allied academic departments runs the risk of favoring the traditional departments. The Putnam Committee advised that “establishing a much stronger faculty commitment to the Woodrow Wilson School as an institution and to the School’s distinctive mission (as opposed to allegiance to particular disciplines or disciplinary departments) is the central challenge facing the new administration.”<sup>59</sup>

Princeton could point to reasons for its decisions here that were consonant with its role as steward of the Robertson grant, however, even if the grant was construed narrowly. First, multi-disciplinary programs (which often entail shared faculty appointments) have become common in universities and in recent years have even been at the heart of an educational innovation. Princeton and other major universities have seen the rapid growth of curricular offerings (e.g., American studies, women’s studies, African-American studies, international area studies, etc.) along with faculty appointments that cross traditional disciplinary lines.<sup>60</sup> There is nothing inherently suspect about a multi-disciplinary program. Second, as for the appropriateness of a multi-disciplinary curriculum to the Robertson-funded MPA program, professional programs in particular tend to be multi-disciplinary, culling material relevant to the particular professional practice from sundry academic disciplines. Programs so constructed are not necessarily lacking in rigor or focus.<sup>61</sup> Third, and most importantly, international affairs as a field of inquiry—involving the study of multiple countries and cultures—does not merely invite such a multi-disciplinary approach, but in recent decades requires it. Globalization has blurred the boundaries between international and domestic policy. Further, the state-centered approach of the Kennedy era, which privileged Western models and culture, has necessarily given way to a multi-cultural view. Multi-culturalism takes as given that phenomena may have different causative agents in different cultures. Only a multi-disciplinary course of study could aspire to prepare students for work in such a dynamic area.<sup>62</sup>

### C. The Temptation

Even if Princeton can point to reasons for its decisions that were consonant with its role as steward of the Robertson grant, the practice of jointly appointing Woodrow Wilson School faculty to academic departments has held significant financial advantages for the University. If a broader interpretation of

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59. *Id.*

60. Expert Report of Robert M. O’Neil, Defendants’ Expert on Academic Freedom, *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008).

61. *Id.*

62. Princeton has argued that its decisions to establish a multi-disciplinary curriculum in the MPA program at the Woodrow Wilson School and to staff it with jointly appointed faculty were an appropriate exercise of discretion consistent with its role as an institution of higher learning, charged under the terms of the gift with husbanding it. *See, e.g.*, Defendants’ Amended Answer, *supra* note 23, at 44. In developing the MPA program consistent with the Robertson mission, Princeton’s faculty and academic administrators may in a manner consistent with their judgment and training choose a curriculum that “takes a long-term approach [to a field of study or indeed to a course preparatory to a career], emphasizing fundamental analytic methods and intellectual breadth rather than narrowly targeted vocational skills.” *See id.*

the Robertson grant afforded Princeton the latitude to respond to the tenor of the times, this interpretation was also convenient in important ways. The Robertsons argued that, by jointly appointing faculty, Princeton could justify the utilization of Robertson Foundation funds to support the surrounding social science departments, paying some or all of the salaries with Robertson funds, as well as providing research grants and other support for those faculty members so appointed.<sup>63</sup>

The Robertson family alleged that Princeton diverted more than \$100 million from the Robertson Foundation into projects and programs that have had little or nothing to do with the mission of the Robertson Foundation.<sup>64</sup> For example, even joint appointments with the Woodrow Wilson School were not always necessary to garner Robertson Foundation support. The Robertsons alleged that Foundation money was used to pay stipends and tuitions for graduate students in non-Woodrow Wilson School academic departments like economics, politics, and sociology, with the goal of providing research doctoral students to support the research interests of faculty themselves jointly appointed.<sup>65</sup>

Even more to their point, so the Robertsons claimed, was the Program in Law and Public Affairs (LAPA)—a joint undertaking with the Woodrow Wilson School, the Politics Department and the Center for Human Values. LAPA is a research center devoted to the study of law and legal institutions that also received the bulk of its support from the Robertson Foundation. The Robertsons maintained that, while LAPA Fellows have taught undergraduate courses in the Woodrow Wilson School as well as seminars for all Princeton undergraduates (in departments such as Politics and English), only one LAPA Fellow taught in the Woodrow Wilson School graduate program and this person taught only one course.<sup>66</sup> Indeed, notwithstanding that resident Fellows were supported with Robertson Foundation funds, the Robertsons maintained that no effort was made to require them to contribute in any way—certainly in no direct way—to the advancement of the mission of the Robertson Foundation.<sup>67</sup>

According to the Robertsons, a similar pattern of Robertson funding without recompense to the mission could be seen with another research center receiving space and virtually all of its operating budget from the Robertson Foundation—the Center for the Study of Democratic Politics (CSDP). No CSDP Fellow has ever taught a graduate course at the Woodrow Wilson School, so the family asserted, or contributed to the Robertson Foundation mission in more specific ways.<sup>68</sup>

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63. According to the Robertsons' brief, approximately half of the Economics and Politics faculty and a third of the Sociology faculty have joint appointments to the Wilson School, and virtually the entire School faculty is appointed to one of these three departments. See Mem. re Fiduciary Duties, *supra* note 21, at 63.

64. William Robertson, *Many Americans Losing Faith in Higher Education*, DESERET MORNING NEWS, Jul. 10, 2004, at A7.

65. Mem. re Fiduciary Duties, *supra* note 21, at 86.

66. *Id.* at 96.

67. *Id.* at 95.

68. *Id.* at 98.

#### D. The Lawsuit

On July 17, 2002, the family-designated trustees of the Robertson Foundation filed suit against the Princeton-designated trustees in Superior Court of New Jersey, Chancery Division, Mercer County (Trenton). In the initial Complaint, the family-designated trustees charged the Princeton-designated trustees (and through them, Princeton) with, among other things,<sup>69</sup> having failed to adhere to the stipulated mission of the Robertson Foundation by ignoring the donors' intent and, further, by using Robertson Foundation funds for projects unrelated to the mission. The plaintiffs alleged that the Princeton-designated trustees (constituting a majority of the Robertson Board) were derelict in the exercise of their fiduciary duty because, by virtue of their competing obligation to Princeton University, they were compromised in their vigilance with respect to the Robertson Foundation mission. About a year later, on June 20, 2003, Princeton moved unsuccessfully to dismiss the suit. When Princeton sought leave to appeal this ruling on the motion to dismiss, they were denied by the appellate court.<sup>70</sup>

Among donors of restricted gifts, members of the Robertson family were uniquely situated to hold Princeton accountable in its application of Robertson funds. Or, perhaps it might more appropriately be said, as charities go, Princeton was with respect to Robertson funds unusually accountable as a recipient of a restricted gift. As we shall explore with more detail later,<sup>71</sup> enforcement of restricted gifts is notoriously lax and this is the case notwithstanding that the obligation inhering in such gifts obtains in perpetuity. Nearly all the modern American authorities—decisions, model acts, statutes, and commentaries—deny a donor standing to enforce a restricted gift to public charity, with the only exception under the common law inuring to the donor who has retained an express reversion.<sup>72</sup> Accordingly, under the common law the only party who is assured standing to enforce any condition attaching to a gift is the state attorney general. And state attorneys general have limited resources and are beset with a host of

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69. One of the many allegations in the Plaintiffs' pleadings is that the Princeton Trustees inappropriately removed the management of the Robertson Foundation endowment from the Foundation Investment Committee (and through this Committee delegated to several independent investment managers) to Princeton University Investment Committee (PRINCO), a wholly owned unit of Princeton University and the manager of the bulk of the Princeton endowment. See Complaint, *supra* note 23, ¶¶ 59–106. The Family Trustees objected but the University Trustees did not reappoint the Investment Committee. *Id.* Given the timing of this discussion, an argument could be made that this discussion was “the straw that broke the camel’s back” and was the precipitating event in the Robertson family’s decision to initiate a lawsuit. After the filing of the initial Complaint, on November 5, 2003, the Princeton-designated trustees—over the objections of the family-designated trustees—voted to place the Foundation endowment with PRINCO. Amended Complaint, *supra* note 43, ¶ 193.

70. *Robertson v. Princeton Univ.*, No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008) (order denying appeal).

71. See *infra* Part II.E.

72. See *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Co.*, 697 N.Y.S.2d 56, 59–60 (App. Div. 1999); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 445–49 (1960).

competing concerns aside from policing the application of charitable gifts. The Robertson family was not without legal recourse, however. The family-designated trustees had legal standing by virtue of their position on the Robertson Foundation Board to challenge the Princeton-designated co-trustees and by examining information obtained through discovery were able to raise questions about Princeton's handling of Robertson Foundation funds that set apart this litigation from others concerning restricted gifts.<sup>73</sup> Enough additional material came to light during discovery that the plaintiffs applied to the court to amend their original complaint. In October 2004, the court granted the plaintiffs' request to amend their initial complaint to include, among other things, allegations of fraud.

### *E. Scholars in the Nation's Service*

Interesting in light of the litigation over the Robertson Foundation mission was the fact that in February 2006, Princeton launched a new program, Scholars in the Nation's Service.<sup>74</sup> This highly selective program became operational in the spring of 2007, when the first group of five scholars was announced.<sup>75</sup>

Drawn from Princeton undergraduates, participants spend their final three semesters as undergraduates completing their majors while also taking selected courses in public policy.<sup>76</sup> During this time, participants in the program learn about career opportunities in the federal government and spend the summer between junior and senior years of college in a federal government internship.<sup>77</sup>

The Robertson Foundation has embraced this program by a unanimous vote of its Board and is providing the bulk of the financial support for it. Upon graduation, participants (then to be known as "Charles and Marie Robertson Government Service Scholars") work in federal government positions for two years.<sup>78</sup> They then return to the Woodrow Wilson School and enroll in the MPA program.<sup>79</sup> Participants are to be encouraged to pursue careers in areas of the federal government concerned with international relations and affairs.<sup>80</sup>

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73. Note, however, that New Jersey provides a limited exception to the common law rule in an old case. *Mill v. Davison*, 35 A. 1072 (N.J. 1896). Although *Mill* may be less of an exception than it first appears as the common law granted standing to founders—as opposed to subsequent donors. See Karst, *supra* note 72, at 476. Relying on *Mill*, Charles and Marie Robertson are likely to have been granted standing in New Jersey during their lives. As the senior Robertsons were both dead by the time the plaintiffs filed their lawsuit, this limited exception would not have carried over to their children or other heirs.

74. Woodrow Wilson School of Public and International Affairs, Scholars in the Nation's Service Initiative, <http://wws.princeton.edu/scholars/> (last visited Feb. 14, 2009) [hereinafter *Scholars*].

75. *Id.*

76. Woodrow Wilson School of Public and International Affairs, The Program, <http://wws.princeton.edu/scholars/program> (last visited Feb. 14, 2009).

