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Article

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The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep.
–Robert Frost, *Stopping by Woods on a Snowy Evening*

Nothing can have value without being an object of utility.
–Karl Marx, *Capital*

When a charitable organization cannot fulfill the terms of a charitable gift agreement, it must decide whether to keep a promise or meet a need. That is to say, a charitable organization can either preserve original donor intent, adhering to conditions placed on a gift, or it can attempt to modify the terms of the gift in order to budget and spend the funds more effectively. If an institution chooses to keep a promise, it might be stuck with a fund it cannot use because of conditions placed on the money at the time of the gift. In order to meet needs, however, the institution must go to court. Cy pres, the best tool available to such an organization, is a saving doctrine that allows courts to modify conditions placed on a charitable gift when the conditions have become either impossible or impracticable.[1] What it means, however, for a condition to be impracticable is unclear.[2]

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1. Cy pres derives from Norman French and means “as near,” the full phrase being “cy pres comme possible,” or “as near as possible . . . . The fairly common usage, ‘si pray,’ seems to be a mixture of French and English pronun-

Courts are aware of this problem. The Iowa Supreme Court, evaluating a cy pres claim, observed: "A review of the case law on impossibility and impracticability has led many to believe 'no precise definition of the standard exists,' and whether something has become impossible or impracticable is up to the 'particular facts of each case.'"[3] Likewise, a Washington, D.C. trial court judge wrote: "The [c]ourt has not found, and the parties have not identified, any case law in this jurisdiction that explicitly defines the term 'impracticable' in the cy pres context."[4] In addition, the judge remarked, there was "relatively little case law on this issue in other jurisdictions."[5]

Scholarship has not provided clear answers, either. Some commentators have remarked that the standards for determining whether a trust's terms are impractical are too high, precluding institutions from using restricted funds in ways that would benefit both the institution and the public.[6] Other com-

ciation." RONALD CHESTER ET AL., THE LAW OF TRUSTS AND TRUSTEES ch. 22, § 431 (3d ed. 2017).

2. Critics have, in fact, complained for years that the cy pres doctrine is both ambiguous and applied inconsistently by courts. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 465–66 (2005). A 1973 American Bar Association report found that there was "significant variance in the degree of impossibility or impracticability required" by courts. Report of Committee on Charitable Trusts and Foundations, *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, 398–400 (1973). Thirty years later, not much has changed. In trust law, one scholar has remarked that, "no precise definition of the standard exists." McLaughlin, *supra* at 437. For other explorations of cy pres, see John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123 (2010); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999); Iris J. Goodwin, *Ask Not What Your Charity Can Do for You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of* Cy Pres *Reform*, 51 ARIZ. L. REV. 75, 123 (2009); and Allison Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663 (2015).

3. Kolb v. City of Storm Lake, 736 N.W.2d 546, 556 (Iowa 2007) (citing McLaughlin, *supra* note 2, at 465). The court concluded that cy pres was applicable when a charitable trust created to build and maintain a fountain and garden at a certain location could no longer fulfill its terms after the city razed the garden in order to make room for a major economic development project. "Such a massive project should be planned in a way that maximizes its potential, and when the location of the garden and fountain jeopardize that potential it becomes impractical not to relocate them." *Id.* at 557.

4. Trs. of the Corcoran Gallery of Art v. District of Columbia, 142 Daily Wash. L. Rptr. 2213, 2218 (D.C. Super. Ct. Aug. 18, 2014).

5. *Id.*

6. Some scholars believe that the reform efforts have not been sufficient to modernize an outdated doctrine. *See, e.g.*, Rob Atkinson, *The Low Road to*

mentators have stated the opposite. These commentators lament a perceived judicial trend to relax the conventional standard, observing that "policy considerations and concern for furthering the public welfare [have become] of increasing importance in delimiting and defining the degree and type of impracticality necessary to call the cy pres doctrine into operation."[7] Neither clarity nor consensus on how courts analyze impracticability exists.[8]

That there is no clear standard or consensus is no small problem. The stakes are high, both in terms of dollars spent in charitable giving, as well as the health of charitable institutions. Americans gave $389.05 billion to charitable institutions in 2016.[9] In addition, it is estimated that by the year 2061 some fifty-eight trillion dollars will transfer between generations.[10] To be sure, not all gifts come with restrictions. But the ones that do are generally major gifts—the ones that provide the most significant resources to an institution. When donors restrict these gifts, they also restrict institutional flexibility because recipient institutions are obligated to adhere to such terms—even if they become outdated or burdensome. Taken to the extreme, gift restrictions may lead to inappropriate forms of

Cy Pres Reform: Principled Practice To Remove Dead Hand Control of Charitable Assets, 58 CASE W. RES. L. REV. 97, 97 (2007) [hereinafter Atkinson, *The Low Road*] (stating that calls for reform, "for all their merit, have gone virtually unheeded"); *see also* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114 (1993) (proposing that charities control charitable assets rather than subjecting gifts to either donor control or state-imposed modification). *See generally* C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407, 414 (1979) (describing the historical development of cy pres and attempts to reform the doctrine). Vocal critics of reform also exist. *See* Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665 (1997). For a comparative perspective, see Peter Luxton, *Cy-Pres and the Ghost of Things That Might Have Been*, 47 CONV. & PROP. LAW. 107 (1983).

7. EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES ch. 5, § 5.02(b) (Matthew Bender & Co. ed., 1950).

8. *See, e.g.*, Eason, *supra* note 2, at 125–26 ("[T]he malleability of cy pres doctrine too often leads to outcomes that fail to predictably serve either donor intentions or society's interest in the accomplishment of purposes beneficial to the public.").

9. *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TR., http://www.nptrust.org/philanthropic-resources/charitable-giving-statistics (last visited Apr. 12, 2018). This reflects a 4.2% increase from 2015. *Id.*

10. JOHN J. HAVENS & PAUL G. SCHERVISH, A GOLDEN AGE OF PHILANTHROPY STILL BECKONS: NATIONAL WEALTH TRANSFER AND POTENTIAL FOR PHILANTHROPY TECHNICAL REPORT 5 (2014), https://www.bc.edu/content/dam/files/research_sites/cwp/pdf/A%20Golden%20Age%20of%20Philanthropy%20Still%20Bekons.pdf.

"donor governance,"[11] where donor control based on gift restrictions—often exerted from beyond the grave—supplants the rightful exercise of discretion by the institutional fiduciaries.[12] An unclear cy pres standard endangers both the financial health and the leadership authority of public charities.

The time has come to articulate a clear and usable cy pres standard. The tools to do so are within reach, contained in the bodies of contract and property law. The turn to these bodies of law is apt, because trust law has roots in both contract and property. In fact, a longstanding debate—what some have even called a "hoary old debate"[13]—exists about whether trust law is contract or property.[14] Both contract and property have something to offer to trust law and each body of law provides an important key to unlocking the cy pres conundrum.

Contract informs trust law's rules about keeping promises. A guiding principle for both contract and trust law is *Pacta sunt servanda* (promises must be kept).[15] Trusts, like contracts, center on relationships, agreements, and intraparty obligations. Legal historians have therefore observed that "the distinction between trusts and contracts has not always been easily drawn."[16] John Langbein, in *The Contractarian Basis of the Law of Trusts*, has further explained the similarities between trust and contract law, particularly in the modern context of fiduciary duty and institutional trusteeship. Langbein states:

11. David Yermack, *Donor Governance and Financial Management in Prominent U.S. Art Museums* 1 (Nat'l Bureau of Econ. Research Working Paper No. 21066, Apr. 2015), http://www.nber.org/papers/w21066.pdf ("Restricted donations represent a form of corporate governance, because they constrain the opportunities for non-profit managers to expropriate resources. I call this practice 'donor governance,' and it permits benefactors to influence a non-profit for decades, even after they may have severed all connections or died.").

12. *Id.*

13. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 471 (1998).

14. *See id.*; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995); Robert Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 628–31 (2004).

15. JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 311 (2009) ("Almost all cases in Chancery can be reduced to this simple formula, and the answer of conscience was as simple: promises have to be kept—*pacta sunt servanda* . . . ." (citing Franz Metzger, *The Last Phase of the Medieval Chancery*, *in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 79, 84 (Alan Harding ed., 1980))).

16. Neil G. Jones, *Aspects of Privity in England: Equity to 1680*, *in* IUS QUAESITUM TERTIO 135, 162 (Eltjo J.H. Schrage ed., 2008).

"[T]he deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract."[17] The result: "Trusts are contracts."[18]

But trust law is also property law. In fact, "[w]e are accustomed to think of the trust as a branch of property law."[19] This connection between trust and property has persisted because, while the relationship may contain a contract between trustee and settlor, a trust cannot be formed without property—an asset to be held and managed in trust. For this reason, the Restatement (Second) of Trusts said: "The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract."[20] Property and trust both focus on the thing, or res, in trust, as well as its protection and efficient use. From property law, trust law inherits a set of rules and concerns about maximizing the value and the utility of a managed asset. Property rules are about productive use, obtaining a reasonable return, and meeting needs.

This Article draws on both contract and property theory in order to enable a better understanding of trust law and what the standard for impracticability should be. Part I briefly describes the history and current status of cy pres in trust law. I offer three cy pres case studies that demonstrate how trust law is caught between contract and property, lacking guidance on how to identify and deploy various practical factors, doctrinal directives, and theoretical concepts. Part II begins with an exploration of the historical connections between trust, contract, and property, uncovering the conceptual ties between the bodies of law. I then analyze contract and property doctrines that bear on trust law's impracticability question. I focus first on commercial impracticability cases that demonstrate contract law's high premium on both keeping promises and bargaining. I then explore property law rules—easements by necessity and variances—to reveal the premium the rules place on efficient use of property and the notion of reasonable return. In Part III, I propose a revised standard for cy pres impracticability, drawing on both contract and property law, and explain why a new hybrid rule is theoretically apposite.

17. Langbein, *supra* note 14, at 627 (1995).

18. *Id.*

19. *Id.*

20. RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (AM. LAW INST. 1959).

Ultimately, both contract and property can help craft a cy pres doctrine that balances institutional obligation and need, while the inquiry into