77. *Id.*

78. *See id.*

79. *Id.*

80. *See id.*

Furthermore, in January 2007, the Woodrow Wilson School and the Robertson Foundation (again by a unanimous vote of the Board) decided to expand the program.<sup>81</sup> Five additional scholarships became available for U.S. citizens who had completed their undergraduate work, either at Princeton or at another institution of higher education and who applied to and were accepted into the MPA program at the Woodrow Wilson School.<sup>82</sup> These students have been denoted Charles and Marie Robertson Government Service Scholars and, before beginning their coursework at the Woodrow Wilson School, undertake two years of service in federal government positions.<sup>83</sup> At that point they undertake the MPA coursework. The first group of graduate scholars was selected in the spring of 2008.<sup>84</sup>

According to Princeton, the purpose of the program is to raise the prestige of government service among an entire generation of college students, especially the nation's top students at Princeton and elsewhere, and to encourage these students to pursue careers in the U.S. government, especially in international relations.<sup>85</sup> In the words of Anne-Marie Slaughter, Dean of the Woodrow Wilson School, "The Scholars in the Nation's Service Initiative is a direct response to the critical need in this country to attract greater numbers of talented students to careers in the federal government."<sup>86</sup> This is best accomplished, according to Princeton, by wedding the best possible education in public policy with opportunities to experience government service first-hand and to gain the skills and contacts necessary to success.<sup>87</sup>

#### *F. Settlement*

As is commonly the case in disputes between donors and charities regarding restricted purpose gifts, the lawsuit between Princeton and the Robertson family settled out of court. One month before the lawsuit between the Robertsons and Princeton was to go to trial, the case settled.<sup>88</sup> The final Judgment and Order of Dismissal was entered on December 12, 2008.<sup>89</sup> While the lawsuit has been closely watched by many charitable organizations holding restricted funds for now unpopular projects,<sup>90</sup> in the final analysis the case did not break new ground in developing guidelines for stewarding a restricted mission over time.

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81. *See id.*

82. *Id.*

83. *Id.*

84. *See* Scholars, *supra* note 74.

85. *See id.*

86. *Id.*

87. *Id.*

88. Agreement of Settlement, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008).

89. Final Judgment and Order of Dismissal, Robertson v. Princeton Univ., No. C-99-02 (N.J. Super. Ct. Ch. Div. dismissed Dec. 12, 2008).

90. Tamar Lewin, *Princeton Settles Money Battle over Gift*, N.Y. TIMES, Dec. 11, 2008, available at <http://www.nytimes.com/2008/12/11/education/11princeton.html?ref=todayspaper>.

Under the settlement the Robertson Foundation is to be dissolved and its funds transferred to Princeton to be held there as a separate endowment to be known as the "Robertson Fund."<sup>91</sup> This endowment is to be subject to the same restriction as the original grant to the Robertson Foundation, but going forward Princeton alone will have the discretion and authority to interpret the purpose of the Robertson Fund and to determine the appropriate means to implement its purposes.<sup>92</sup>

The Robertson family is to receive \$50 million out of the Robertson Fund to establish a new foundation—to be called the Robertson Foundation for Government. The mission of this new organization will be to prepare students for government service.<sup>93</sup> Princeton will also reimburse the Robertson family (and its other foundation, the Banbury Fund) for the substantial legal fees and expenses incurred in connection with the lawsuit.<sup>94</sup>

## II. RESTRICTED GIFTS AND ELEEMOSYNARY SELF-HELP

Donors play an extremely important role with respect to charitable mission, especially as they press their eleemosynary preferences on charities by means of restricted gifts. A donor in making a restricted gift has enormous freedom under the law to craft a charitable mission, either by creating a new organization and imposing the restriction on the organization itself in the charter or by giving a restricted gift to an existing organization.<sup>95</sup> Either way, donors are not just a source of material endowment for a charitable organization but they are a crucial source of mission as well. Admittedly, if the organization is an existing one, the donor's restriction must be consistent with the overall mission of the organization and the charity must be willing to accept the terms. But any

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91. Agreement of Settlement, *supra* note 88, at 5.

92. *See id.* at 5–6.

93. This \$50 million will be paid pursuant to a schedule with the first payment due in 2012 and subsequent payments to be made over the following eight years, subject to interest. *See id.* at 6–7.

94. Again, this amount will be paid over time, with the first \$20 million to be paid in 2009, another \$10 million in 2010, and the remaining \$10 million in 2011. *See id.* at 8–9.

95. Gifts to public charities occur against the background of the federal income tax law and its regulations, to which the regulation of charitable organizations has now largely fallen. At one time most states sought to regulate charities and strictly limited the purposes for which an organization could be formed but now the common law limitations are undemanding. A "charitable" purpose is any lawful purpose (that is, any purpose consistent with public policy) that promotes the general welfare. RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). If regulation of the nonprofit sphere has now largely devolved to the Internal Revenue Code, it also imposes few constraints upon donors. Section 501(c)(3) of the Internal Revenue Code requires only that organizations that would qualify as "public charities" be "organized and operated exclusively" for one or more of eight specified purposes: for "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competitions . . . or for the prevention of cruelty to children or animals . . . ." *See* I.R.C. § 501(c)(3) (2006). This list is not exhaustive, however. Indeed, "charitable" is a term that Congress has never defined and the Regulations contribute little more guidance. *See* Treas. Reg. §§ 1.501(c)(3)–1(d)(1)–(2) (as amended in 2008).



discussions between the donor and the charity occur against a legal framework largely consisting of broad principles. Of course, charitable mission can have a number of origins as purposes or programs can issue from sources other than individual donors.

Other organizations or entities—other public charities, for-profit corporations, and government agencies—can contribute funds and then tie the use of those funds to particular programs or projects. And professional staff within an existing organization can develop programs, sometimes going outside to induce donors to support these projects. Notwithstanding other sources of mission or purpose, however, gifts from individual donors are especially significant. In recent years, of the approximately \$240 billion contributed annually to charity, \$179.36 billion (almost 75%)—\$227 billion including bequests and foundations (almost 94%)—has come from individuals.<sup>96</sup>

Among contributions from individual donors, however, restricted gifts are particularly important. 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.<sup>97</sup> There are indications, however, that a large percentage of major gifts (that is, those over \$10 million) is restricted in some way.<sup>98</sup> Not only are restricted

96. AM. ASS'N OF FUNDRAISING COUNSEL, GIVING USA 2004, Chart 2003 by Source of Contribution, [http://www.aafc.org/about\\_aafc/bysourceof66.html](http://www.aafc.org/about_aafc/bysourceof66.html).

97. 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 OF GIVING TRENDS: UPDATE ON FUNDING PRIORITIES (2003); 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., American Association of Fundraising Counsel, Trust for Philanthropy Home Page, <http://www.aafc.org> (last visited Jan. 2, 2009); The Foundation Center Home Page, [http://fdncenter.org/fc\\_stats/index.html](http://fdncenter.org/fc_stats/index.html) (last visited Jan. 2, 2009); The Independent Sector Home Page, <http://www.independentsector.org> (last visited Jan. 2, 2009); The National Center for Charitable Statistics Home Page <http://nccs.urban.org> (last visited Jan. 2, 2009); The Urban Institute Home Page, <http://www.urban.org> (last visited Jan. 2, 2009).

98. The bi-weekly CHRONICLE OF PHILANTHROPY routinely reports on major gifts in its regular column, *Gifts and Grants*. See, e.g., *Gifts and Grants: \$40-Million Committed for Scholarships; Other Gifts*, CHRON. OF PHILANTHROPY, Feb. 3, 2005, at 10; *Gifts and Grants: \$50-Million Awarded to Hospital; Other Gifts*, CHRON. OF PHILANTHROPY, Apr. 28, 2005, at 13. A perusal of this column across 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, 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., *Articles: About Gifts and Grant-Making, Rensselaer Polytechnic Institute Has Received an Unrestricted \$40 Million Donation; Other Gifts to Nonprofit Organizations and Institutions*, CHRON. OF PHILANTHROPY, Sept. 30, 2004; *Articles: About Grant Makers and Giving, The University of Notre Dame Has Received an Unrestricted Gift of \$40 Million from an Alumnus; Other Recent Gifts to Nonprofit Organizations and Institutions*, CHRON. OF PHILANTHROPY, Feb. 17, 2005; *Articles: About Giving and Fund Raising, Community of Christ, A Religious Denomination with Headquarters in Missouri, Has Received an Unrestricted Donation of*

gifts important because of their size, but a restricted gift—especially if it is restricted as to mission—is much more than a source of funding; it represents a creative spark from outside the charitable organization, an inducement to the organization to reinterpret an existing mission or undertake a new one. The role of donors with respect to mission is important because there can be no doubt that the diversity of the charitable sector is in the final analysis owing to individual initiative.<sup>99</sup> As the Robertsons embraced the Kennedy era with their gift in support of the Woodrow Wilson School, individual donors provide an endless stream of new perspectives on changing societal aspirations and needs, each one with the potential of yielding a new charitable mission.<sup>100</sup>

### *A. In Perpetuity*

Most gifts to charity are unrestricted, especially smaller ones. An unrestricted gift is a contribution of money or property that the donor makes without attaching any condition to its subsequent use by the charity. The charity in receipt of an unrestricted gift is then at liberty to apply that gift toward its general operating expenses, to be used for any purpose consistent with its fundamental mission. In contrast, a restricted or special purpose gift is given with one or more conditions attached usually stated in the donative instrument. These conditions specify the purpose for which the donor requires the gift be applied. The gift can be a founder's gift creating a new charitable organization with its own mission (as set forth in its constitutive documents). Or, it can be a gift to an existing charitable organization to support an ongoing mission or project, or to fund a new mission compatible with the charity's overall purposes. In either instance, however, a restriction attached to a gift requires that the charity in receipt of the gift segregate the donated funds in its financial records and employ them only in ways consistent with the donor's specified purpose.<sup>101</sup>

Restricted gifts are attractive to charities for a number of reasons. Such gifts are appealing not only for reasons of their characteristic size, but the donor-designated purpose is useful as an external endorsement of or perhaps a new direction for some facet of the charity's work. Indeed, restricted gifts are especially attractive to the activist donor—that is, someone (like Charles and Marie Robertson) who seeks through the charitable arena to advance a deeply held personal belief or social agenda. Such individual donors are ready with an endless stream of new perspectives on changing societal aspirations and needs, each one

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*\$40 Million; Other Recent Gifts to Nonprofit Organizations and Institutions*, CHRON. OF PHILANTHROPY, Jan. 20, 2005.

99. John Gardner, *The Independent Sector*, in *AMERICA'S VOLUNTARY SPIRIT: A BOOK OF READINGS* 4–6 (Brian O'Connell ed., 1983).

100. 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).

101. We are interested here only in gifts that restrict mission. A donor may also make an "endowment gift," a restriction which 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.

with the potential to provide fresh insight into an organization's fundamental mission.<sup>102</sup>

For the charity, however, a restricted gift can quickly become a mixed blessing. Once the charity accepts a restricted gift, the charity becomes subject to a draconian law: not only must the charity use the gift solely to fund the stipulated mission or project, but a restriction, once accepted by a charity, obtains in perpetuity or until the subject funds are exhausted. While many interests in the law must terminate in some finite period of time, there is an exception under the common law for interests that are charitable. In the same way a charitable organization can go on forever, so restrictions placed on the use of donated funds last forever also.

That donor-imposed restrictions must obtain in perpetuity is not merely a rigid requirement, but like most rigid rules, it is also impractical. A restricted gift that at inception facilitates a timely project or program can, with the passage of time, function as a "dead hand" on the charity. Indeed, endowed programs and projects that are ground-breaking in one era can become quixotic at best in another.<sup>103</sup> A restriction imposed by a donor can operate as a perpetual constraint on the charity, even though the effectiveness of the charitable sector—and of any charity within it—depends in large part on the ability to respond to the changing needs of society. It stands to reason that a charity eager to respond to pressing problems with relevant programs would chafe under a requirement that it hold funds in abeyance for a restricted purpose once timely but now passé.

### ***B. The Robertson Restriction***

No party to *Robertson v. Princeton* denied that the Robertsons' 1961 gift to the Robertson Foundation for the benefit of the Woodrow Wilson School is governed by the restrictive language found in Robertson Foundation Certificate of Incorporation,<sup>104</sup> and that the effect of this language was to restrict the purposes for which the funds contributed by Charles and Marie Robertson might be applied. It is important to discern, however, that there are two distinct levels at which this restriction operated. First, the restriction operated as a constraint on the funds held by the Robertson Foundation and, accordingly, the Robertson Foundation trustees were by virtue of this restriction circumscribed in the purposes for which they might distribute funds from the Foundation. Absent a unanimous vote of the Robertson Foundation trustees to amend the restrictive language (as required under the Foundation Certificate),<sup>105</sup> funds could only be distributed to support certain

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102. Smith, *supra* note 100, at 347–55.

103. 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. See Michael M. Schmidt & Taylor T. Pollock, *Modern Tomb Raiders: Nonprofit Organizations' Impermissible Use of Restricted Funds*, COLO. LAW., Sept. 2002, at 57.

104. See Robertson Found., Certificate of Incorporation, *supra* note 38, at 1.

105. See *id.* at 4.

projects and endeavors that fell within the restrictive language (all of them, according to the language of the restriction, at Princeton University).

But there is a second way in which the language in the Robertson Foundation Certificate operated to bring the subject funds within the purview of the law of restricted gifts. In this instance, the language in the Certificate operated to constrain Princeton itself. Once the Robertson Foundation was established and conditions imposed on the application of funds, any Robertson Foundation funds subsequently distributed to Princeton would flow to Princeton subject to the restriction. That is to say, in receipt of such funds, Princeton could apply them only in ways consistent with the restriction (or some more limited purpose imposed by the Robertson Foundation trustees consistent with the restriction).

The Robertson family's lawsuit against Princeton implicated the restrictive language as it operated at both levels. As for the constraints imposed on the Robertson Foundation itself, the three family-designated trustees of the Robertson Foundation (as plaintiffs) claimed that the four Princeton-designated trustees (acting as a majority of the Board and exercising discretion to distribute funds to Princeton), failed to oversee Princeton's application of those funds and demand compliance with the donative restrictions inhering in transferred funds. By ignoring Princeton's disregard of the restricted character of funds received from the Robertson Foundation, the majority of the Robertson Foundation Board violated its own fiduciary duty (or so the plaintiffs' argument went).<sup>106</sup>

### C. *Cy Pres*

As Princeton's predicament ripened in the late 1960s and into the 1970s, there were few avenues of legal relief under the common law. In that era (and largely in ours as well, as we shall see), a charity that would like to free restricted funds for other projects and purposes or simply take an existing program in a new and more timely direction had recourse only to the classic common law avenue of legal relief. Princeton would have to approach a court of equity, asking it to modify the restriction inhering in the funds flowing from the Robertson Foundation under the doctrine of *cy pres comme possible*.<sup>107</sup> Even though *cy pres*

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106. See *supra* Parts I.B–C.

107. A Norman French phrase meaning “as near as possible.” BOGERT ET AL., *supra* note 13, § 431. There would be a second avenue of equitable relief applicable to restricted gifts—administrative deviation. Strictly speaking, administrative deviation would operate not to modify the purpose of the gift (the province of *cy pres*), but would enter only where at issue was compliance with a particular administrative or procedural term—for example, a restriction limiting the investment of an endowment to a particular type of security. RESTATEMENT (SECOND) OF TRUSTS § 381 (1959). With respect to the dispute between the Robertsons and Princeton, this doctrine has a sufficiently narrow application that was unlikely to avail the University of the type of relief it would have been seeking. Strictly speaking, in applying the doctrine of deviation, a court would not change the original charitable objective of the donor or divert the gift to a different purpose or project from that specified in the donative instrument. JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 111 (3d ed. 2006).

is recognized in nearly all American jurisdictions,<sup>108</sup> however, it was and is a narrow doctrine.<sup>109</sup> Courts grant *cy pres* relief only where the charity can demonstrate that the restriction adhering to the particular funds has become “impossible,” “impracticable,” or “illegal” to fulfill.<sup>110</sup> While we will return to restrictions deemed “illegal” later in this Article, at this juncture we will set aside “illegality” as a criterion of relief,<sup>111</sup> as it is applied almost entirely to defeat restrictions that are discriminatory with respect to race, gender, and sometimes religion. And while discriminatory grants may themselves represent a species of anachronism (in that certain types of discrimination were more accepted in earlier eras), this criterion of relief offers nothing with respect to the more vexing problem for charities—the problem that Princeton confronted with respect to the Robertson grant. Where the great majority of nondiscriminatory but otherwise restricted gifts are concerned, the need is for a standard by which to evaluate their continued social efficacy and, further, to attenuate the force of restrictive language where the mission is increasingly encumbered due to societal change.

For this type of relief, recourse under the *cy pres* doctrine can only be to one of the two other criteria there—“impossibility” or “impracticability.” As we shall see, however, these criteria also afford relief only under very limited circumstances. Relief on grounds of “impossibility” is typically granted only where subject funds remain, but the cause to which funds are to be applied has ceased to exist. That is to say, the criterion of “impossibility” applies where the social object of the grant has altogether ceased to exist, the efforts of the charity notwithstanding. The disease has been cured or the societal ill to be remedied has been eliminated.<sup>112</sup> If “impossibility” provides relief only on a narrow set of grounds, however, “impracticability,” as interpreted by the courts, is equally unyielding. According to the *Restatement (Second) of Trusts*, a purpose has become “impracticable” when it appears that “under the circumstances the . . . intention of the [donor].” The criterion of “impracticability” then effectively dissolves into “impossibility,” with courts unwilling to exploit the category otherwise.<sup>113</sup>

The implication is clear: under the *cy pres* doctrine, for relief to be granted, unless the mission is discriminatory with respect to race, gender, or religion, the mission must be shown to be impossible to achieve. The *cy pres*

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108. See AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 399.2 (4th ed. 1989).

109. *Id.* § 399 (stating presence of valid gift over makes *cy pres* inapplicable when charitable trust fails).

110. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959); see also Schmidt & Pollock, *supra* note 103, at 59. Various authorities have attended to expand these criteria, but to date these efforts have been to modest effect. We will turn to this effort. See *infra*, Part II.F.

111. We will return to the criterion of “illegality” later. See *infra* Part III.B.

112. See, e.g., *Jackson v. Phillips*, 96 Mass. 539 (1867) (*cy pres* relief granted after the Emancipation Proclamation when the testator had left funds to produce books, newspapers, and speeches to influence public sentiment to end slavery in the United States).

113. See RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. q (1959).

doctrine harbors no criterion by which to evaluate the continued social efficacy of a nondiscriminatory restricted gift short of a showing that its object has ceased to exist. 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 because a mission has become dated or even anachronistic in the ordinary sense of these words. Had Princeton sought relief from the Robertson restriction, the narrow grounds under the *cy pres* doctrine would have posed an insurmountable obstacle. Even if employment with the federal government was unpopular in the years immediately after the establishment of the Robertson Foundation, it is difficult to see how the mission specified under the Foundation Certificate of Incorporation could have been deemed impossible or impracticable.

Furthermore, there was a second legal hurdle for any charity seeking relief from a restriction. To obtain *cy pres* relief, Princeton would have had to demonstrate that the Robertsons, in establishing the Foundation, did not have a narrow, specific charitable goal, but rather that they had a broader purpose—a “general charitable intent.”<sup>114</sup> While there are now authorities that would substantially attenuate the force of this second requirement,<sup>115</sup> until quite recently Princeton would have had to show that Charles and Marie Robertson as donors had implicitly consented to the change Princeton wanted to make.<sup>116</sup> And if Princeton established that the purpose was impossible or impracticable (a challenge on these facts), but could not then get over the second hurdle (i.e., demonstrate the Robertsons’ aspirations in making the gift were in some sense larger than simply the project or purpose at hand), then rather than being able to direct the funds to “*cy pres*”—the nearest thing—the court could then only recognize the gift as having failed. The funds would then revert to Charles and Marie Robertson or to their survivors (or, if neither of them was then living, to their estates) and be forever lost to Princeton and the charitable sector.

Finally, even if a charity could meet its burden under the law, *cy pres* relief is by its very nature modest. Even if Princeton could have demonstrated that the purpose had been frustrated to the degree required under the law and, further, that the donor had a magnitude of charitable intent that transcended any narrower purpose supplied in the donative instrument,<sup>117</sup> equity would indeed permit the charity to substitute another charitable object, but only one that approached the donor’s original purpose as closely as possible—thus the name for the proceeding, *cy pres*.<sup>118</sup> In modifying the restriction, the court had to follow the donor’s original purpose as closely as possible, making the degree of change relatively small.<sup>119</sup> At the end of the day, the doctrine of *cy pres* is a saving device and what is saved is donor intent.

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114. See, e.g., SCOTT & FRATCHER, *supra* note 108, § 399.

115. See *infra* Part II.F.

116. See SCOTT & FRATCHER, *supra* note 108, § 399.

117. *Id.* (stating presence of valid gift over makes *cy pres* inapplicable when charitable trust fails).

118. BOGERT ET AL., *supra* note 13, § 431.

119. See RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a (1959).

#### *D. Restricted Gift Held as Charitable Trust*

The rule that restrictive purposes obtain in perpetuity with relief to be had only in equity (and there only under the narrow doctrine of *cy pres*<sup>120</sup>) comes into the law courtesy of the rather conservative and picayune law of trusts. Charities can be organized not only as trusts, but also as corporations. This is significant because, in most states, in the late 1960s and 1970s (as now) directors of charitable corporations could change the purposes of the organization where their charters permitted. Directors of a charitable corporation could be afforded such latitude because the entity holds those corporate assets outright. In contrast, trustees are almost never so empowered, because they hold property in trust.<sup>121</sup>

Whatever the apparent advantages of the corporate form, however, when a charitable corporation is in possession of a restricted gift (other than a founder's gift), the corporation is subject to the law of trusts, at least where the restricted funds are concerned.<sup>122</sup> This is particularly relevant on the Robertson facts because the Robertson Foundation is organized as a charitable corporation (and not as a trust). The question then occurs as to whether, once the Kennedy era had ended, the directors of the Robertson Foundation could have opted to change the purposes of the organization, so as to fund a graduate program at the Woodrow Wilson School more in line with then current attitudes and values. The answer with respect to the Foundation is yes, but no. As in the case of many other charitable corporations, the Certificate of Incorporation for the Robertson Foundation indeed permits the trustees to change the fundamental purposes of the organization and then subsequently apply the founder's gift from the Roberstons and its proceeds consistent with this new purpose. But under the Robertson Foundation Certificate, this could only be done by a unanimous vote,<sup>123</sup> a vote that would have required the consent of the three family-designated trustees—a highly unlikely occurrence.

#### *E. Lax Enforcement and Charitable Self-Help*

If charities are subject to a draconian rule requiring that donative restrictions be observed in perpetuity, this rule has been coupled—ironically—with enforcement that is at best sporadic. And it is here that relief of a sort has been available to the charity. The enforcement of charitable restrictions is typically lax because the only person who has been assured standing under the common law to

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120. *But see supra* Part II.C.

121. "Ordinarily the principles and rules applicable to charitable trusts are applicable to [gifts to] charitable corporations." SCOTT & FRATCHER, *supra* note 108, § 348.1. This Article thus makes frequent reference to the law of trusts, including both the *Restatement (Second) of Trusts* and *Scott on Trusts*. Princeton in fact argues that the Robertson Foundation, a Delaware nonprofit corporation, is appropriately governed by Delaware law in its dealings with Princeton and, further, that Delaware has never applied the law of charitable trusts to charitable corporations where restricted gifts are concerned. For this reason, Princeton argues, Princeton should not be held to the common law rules with respect to the gifts received from the Foundation. This Article takes no position with respect to Delaware law per se or to Princeton's claim with respect to the applicability of Delaware law to the Robertsons's claims.

122. *See generally* SCOTT & FRATCHER, *supra* note 108.

123. *See* Robertson Found., Certificate of Incorporation, *supra* note 38.

hold trustees and directors to account is a state official, the attorney general. And as many commentators in the last twenty years have noted,<sup>124</sup> as a monitor of charitable restrictions, the attorney general is for many reasons woefully inadequate.

Where restricted gifts are concerned, it is the role of the attorney general to enforce the donor's required purposes.<sup>125</sup> The attorney general occupies the position of enforcer preeminent because the beneficial interest in a charitable organization is deemed to reside not in individual beneficiaries but in the community (an indefinite class).<sup>126</sup> Charitable property is by definition devoted to the accomplishment of purposes that are ultimately beneficial to the community at large.<sup>127</sup>

Despite the noble policies that lay behind making the attorney general the enforcer of gifts to public charity, it has long been the case that attorney general supervision of this sector is more theoretical than real. The office of the attorney general, the claim is made, is usually understaffed and short of funds, with many competing priorities in addition to the supervision of charities and charitable restrictions.<sup>128</sup> Furthermore, notwithstanding the enormous number of charitable organizations throughout the United States and the untold<sup>129</sup> numbers of restricted

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124. See, e.g., Chester, *supra* note 19, at 454.

125. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959). This point was underscored recently in *Carl J. Herzog Foundation v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997). See also *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 439-42 (N.Y. App. Div. 2001) (Friedman, J., dissenting); Attorney General's Memorandum of Law in Support of Motion to Dismiss at 4, *Smithers v. St. Luke's-Roosevelt Hosp. Center*, 723 N.Y.S.2d 426 (App. Div. 2001). 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). E.g., Illinois Charitable Trust Act, ILL. COMP. STAT. 55/12 (2004); see also N.Y. EST. POWERS & TRUSTS LAW § 8-1.4 (McKinney 2002); BOGERT ET AL., *supra* note 13, § 415 ("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.").

126. Bear in mind, however, that if the beneficiaries having an interest in the trust are ascertained (that is, if the gift is to benefit an entity named in the grant or another ascertainable group), these beneficiaries will have standing in all matters involving the construction of a charitable trust. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).

127. The state's interest in public charities and its right to enforce gifts to them has its historical roots in 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 and its agent there was the attorney general who had an exclusive duty to enforce charitable gifts. SCOTT & FRATCHER, *supra* note 108, § 391; see Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 408 (1992). 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. Blasko et al., *supra* note 14, at 40-41; see also RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

128. Blasko et al., *supra* note 14, at 48.

129. Since there are no reporting requirements, no records are available.



gifts with respect to which these organizations have assumed a fiduciary responsibility, only thirteen states have departments within the office of the attorney general specifically devoted to charities.<sup>130</sup> Lack of money, coupled with the obligation to discharge other important duties invites—indeed necessitates—selective prosecution.<sup>131</sup>

Moreover, the attorney general in the role of monitor of charities can also be beset with conflicts of interest. If attorneys general are often elected officials, they are always political ones, frequently harboring significant personal political aspirations beyond their present positions. Thus, supervision, when forthcoming from the attorney general, can be skewed by the self-interest of an ambitious official.<sup>132</sup> The construction of the language governing large charitable gifts can involve 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.

Recently, there have been calls to supplement attorney general supervision with expanded individual standing. This Article will return to this point in the Conclusion. Here, it is important only to recognize that traditionally the law has been chary in according standing to private parties.<sup>133</sup> 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—all potentially have reasons to monitor a 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.<sup>134</sup>

Be that as it may, other than the attorney general, only persons with a legally cognizable interest in the outcome of any litigation are assured standing to enforce a restricted gift. Indeed, even donors have historically been denied standing. This limitation on standing can be dated at least to 1819, with Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, where the rights of donors were at issue.<sup>135</sup> The Chief Justice articulated the classic

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130. See Blasko et al., *supra* note 14, at 48.

131. EDITH FISCH, CHARITIES AND CHARITABLE FOUNDATIONS § 723 (1974).

132. Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 692–93 (1998).

133. To expand standing in a more traditional and conservative way, some suggest expanded use of the relator action. See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 673–74 (1985). Largely a statutory creation, a relator may not have an interest (legally cognizable or otherwise “special”) in a transaction, but is permitted to institute a proceeding even though the 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—becoming in effect a “private attorney general.” Blasko et al., *supra* note 14, at 49–50. Relator status has been granted to bar associations and to members of a social club. See *Hooker v. Edes Home*, 579 A.2d 608, 609 (D.C. 1990); Atkinson, *supra* note 132, at 685.

134. Atkinson, *supra* note 132, at 659.

135. 17 U.S. 518, 566–69 (1819).

common law position that, absent retention of an express reversion, donors have no standing to hold charities to account.<sup>136</sup> Further, Marshall's broad language justifying their exclusion—the need to protect charities from vexatious and harassing litigation (with the accompanying drain on charitable resources)—continues to resonate through the law as a caution to courts and legislatures, serving to frustrate all manner of private parties in the pursuit of standing vis-à-vis a charity.<sup>137</sup>

But sporadic enforcement is highly consequential in the presence of a draconian rule. The requirement under the common law that a restriction obtain in perpetuity makes it likely that within some period of time a restricted grant will feel like a shackle on the larger eleemosynary impetus of a charitable organization. Whatever the vitality that donors of restricted gifts may lend to the charitable sector with their ideas for new missions and new interpretations of old ones, over time restricted gifts have a significant effect on a charity's ability to respond to change. The law of restricted gifts notwithstanding, charities can only be loathe to stand by and watch as endowed programs once cutting edge become anachronistic, while other needs arise only to go unmet. As the law currently stands, if a charity believes a restriction has become an encumbrance on its mission broadly conceived, the charity can seek equitable relief, the narrow *cy pres* doctrine notwithstanding, or ignore the restriction, hoping the attorney general will decline to press the issue.

The increasing numbers of disputes chronicled in the press and, when the parties do not settle their differences otherwise, in law reporters suggest that disputes between donors of restricted grants and their recipient charities are increasingly common.<sup>138</sup> Perhaps this is attributable to the advent of the activist

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136. See *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Co.*, 697 N.Y.S.2d 56, 59–60 (App. Div. 1999); Karst, *supra* note 72, at 445–49.

137. For example, the New York Court of Appeals in *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 756 (N.Y. App. Div. 1985), 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.” See also BOGERT ET AL., *supra* note 13, § 411; Atkinson, *supra* note 132, at 659.

138. The numbers of donors of restricted gifts suing recipient charities grows with each year. See *Glenn v. Univ. of S. Cal.*, No. BC 236256, 2002 WL 31022068 (Cal. Ct. App. 2d Sept. 10, 2002) (settled out of court in 2002, where the donor claimed that his donation, which was to be spent funding a professorship of cellular and molecular gerontology, was not used as required by the terms of the grant and, further, that the recipient organization had concealed how the funds actually were spent); *L.B. Research & Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Ct. App. 2005) (settled out of court after a donor of a \$1 million gift to endow a chair of cardiothoracic surgery was granted standing to sue the recipient organization for failing to employ a professor whose training and research activities met the terms of the grant); *Dodge v. Trs. Randolph-Macon Woman's Coll.*, 661 S.E.2d 801 (Va. 2008); Frank Green, *Virginia High Court to Hear Randolph Cases: Appeals Challenge Move to Coeducation at Former R-MWC*, RICHMOND TIMES-DISPATCH, Oct. 2, 2007, at B6. See also *Howard v. Tulane Educ. Fund*, 970 So. 2d 21 (La. Ct. App. 2007). In *Howard*, the family of Josephine Louise Newcomb brought a

donor, who is inclined to stick around and monitor the application of her restricted contribution, or perhaps charities have indeed grown more cavalier where restrictive language is concerned. It is difficult to garner more than an impression here because the outcomes of these disputes often turn on the determination of donor-standing, with the charity left in the cat-bird seat when the donor loses<sup>139</sup> and an out-of-court settlement likely to follow when the donor wins.<sup>140</sup> Both law reporters and newspapers seem to indicate, however, that where endowed projects have in the charity's view ceased to be timely (or perhaps even convenient) but the criteria for *cy pres* relief cannot be met, charities are taking matters into their own hands.<sup>141</sup>

### F. Attempts at Reform

This apparent shortfall between what the law of restricted gifts would require of a charity and how charities commonly treat such gifts over time has been variously acknowledged in the literature of charitable organizations. For example, in the dispassionate language of law and economics it has been termed an "agency problem."<sup>142</sup> In fact, many decades ago Henry Hansmann in his groundbreaking article on the nonprofit organization recognized that a charity was especially susceptible to a disconnect between the donor's expressed purposes and the charitable trustee's performance.<sup>143</sup> Hansmann used this shortfall to explain and indeed justify a heightened standard of fiduciary duty applicable to charitable

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lawsuit in Louisiana against Tulane University challenging trustees' decision to dissolve Newcomb College, endowed by the family more than a century earlier as a coordinate women's college, and pour the Newcomb endowment into the unrestricted University endowment. *See also* Anne Yastremski, *College Switch a Con on Donors?*, WASH. TIMES (D.C.), Sept. 13, 2007, at A17.

139. *See L.B. Research.*, 29 Cal. Rptr. 3d 710; *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 999–1002 (Conn. 1997) (following the *Restatement (Second) of Trusts* section 391 (1959) and Marshall in *Dartmouth College*, the court denied standing to the donor organization which had not retained an express reversion to enforce the terms of a restricted gift made for the purpose of providing scholarships to nursing students, even though such funds were used for the recipient organization's general purposes). *See also* Paula Kilcoyne, *Charitable Trusts—Donor Standing Under the Uniform Management of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 W. NEW ENG. L. REV. 131 (1999).

140. *See Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 431–32 (App. Div. 2001) (settled out of court after donor's widow and special administratrix was granted standing to enforce husband's gift to establish and maintain an alcoholism treatment center); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093 (2005).

141. *See, e.g., Susan Kinzie, Exacting Donors Reshape College Giving*, WASH. POST, Sept. 4, 2007, at A1.

142. *See* 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).

143. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 873–75 (1980).

trustees (in contrast to corporate directors).<sup>144</sup> As we have seen, however, absent enforcement, such requirements operate effectively as moral injunctions, if they operate at all.

Other legal scholars have suggested ways to close the gap between the requirements of the law and fiduciary performance. Some propose that the law simply come clean and demote the legal duty of obedience—the requirement that the charity adhere to the donor’s restrictive language—to precatory status.<sup>145</sup> Then, when time weighs heavily on a particular grant, the charity could respond to circumstances as the organization saw fit, without violating the law. Of course, if the duty incumbent upon charitable fiduciaries is transformed from a legal prescription to a purely moral one, the charity would also be at liberty to ignore that donor’s language altogether, albeit at the risk of alienating this donor as well as others.<sup>146</sup> Thus, while this tack would eliminate the shortfall, it risks sacrificing much that donors contribute to the sector, especially by means of restricted gifts.

Others have sought to close the gap by attacking the problem from the opposite end—by enhancing enforcement, granting standing to donors (even absent the common law requirement of an express reversion) and to others under the “special interest doctrine.” Where donors are concerned, there is no doubt that of late both courts and academic commentators are more open to their cause.<sup>147</sup> And where standing for other parties is concerned, both commentators and some state courts have responded to the apparent inadequacy of state supervision by relaxing requirements on a case-by-case basis to grant them standing.<sup>148</sup> Nevertheless, a question remains as to the requisite “interest” a non-donor plaintiff must have in the charity in order to force the organization into court.<sup>149</sup> 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

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144. This shortfall is also the reason that Hansmann would require the nondistribution constraint (the essential attribute of any charitable organization). *See infra*, Part III.A.

145. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 225–26 (2004).

146. *See Atkinson, supra* note 15, at 1128–30.

147. Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1191 (2007); Goodwin, *supra* note 140, at 1119.

148. *See, e.g., Smithers v. St. Luke’s-Roosevelt Hosp. Ctr.* 723 N.Y.S.2d 426 (App. Div. 2001); *see also Goodwin, supra* note 140, at 1141.

149. *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990), is thought to be the exemplary case for “specially interested” beneficiaries. Blasko et al., *supra* note 14, at 71. 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. In this way, Princeton, the sole beneficiary under Article 3, would have standing to enforce Article 3 against the Robertson Foundation. *See id.* at 52.

vexatious.”<sup>150</sup> To date, however, no comprehensive or coherent “special interest doctrine” has emerged.<sup>151</sup>

Undoubtedly, attention to the question of standing is essential to any comprehensive *cy pres* reform. To enlarge the category of those with standing without also addressing the stringent and impractical substantive law, however, may well result in charities’ declining to accept restricted gifts. If charities refuse donations subject to restriction, donors will play a much smaller role in the charitable sector. The attorney general’s neglect is what affords the charity a degree of autonomy with respect to the interpretation of restrictive language in the face of change. To enlarge standing without addressing the substantive law will foreclose the latter avenue and only leave the charity hamstrung as time moves forward. Charities will foresee this predicament and resist being placed in this position.

Efforts have been made to go to the heart of the matter and redress the draconian nature of the law. Recently, the grounds for *cy pres* relief have seen a modest expansion under both the *Uniform Trust Code*<sup>152</sup> and the *Restatement (Third) of Trusts*,<sup>153</sup> with the addition of a fourth criterion, “wasteful,” to the historic triad of grounds, “impossibility,” “impracticality,” and “illegality.” With respect to a restrictive grant, “waste” allows for an assessment of the adequacy of the funding relative to the mission and, where such funding far exceeds the requirements of the specified mission, permit the overage to be applied “*cy pres*”—that is, to closely allied projects and programs.

This addition of “wasteful” reflects a deliberate effort to expand the range of circumstances under which the court might properly modify a restrictive grant. Such attempts to expand the grounds of relief are welcome, but the criterion of “waste” nicely avoids, rather than confronts, the nub of the problem. While as a basis for relief “waste” permits a court to assess the funding relative to a mission, the new criterion does not require or even allow a court to consider the continued social efficacy of the mission itself.<sup>154</sup>

The other significant effort to make *cy pres* relief easier for charitable organizations to obtain involves effectively eliminating the second element of proof under the *cy pres* doctrine—the need to prove that the donor had a “general charitable intent” in making the gift at issue. Again, both the *Uniform Trust Code* and the *Restatement (Third) of Trusts* have moved either to lower or eliminate this legal hurdle for the charity by creating a legal presumption of general charitable

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150. Blasko et al., *supra* note 14, at 61–62 (1993); see also RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959). A trustee or director or other person having sufficient special interest may also qualify to enforce a charitable trust. See *Holt v. Coll. of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 934 (Cal. 1964).

151. See Blasko et al., *supra* note 14, at 60 n.194; RESTATEMENT (SECOND) OF TRUSTS § 200 cmts. a–e. The donor may not maintain a suit unless he retained an interest in the trust property. *Id.* § 200 cmt. b. An incidental beneficiary cannot maintain suit either. *Id.* § 200 cmt. c.

152. § 413(a) (2005).

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

154. See sources cited *supra* note 16.

intent with respect to any restricted gift, thereby shifting the burden to the party opposing the application of *cy pres* to show that the donor's intent was entirely limited to the purpose stated in the grant.<sup>155</sup>

These attempts at reform notwithstanding, the age-old *cy pres* doctrine remains largely intact, still offering no relief to charities with endowed projects and programs burdened by time and changed circumstances (except where the mission is determined impossible to achieve whatever the efforts of the charity). And with no legal relief and in the face of substantial opportunity costs, charities are still tempted to self-help, to ignore restrictive language and hope the attorney general will turn a blind eye. To come to terms with the *cy pres* doctrine and the problem of timeliness where restricted gifts are concerned, we must turn to the normative foundations of the charitable sector and the donor's role in the development of charitable mission.

### III. CHARITABLE MISSION IN THE LIBERAL STATE

Despite myriad calls for reform over several decades,<sup>156</sup> no one attempting to embellish the criteria of impossibility or impracticality—not in the case law, not in the Restatement, not in the academic literature—has successfully addressed the issue at the heart of the problem of restricted gifts. That is to say, no one has devised a legal standard to govern the loosening of restrictive language upon the passage of time and the attendant accretion of obstacles to the realization of a mission. Over the last decades, however, some discussions about *cy pres* reform—and in particular ways to enlarge upon the standards of impossibility and impracticality—sought to draw upon the concepts of “efficiency” and, more fundamentally, the “public good.” Such discussions are provocative in that they go to the essence of the problem, even if they also provide evidence of the elusive nature of the quarry. Attempts to ground *cy pres* relief in the concepts of efficiency and public good have not proven successful, one commentator has offered, because now, unlike in earlier eras, there is simply no consensus as to the meaning of either term, at least not as they might apply to the charitable sector. In the 1930s—in the era of the New Deal—there was a consensus about the meaning of

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155. For many years general charitable intent has constituted a rather fungible component of the *cy pres* doctrine. While the distinction between specific charitable intent and general charitable intent seems simple enough, in practice differentiating between the two could be a challenge. See SCOTT & FRATCHER, *supra* note 108, § 399 (distinguishing between general charitable intent and specific intent complex process). Often at the center of *cy pres* litigation, general charitable intent was a weak standard. See FISCH, *supra* note 131, § 575. This has proven fortunate for the charitable sector, as it invited a fact-intensive inquiry and opened the door to a certain interpretive license on the part of courts as they exercised a certain sleight of hand in order to save funds for a charity. See RESTATEMENT (SECOND) OF TRUSTS § 399, cmt. d (1959) (listing factors a court may consider in determining donor's probable wishes in event trust impracticable); Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

156. See, e.g., sources cited *supra* note 15.

public good or at least a belief that, for purposes of any given situation, the public good was discoverable by social scientists.<sup>157</sup>

But a definition of “efficiency” or “public good” eludes legislatures and courts for reasons that go well beyond the zeitgeist. Since Hansmann’s 1980 article, it has become canonical that the fundamental reason for the distinction between nonprofit and for-profit enterprise is rooted in inherent limitations in the market mechanism. Economics teaches us that, when certain conditions are satisfied, profit-seeking firms will produce goods and services in a quantity and at a price that together make for social efficiency.<sup>158</sup> Nonprofit organizations appear where the conditions necessary for market efficiency are not present. Efficiency then is an inapt criterion by which to attempt to evaluate or discipline the preferences in play in the charitable sector, except perhaps at the margins.

The question is whether the concept of the public good can accomplish what the concept of efficiency could not—that is, produce a legal standard to govern the loosening of restrictive language in the face of societal change. An attempt to draw upon the concept of the public good would appear to set the stage for a more productive inquiry where charitable mission is concerned, especially given that almost any charitable mission or purpose aims to foster some putative public good. Indeed, restricted gifts would seem to submit readily to a standard based upon some concept of the public good, as they generally seek to advance some privately envisioned priority for the commonweal—research into one disease before others, opera rendered in traditional instead of contemporary production, adult literacy before early childhood education, protection of one endangered species before another, or indeed careers in the U.S. government instead of myriad other forms of public service. As we shall see, however, even if charitable purposes and programs aim to foster the public good, any attempt to draw upon the concept of the public good to develop a criterion by which courts and legislatures might evaluate charitable mission is in its own way profoundly problematic.

### *A. The Right and the Good*

To shed light on the disappointment and frustration attendant upon efforts to plumb the concept of the public good in pursuit of a criterion by which to evaluate charitable mission short of a finding of impossibility, we would do well to explore the distinction between the concepts of the “right” and the “good,”<sup>159</sup> a distinction long taken to be fundamental to liberal political thought, and in particular the way that John Rawls has used these two concepts to locate within liberal democracy certain claims about the public good. Rawls’s approach to the right and the good yields rich insights into the challenges faced by courts and legislatures as they attempt to arrive at an evaluative criterion applicable to charitable mission, especially if we assume these courts and legislatures are operating out of a tradition of political liberalism.

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157. Atkinson, *supra* note 15, at 1137–38. For an example of someone with more confidence in arriving at a conception of the public good, see Arthur Allen Leff, *Economic Analysis of the Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 460 (1974).

158. Hansmann, *supra* note 143, at 848–49.

159. See generally ROSS, *supra* note 17.

Rawls begins with the idea that, in a liberal polity, the concept of the “right” is fundamental. The “right” is embodied by the regime of rights, this regime being the foundation of the system of justice. But further, the role of government here is to promulgate and guarantee the “right”—or this framework of rights. The framework of rights is fundamental in a liberal polity because it empowers individuals as free and independent persons (or right-bearers) to arrive at the ends or purposes of life (such as they see them). In contrast to the “right” which is promulgated and guaranteed by the government, the “good” emanates from such individuals and is embodied by those ends or purposes of life which each individual as a free and independent person embraces as she prioritizes her preferences. Any one of these individually chosen purposes or preferences is an instance of the “good.”<sup>160</sup>

But Rawls continues: once government has empowered individuals through the regime of rights to arrive at and live out their own conceptions of the good, government in its role as promulgator and defender of the right must take a neutral posture vis-à-vis those conceptions of the good chosen by individuals. In short, in a liberal polity, principle dictates that courts and legislatures preserve and defend the right, but assume a posture of neutrality with respect to the good.<sup>161</sup>

This neutrality will obtain even where an idea of the good is widely embraced. While ideas about the good can be private, even idiosyncratic beliefs, by the same token, certain ideas of the good can also enjoy a broad acceptance. For Rawls, however, even where there is a broad-based consensus as to the purposes of life or as to a hierarchy of preferences, this popularly embraced view of the good cannot supplant the right in political life or govern its content, nor can this broad-based consensus be privileged relative to other conceptions of the good.<sup>162</sup> There is

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160. From a principled perspective, the political system must be neutral with respect to conceptions of the good because each individual is a “self-authenticating source[ ] of valid claims.” JOHN RAWLS, *POLITICAL LIBERALISM* 32 (1996).

161. This neutrality has a practical dimension, a point Rawls concedes in his later writings where he also recognizes a distinction between political and comprehensive liberalism, operative at least in modern society where people typically disagree about the good. Views of the good in modern society are thus potentially myriad, with at least some of these at any given time being incompatible with the others. Therefore, when it comes to establishing a government in the face of myriad conceptions of the good, the only possible stable government is one that is neutral as to these competing conceptions. See John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 14, 223 (Summer 1985); see also MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 189 (2d ed. 1998).

162. This subordination of the good to the right also applies to values or purposes that might be characterized as “perfectionist,” or claims about the good (whether or not broadly embraced) that speak to the “higher pursuits that arguably make for the improvement of the individual and the species.” RAWLS, *supra* note 160, at 32. Such claims would obviously include efforts to foster the arts and other areas of high culture, but can also speak to lifestyle choices such as sexual orientation. In comparison to other claims about the good, what is distinctive about perfectionist claims is their moral ambition and aspiration to a universal normative force (whatever their consensual basis). If perfectionist claims are accorded the degree of moral resonance that they profess, to the extent that such claims are not mere counsels to the individual regarding private internal sanctity but address



no consensus that would constitute a “public good” such that it could create rights or inform their interpretation, nor would this consensus appropriately inform a standard by which government could discriminate among other, competing conceptions of the good.<sup>163</sup>

There is one exception to the foregoing: for Rawls, there is only one claim as to the good that can serve as a public good in the liberal polity. There is one instance of “congruence” between the right and the good and that is the priority of the right (recognized as integral to the good life) with all that this entails for the system of justice. One good rises to the level of a public good, and that good is the priority of the right neutral as to all other species of the good.<sup>164</sup> Only with respect to this principal—the priority of the right neutral as to the good—is the government in a liberal polity not neutral.

This is not to suggest that, for Rawls, judgments of value (those other than the priority of the right) do not have an important place in human affairs.<sup>165</sup> It is just that in a liberal polity, the proper venue for claims as to the good is not government,<sup>166</sup> but the realm of voluntary association—or civil society.<sup>167</sup> It is in voluntary associations—a realm that would include charitable organizations—that endeavors motored by ideas of the good belong.<sup>168</sup> In all events, however, what is paramount in the liberal polity is that those making claims as to the good not attempt to use the government to impose such claims on others, something that would occur only if claimants failed to recognize the subordinate status of the good.<sup>169</sup>

At this point in the inquiry into the right and the good we begin to discern the deep, normative reasons for which an evaluative criterion applicable to restricted gifts has eluded commentators, judges, and legislatures. Rawls’s inquiry into the concepts of the right and the good sets the stage to locate charitable

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(directly or indirectly) relations between people, these claims would then acquire a preemptory status in any ethically based political order, even informing the framework of rights where implicated. Nevertheless, all claims about the good emanating as they do from individuals have for purposes of a liberal polity equal moral force, whether perfectionist or otherwise. *Id.* This is another implication of the neutrality of the right with respect to competing conceptions of the good as well as an implication of the subordination of the good. RAWLS, *supra* note 18, at 291.

163. This is the distinction that Rawls allows in his later writings between political and comprehensive liberalism, which is a practical response to circumstances of modern democratic society where people typically disagree about the good. People’s moral and religious convictions are unlikely to converge. *See* RAWLS, *supra* note 160, at 223; *see also* SANDEL, *supra* note 161, at 189.

164. RAWLS, *supra* note 18, at 496–505.

165. *Id.* at 288.

166. *Id.* at 289. “They do not use the coercive apparatus of the state to win for themselves a greater liberty or larger distributive share on the grounds that their activities are of more intrinsic value.” *Id.*

167. *Id.* “While justice as fairness allows that in a well-ordered society the values of excellence are recognized, the human perfections are to be pursued within the limits of the principle of free association.” *Id.*

168. RAWLS, *supra* note 160, at 215; SANDEL, *supra* note 161, at 211.

169. RAWLS, *supra* note 18, at 289; RAWLS, *supra* note 160, at 215.

mission in this normative taxonomy as an expression of the good. But this understanding of charitable mission as appropriately placed within the category of the good receives further validation, when Rawls looks to the realm of voluntary association as the appropriate venue for claims as to the good. Indeed Rawls's point seems especially salient in situations where, as with the Robertson gift, mission emanates from a private individual and so clearly represents a privately envisioned priority for the commonweal. Finally, as Rawls elaborates upon the role of government relative to the right and the good, we begin to expect that those preferences in play in the charitable arena are likely as a matter of principle to be accorded a certain deference by courts and legislatures (except, that is, where such preferences implicate the right, a subject to which we will turn momentarily).

Where restricted gifts are concerned, there is no objective criterion of public good (consistent with liberal norms) by which courts and legislatures appropriately distinguish the timely from the anachronistic. In any era, one person's well-considered passion is another's tilting at windmills. The same applies to any endowed project or program over time. It is virtually impossible to provide a principled distinction between the opportune and the quixotic on liberal grounds, short of a showing that the mission is simply impossible to achieve.

Thus, there are not merely historical reasons that a concept of the public good continues to elude us as we attempt to reform the *cy pres* doctrine. Our frustrations cannot simply be attributed (as some have been wont to do)<sup>170</sup> to the tenor of the times. A concept of the public good by which to evaluate the social efficacy of a restricted gift will always elude the liberal state, understood as the province of the right neutral as to the good. At this point, it should come as no surprise that in a liberal state courts and legislatures principled in their neutrality with respect to any and all conceptions of the good should find it difficult to develop a legal standard to evaluate the continued efficacy of a charitable mission.

So long as the framework of rights is not implicated, the system of justice has little to offer in assessing the social efficacy of restricted gifts, short of a finding of impossibility. Not only is the standard impossible (as an analytic matter) to construct out of the concept of the right (as the right does not encompass particular ends of life or hierarchies of preferences), but there are also principled reasons for courts and legislatures to resist. Even in an age where there was a consensus as to the good, from a liberal perspective there would be good reason not to use this consensus as a criterion to assess charitable mission.

### ***B. The Right and the Good Applied***

If there is any lingering doubt that the jurisprudence surrounding the categories of the right and the good has explanatory force with respect to the challenges of *cy pres* reform, we can lay the matter to rest by examining a few cases where the third criteria of relief—"illegality"—is employed. Where a mission is discriminatory on grounds of race, gender, or perhaps religion, the law is willing to grant relief short of a showing that the restrictive grant is simply impossible to achieve. What these cases demonstrate is that we have not merely

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170. See *supra* pp. 111–12

grafted the jurisprudence surrounding the right and the good onto the law of charitable mission, but that these categories have long informed the law of charitable mission. With respect to purposes that are putatively discriminatory, courts are far readier with relief, because what is juxtaposed to the offending mission is not a competing conception of the good, but the framework of rights.<sup>171</sup> A brief review of three cases will illustrate the point.

*Evans v. Newton*<sup>172</sup> is arguably the foundational case for the application of the Fourteenth Amendment to charitable grants and, as such, it provides a powerful example of the way the priority of the right enters into the law as an evaluative criterion vis-à-vis certain charitable purposes.<sup>173</sup> In *Evans*, property was conveyed to the city of Macon, Georgia, to be administered as a park for whites only. The Supreme Court held that, where state or municipal officials are involved in the administration of a racially discriminatory grant, this “state action” is effective to subject the charitable mission to the Fourteenth Amendment and render it illegal (thereby opening the door to *cy pres* relief).

The *Evans* Court had constitutional reasons for invoking the criterion of state action, as state action is necessary under the Fourteenth Amendment to bring the law to bear on what would otherwise be merely an expression of private preference. The presence of state action in this case also makes it easily subsumed under the rubric of the priority of the right. While ordinarily there are principled reasons that the liberal state must be neutral with respect to competing conceptions of the good, here the Court effectively recognized that this is not so where the restricted grant would compromise the government as the neutral purveyor of the right with respect to all individuals.<sup>174</sup>

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171. A competing conception of the good is not implicated unless, of course, that good is understood as the good that affirms the priority of justice—or the right. If the right is not implicated, then we are in the realm of the good—that is, simply that of competing preferences which submit to no evaluative criterion.

172. 382 U.S. 296 (1966).

173. See also the similar *Girard College* cases that involved a trust established in 1831 to support a school for “poor male white orphan children,” naming the city of Philadelphia, Pennsylvania, as trustee. In *In re Estate of Girard*, the Pennsylvania Supreme Court upheld the trust, which was then administered by an agency of the city. 127 A.2d 287 (Pa. 1956). In *Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia*, the U.S. Supreme Court reversed this decision, asserting that the refusal of admission to applicants because of race by a state agency violated the Fourteenth Amendment. 353 U.S. 230 (1957). On remand, the Orphan’s Court removed the city in favor of private trustees and the Pennsylvania Supreme Court then upheld the substitution of trustees, letting the discriminatory purpose remain in place. *In re Girard Coll. Trusteeship*, 138 A.2d 844 (Pa. 1958), *appeal dismissed, cert. denied sub nom. Pennsylvania v. Bd. of Dirs. of City Trusts of Phila.*, 357 U.S. 570 (1958). After the Supreme Court’s decision in *Evans v. Newton*, however, the Third Circuit in *Pennsylvania v. Brown* concluded that *Evans v. Newton* governed on the facts here and directed that the private trustees be granted relief from the restrictive provision under the doctrine of *cy pres*. See 392 F.2d 120, 123–25 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968); see also James W. Colliton, *Race and Sex Discrimination in Charitable Trusts*, 12 CORNELL J.L. & PUB. POL’Y 275, 278–80 (2003).

174. RAWLS, *supra* note 160, at 32; see *supra* pp. 111–12.

But there is more to note in *Evans*. The issue before the Court goes beyond the role of government as direct purveyor of a discriminatory grant. The operative facts of the case began with a discriminatory grant to the city, but the specific issue arose only after the city sought to resign as trustee of the grant, having realized that operating a park subject to a racially discriminatory condition was a violation of the Constitution. The city sought to step aside in favor of putatively private trustees. In responding to the more challenging question of whether the city's resignation in favor of private trustees rendered the park a private entity (and thereby removed the grant from the purview of the Fourteenth Amendment),<sup>175</sup> the Court refused to defer to private preference, as the dissent suggested it must.<sup>176</sup> Writing for the majority, Justice Douglas held fast to the applicability of the Fourteenth Amendment. He denied the park could be rendered a private entity by the mere substitution of private trustees. Instead, he undertook a nuanced approach to what might constitute state action and at the same time offered a much more nuanced understanding of the way preferences as to the good can jeopardize the right.<sup>177</sup> "What is 'private' action and what is 'state' action is not always easy to determine," Douglas conceded.<sup>178</sup> But, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."<sup>179</sup> Accordingly, the racially discriminatory mission did not escape the Fourteenth Amendment by the mere insertion of private trustees.<sup>180</sup>

The liberal principle of the priority of the right neutral as to the good percolates only slightly beneath the surface in other cases where courts have had to confront charitable purposes that discriminate on grounds of race, gender, or religion.<sup>181</sup> For example, note the colloquy between Chief Justice Burger (writing for the majority) and Justice Powell (concurring) in *Bob Jones University v. United*

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175. See *Evans*, 382 U.S. at 312–15 (1966) (Black, J., dissenting).

176. *Id.* at 314.

177. A recent article points out that the law with respect to discriminatory purposes is in a transition from generally upholding discriminatory charitable trusts that have no direct state administration to generally invalidating discriminatory charitable trusts, regardless of whether state officials have a direct role in their administration. Colliton, *supra* note 173, at 276. Charitable trusts, so the argument goes, require court enforcement and therefore are not really private arrangements. *Id.* at 276, 287. The difficulty with a standard for reformation such as this—based on a public–private distinction—is that it places all charitable trusts in the public domain, discriminatory and otherwise. See David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000).

178. *Evans*, 382 U.S. at 299.

179. *Id.*

180. As the case law has developed, for purposes of the Fourteenth Amendment, state action is generally deemed to be present if "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the state." See *Estate of Wilson*, 452 N.E.2d 1228, 1235 (N.Y. 1983) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

181. See Colliton, *supra* note 173, at 275–76; David Luria, *Prying Loose the Dead Hand of the Past: How Courts Apply Cy Pres to Race, Gender, and Religiously Restricted Trusts*, 21 U.S.F.L. REV. 41 (1986).

*States*.<sup>182</sup> Bob Jones University had a policy (deemed integral to its mission) of not admitting African-Americans at all or, later, of admitting African-Americans contingent on a proscription against interracial dating. Both justices agreed that, however putatively principled such a mission might be, however sincerely founders and donors might believe that separation of the races is socially desirable,<sup>183</sup> such an institution (especially an educational institution) cannot qualify as a “charitable”<sup>184</sup> organization, given the unbroken line of Supreme Court cases beginning with *Brown v. Board of Education*, each case having the object of freeing the nation from the scurrilous doctrine of “separate but equal.”

Where Justice Powell and Justice Burger appear to disagree, however, is about the nature of any evaluative criterion harbored within or implied by the concept of the “charitable.” Does the concept of the “charitable” harbor a standard that would disqualify Bob Jones University and other racially discriminatory educational institutions as tax-exempt organizations? The Chief Justice took the position that an organization cannot qualify as charitable and be “at odds with the common community conscience.” Not only must a qualifying organization have a purpose that falls within one of the categories specified in the applicable sections of the Internal Revenue Code, but the mission must also “demonstrably serve and be in harmony with the public interest.”<sup>185</sup> Therefore, given *Brown* and its progeny (exemplifying the common community conscience), the mission of Bob Jones University cannot qualify.

Although Justice Powell did not equivocate with respect to the nonqualifying nature of Bob Jones’s mission, he resists the Chief Justice in embedding within the concept of the charitable what Powell saw as an “element of conformity.”<sup>186</sup> Powell was clearly unhappy at the degree to which, according to the Chief Justice, a qualifying mission needs to be at one with government

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182. 461 U.S. 574 (1983). In 1975, the Internal Revenue Service reconsidered the tax-exempt status of schools that discriminated on the basis of race and revoked the tax-exempt status of Bob Jones University. The question that came up on appeal to the Supreme Court was whether an organization with a purpose falling within one or more of the categories specified in the Internal Revenue Code, *see supra* note 95, was automatically entitled to tax-exempt status or whether such an organization might be subjected by the Treasury Department to a broader inquiry, one predicated on certain public policy implications inhering in the term “charitable.” *See Bob Jones Univ.*, 461 U.S. at 577–79. The Court’s inquiry into the appropriate test under I.R.C. section 501(c)(3) also involved the question of whether the IRS exceeded its delegated powers in going beyond the formal requirements of the statute to impose on an organization additional qualitative requirements for tax-exempt status. *See id.* at 612–23 (Rehnquist, J., dissenting).

183. These policies were, so the University claimed, integral to its mission—which was to propagate fundamentalist Christian beliefs, including a biblical proscription (a sincere belief of the founders) against interracial dating. *See Bob Jones Univ.*, 461 U.S. at 580.

184. Organizations “operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes” are exempt from federal income tax. I.R.C. § 501(c)(3) (2006). Furthermore, contributions to organizations with qualifying purposes are tax deductible to the donor. § 170.

185. *Id.* at 592.

186. *Id.* at 609 (Powell, J., concurring).

policies: "[t]aken together, these passages [in the majority opinion] suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies."<sup>187</sup> Justice Powell reminded observers that the law of charitable organizations is to "encourag[e] diverse, indeed often sharply conflicting, activities and viewpoints"—that is to say, diverse, even contrarian conceptions of the good.<sup>188</sup> "Each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."<sup>189</sup> Far from representing an effort to reinforce any perceived "common community conscience," charitable groups are indispensable in their role of limiting the influence of collective (especially government) orthodoxy in community life.<sup>190</sup>

Recall, however, that in the liberal polity there is one good that can serve as a public good and as such operate as a constraint upon other putative conceptions of the good. The priority of the right is ultimately a principled conception of the good and, as such, it takes precedence for reasons independent of its being collectively embraced at some moment in time. The way to unequivocally disqualify Bob Jones's mission, but without recourse to the conventional, without effectively imposing the straight-jacket of conformity on the charitable sector, is to turn to the priority of the right and subject Bob Jones's mission to this evaluative criterion. And the avenue to the application of the concept of the right to this grant lies (as the Court in *Evans v. Newton* discovered) in employing a nuanced understanding of the ways in which certain conceptions of the good operate to burden the right.

Whatever Justice Powell's criticisms, reliance upon the right neutral as to the good is just beneath the surface in the majority opinion in *Bob Jones University*. Indeed the Chief Justice set the stage for this alternative approach when, as evidence of the "common community conscience" (with which Bob Jones' mission is at odds), he pointed to *Brown* and its progeny.<sup>191</sup> While *Brown* could be cited simply as expressing the currently predominating preference (which is what Justice Powell discerned the Court to be doing), this case can also be invoked as an application of the right as an evaluative criterion vis-à-vis the good.<sup>192</sup> And if this approach is taken, Powell's criticisms become far less trenchant.

Relying on the liberal principle of the priority of the right neutral as to the good, it is easy to evaluate Bob Jones's mission because, although Bob Jones University was a private institution and did not employ the state in the realization of a racially discriminatory purpose, in the wake of "separate but equal," we know

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187. *Id.*

188. *Id.*

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

190. *Id.*

191. *Id.* at 592-93 (majority opinion).

192. Justice Powell similarly heads in the right direction when he states: "the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior." *See id.* at 610 (Powell, J., concurring).

that racial discrimination in an educational institution has profound social consequences. Educational institutions inevitably inculcate values about civic virtue and equality and in this way prepare people in the liberal state to embrace the priority of the right. The mission in question (propounded as it was in a university) must implicate and compromise the right in its principled posture of neutrality toward each individual as a right-bearer.<sup>193</sup> As such, the principle of the priority of the right neutral as to the good vitiates Bob Jones's charitable purpose.<sup>194</sup>

Finally, we might briefly take note of Justice O'Connor's concurrence in *Roberts v. United States Jaycees*.<sup>195</sup> The rhetoric of this opinion can easily be recast in terms of the categories of the right and the good. To the extent that *Evans* and *Bob Jones University* invite a nuanced approach to the application of the right as an evaluative criterion vis-à-vis the good, these cases set the stage for O'Connor's constitutional taxonomy of nonprofit purposes.

*Roberts* concerned the Jaycees (or Junior Chamber of Commerce), a national organization that limited full membership to young men, although young women could participate in most activities as associate members.<sup>196</sup> In Minnesota, "the Minneapolis and St. Paul chapters began admitting women as regular members," prompting the national organization to threaten to revoke their charters.<sup>197</sup> The local chapters then filed suit in state court, claiming that the national bylaws were illegal under Minnesota law.<sup>198</sup> Like many states and the federal government, Minnesota forbids discrimination by race, religion, sex, and various other categories in "place[s] of public accommodation," a term the Minnesota Supreme Court determined applied to the Jaycees.<sup>199</sup>

The Supreme Court granted certiorari on the issue of whether Minnesota's law forbidding discrimination against women in membership violated the Jaycees' right under the First Amendment to freedom of association, a right that would otherwise presumably entitle the organization to set membership criteria in accordance with its mission (which here would have meant the Jaycees could exclude women from full membership).<sup>200</sup> Writing for the majority, Justice Brennan weighed the connection between the stated mission of the organization and the membership requirement and found that, where the Jaycees were

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193. RAWLS, *supra* note 160, at 32.

194. Where a racially restrictive grant does not involve state action, *cy pres* relief is less certain. While in the earlier cases where state officials play no part in the administration of the discriminatory grant, there is the suggestion that such grants raise no issues under the Fourteenth Amendment. In the past twenty-five years courts have found reasons not to enforce racially discriminatory language, whether or not the state was directly involved. See Colliton, *supra* note 173, at 275-78; Luria, *supra* note 181, at 41.

195. 468 U.S. 609, 631 (1984) (O'Connor, J., concurring).

196. Note that United States Jaycees is a "mutual benefit" or membership organization. *Id.* at 612-13. For membership organizations, see generally FISHMAN & SCHWARZ, *supra* note 107.

197. *Roberts*, 468 U.S. at 614.

198. *Id.*

199. *Id.* at 615.

200. *Id.* at 612.

concerned, this connection was not sufficiently present to justify First Amendment protection.<sup>201</sup> In effect, Justice Brennan tested the Jaycees' policy of excluding women by assessing whether the policy was integral to the stated mission of the organization and determined that it was not.<sup>202</sup>

Justice O'Connor challenged much of the Court's opinion, claiming that the majority's approach both over- and under-protected the right to associate. Justice O'Connor agreed with the Court that application of the Minnesota law to the Jaycees did not contravene the First Amendment, but she came to her conclusion for different reasons. The Court declared that the Jaycees' right of association depended on the organization's making a "substantial" showing that the admission of unwelcome members "will change the message communicated by the group's speech." Justice O'Connor continued: "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."

Justice O'Connor went on to say that what should govern is "the power of states to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society."<sup>203</sup> As a rationale for permitting the states to do this, she proceeded to divide nonprofit organizations into two fundamental types: expressive and commercial.<sup>204</sup> Organizations that are purely expressive enjoy a certain protection from governmental interference in the selection of members.<sup>205</sup> Indeed, for expressive organizations, the right to select members is part and parcel of the message and, like the right to free speech for individuals, is entitled to constitutional protection.<sup>206</sup> Commercial association is another matter, however. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions," O'Connor advised.<sup>207</sup> Commercial organizations receive "minimal constitutional protection" so that the state can impose any rational regulation on them.<sup>208</sup> She acknowledged that many organizations fit neatly into neither category, but she conceded this with an admonishment: "An association must choose its [m]arket."<sup>209</sup> Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.<sup>210</sup>

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201. *Id.* at 626–29.

202. *Id.* at 632 (O'Connor, J., concurring).

203. *Id.*

204. *Id.*

205. *Id.* at 632–33.

206. *Id.* at 633 ("[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual."). How absolute the privilege of membership selection might be remains unsettled. *See* Kent Greenawalt, *Freedom of Association and Religious Association*, in *FREEDOM OF ASSOCIATION* 109, 115 (Amy Gutmann ed., 1998).

207. *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring).

208. *Id.*

209. *Id.* at 636.

210. *Id.*



Therefore, the Jaycees, not being a purely expressive organization but being largely a commercial one, could be subject to rational regulation, according to Justice O'Connor.<sup>211</sup> And given the "profoundly important" goal of guaranteeing nondiscriminatory access to commercial opportunities in our society, it is rational (and thus constitutional) for the state of Minnesota to prohibit the Jaycees from refusing to admit women as full members.<sup>212</sup>

Justice O'Connor's distinction between expressive and commercial organizations and her application of this organizational taxonomy to the Jaycees is interesting, especially in light of the categories of the right and the good and the jurisprudence surrounding them. Indeed her concurrence in *Roberts* can be easily recast in terms of the right and the good. For purposes of a liberal social order, what is significant about the Jaycees' policy of excluding women is that the mission (and the attendant exclusion), even though an exercise of a private preference (and otherwise entitled to constitutional deference), is located in the "marketplace of commerce" and thereby deprives women of access to commercial opportunities, jeopardizing their ability to earn a living. In this way, the Jaycees' policy of exclusion jeopardized the neutrality of the right by economically (and socially) disempowering women, thereby undercutting them as right-bearers.<sup>213</sup>

It is also worth noting that, as was implicit in the reasoning of the Court in *Evans* and in *Bob Jones University*, Justice O'Connor's understanding of the interplay of the right and the good is highly situated. It is the commercial context of the exclusion (the expression of the preference) that makes for the impact on the right. Thus, as Justice O'Connor made clear, unlike a purely expressive organization which is constitutionally protected in its mission (including in its attendant membership restrictions) as expressions of private preference, once an organization is operating in the marketplace of commerce, the extent to which any rational regulation might burden the organization's mission (and the message) is irrelevant.<sup>214</sup> The right to exclude (as an integral element of mission) is not justified by whether exclusion is part and parcel of purpose. Rather, it is protected so long as it remains outside the commercial sphere. Within the commercial sphere, the right enters to operate as an evaluative criterion vis-à-vis the good.

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211. *Id.* at 632.

212. *Id.*

213. RAWLS, *supra* note 160, at 32. For the system of rights as part of the "background conditions under which these aims [meaning conceptions of the good] are to be formed." See also RAWLS, *supra* note 18, at 491; SANDEL, *supra* note 161, at 191.

214. She states:

[W]ould the Court's analysis of this case be different if, for example, the Jaycees membership had a steady history of opposing public issues thought (by the Court) to be favored by women? It might seem easy to conclude, in the latter case, that the admission of women to the Jaycees' ranks would affect the content of the organization's message, but I do not believe that should change the outcome of this case.

*Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

### CONCLUSION AND PROCEDURAL AFTERTHOUGHT

Neither the concept of "efficiency" nor the concept of the "public good" lends itself to the development of a standard by which to address the problem of restricted purpose grown untimely. The reasons for which these concepts do not yield the requisite standard, when taken together, argue that such a standard is not likely to emerge. If the law cannot provide a substantive rule by which to evaluate the continued social efficacy of charitable mission, this does not mean that at a practical level the problem of restricted gifts has ceased to exist, especially given that such gifts obtain in perpetuity. For the charity, any restricted gift remains a mixed blessing and in the current legal regime, an invitation to self-help.

If there can be no substantive law consistent with liberal principles by which to evaluate charitable preferences, the only recourse is to a procedural solution. This does not cede the high ground to those who would advocate improved enforcement mechanisms alone, however. There can be no doubt that improved enforcement mechanisms will form an essential component of any comprehensive *cy pres* reform, ensuring thereby that donors continue to make restricted gifts and play their important role in the nonprofit sector and in the larger democratic policy. Improved enforcement mechanisms alone will not suffice, however.<sup>215</sup> If much that restricted gifts bring to the charitable arena and indeed to the liberal polity is not to be jeopardized, broader standing rights must be coupled with other measures that are calculated to preserve the important policies in play here and balance them where they compete.

And there are indeed a number of competing concerns here. Restricted gifts play an essential role in ensuring the diversity of the charitable sector, as well as social and ideological innovation in the larger polity. As Justice Powell noted, the law of charitable organizations is to "encourag[e] diverse, indeed often sharply conflicting, activities and viewpoints,"<sup>216</sup> with each group contributing "to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."<sup>217</sup> While innovation and diversity spring from many sources in the charitable arena, it is in donors, as they condition their gifts with restrictive language, that innovation and diversity find their guarantee. Accordingly, any procedural solution to the problem of restricted gifts must continue to accord donor preference as expressed in the language of a grant a privileged place in the law.<sup>218</sup>

At the same time, however, other values must not be ignored. As important as is the need for diversity of mission, the community as the ultimate beneficiary of any charitable organization has an interest in seeing that projects and programs remain timely. This means that charities must have some liberty to interpret restrictive language in light of changed circumstances.

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215. See Chester, *supra* note 19, at 450.

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

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

218. Gardner, *supra* note 99, at 4-6.

Accordingly, a procedure or framework for the amelioration of restrictive language suggests itself, at least in broad outlines. The administration of a restricted gift should be governed by a succession of "Program Periods." The length of a Program Period is somewhat arbitrary, but a Program Period should be a length sufficient to allow the charity to steward the grant with a degree of autonomy and also to gather evidence demonstrating the feasibility of the stipulated mission given present circumstances. A length of time equal to two business cycles (approximately fifteen years) suggests itself as being of sufficient length to permit these things to take place. The first Program Period should commence with the charity's acceptance of the gift and others would follow successively thereafter.

During the first Program Period, the charity would be required to adhere to the strict terms of the grant. After the first or any subsequent Program Period, however, an "Evaluation Window" (lasting from six months to a year) would ensue. During the first Evaluation Window or any later Evaluation Window, the charity would be authorized to announce prospectively an "Operative Interpretation" to govern its administration of the grant during the upcoming Program Period. The charity would only be authorized to undertake any Operative Interpretation, however, if the charity could demonstrate from evidence drawn from the administration of the grant pursuant to the Operative Interpretation in the previous Program Period (or in accordance with the strict terms of the grant in the initial Program Period) that the goals of the endowed project or program could not be meaningfully realized, the good faith efforts of the charity notwithstanding. Evidence of other pressing societal needs extraneous to the grant should not justify a new Operative Interpretation. Further, any Operative Interpretation announced prospectively should deviate from the language of the original grant (or, after the first Program Period, any immediately preceding Operative Interpretation) to the least degree necessary to respond to the evidence drawn from the ongoing project or program.

During any Evaluation Window, anyone with standing with respect to mission should be able to challenge the charity, either with respect to its adherence to the Operative Interpretation during the preceding Program Period or with respect to the sufficiency of the evidence supporting a new Operative Interpretation to govern an upcoming Program Period. Finally, where the charity could not demonstrate a good faith effort to husband the endowed project or program (either consistent with the requirements of the original grant during the initial Program Period or, later in the life of the grant, consistent with the Operative Interpretation announced for the relevant Program Period), there should be a gift over to another charitable organization.

This framework for stewarding a grant will not be effective to address the burdens of time in the case of all restricted gifts. For example, many charities accept artwork subject to the condition that it not be sold. It would be difficult to attenuate the force of this sort of restriction within this framework, although this is not to suggest that amelioration of such restrictive language could not be justified within a different framework.<sup>219</sup> It is simply that the framework presented here is

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219. That is, unless the restriction gave the artwork a programmatic purpose.

better suited to the stewardship of gifts that endow active projects or programs, the achievements and challenges of which can be demonstrated. Be this as it may, this framework speaks to the important policy objectives in play with respect to all restricted gifts

Most importantly, by authorizing the charity to reinterpret restrictive language, the procedure provides an avenue by which to alleviate some of the burdens of a restriction grown untimely and invites the charity in its fiduciary capacity to reinvigorate an endowed program, to restore its cutting edge. But further, because the charity can only justify a new interpretation of restrictive language by reference to the achievements or challenges of an ongoing project or program (and not by reference to competing and extraneous societal needs), the framework discourages the charity from ignoring the restriction altogether. The effect here is to privilege the donor's preference and thereby, to return to Justice Powell's phrase, to "encourag[e] [the] diverse, indeed often sharply conflicting, activities and viewpoints"<sup>220</sup> that characterize the charitable arena. Furthermore, by confining challenges to the charity to Evaluation Windows, the charity is secured in its exercise of administrative discretion in other times, obviating at least to some degree Justice Marshall's age-old concern with respect to the drain of vexatious and harassing litigation (expanded standing rules notwithstanding).<sup>221</sup>

Finally, we may discern the usefulness of such a framework for the stewardship of a restricted gift by returning briefly to the Robertson grant to Princeton. Obviously, had Princeton known that it could have been challenged within a few years of its acceptance of the Robertson gift with respect to its adherence to the strict language of the grant, the University in accepting the grant would have likely paid greater attention to the restrictive language (and to the various interpretations to which it might be subject) and in particular ascertained what the grant to the Woodrow Wilson School could in some view be specifically calculated to accomplish. Further, the possibility of attenuating the force of the grant upon a showing of evidence drawn from the operation of a program would provide yet another incentive to establish the program in accordance with the strict terms of the grant, whatever they were. With a program calculated to train students for federal service in place, soon upon the advent of the extraordinary sea-change in U.S. politics that began in the late 1960s, Princeton would have been able to point to various indicia demonstrating that the program as originally envisioned had become anachronistic. Antipathy toward the U.S. government would likely result in enrollment data indicating that students were not interested in such a program. Additionally, the out-sourcing of federal work would presumably result in placement data showing the difficulty of placing students in federal positions after graduation. Both of these pieces of evidence could then be used to support a new Operative Interpretation to govern the program going forward. At a minimum, such data would have suggested opening the door to placement of graduates in private industry, especially in areas where federal projects were likely to be outsourced.

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220. *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring).

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

None of this is to suggest, however, that the dispute with the Robertson family and indeed that much of the debate within the University concerning the meaning and import of the grant could have been entirely avoided, had the proposed framework been in place.<sup>222</sup> Disagreement about the meaning and application of restrictive language over time is virtually inevitable. A framework devised to encourage and support charity in the stewardship of a mission would, however, afford differences a venue, allowing them to surface within a structured dialogue aimed at bringing a donor's vision to fruition, the vagaries of time and circumstance notwithstanding.

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222. Recall what Dean Lewis of the Woodrow Wilson School said in his 1972 memo: "What bothers me about the terms of the gift is the unspoken premise that, with respect to any American institution dealing with public affairs, the highest per-se loyalty automatically must be to the United States [g]overnment. . . . the University should resist [such] a blind commitment to nation-state parochialism." Mem. re Fiduciary Duties, *supra* note 21, at 27 n.12 (quoting Memo from John Lewis, Dean, Woodrow Wilson Sch. of Pub. & Int'l Affairs, to William Bowen, President, Princeton Univ. (Jun. 27, 1972)).

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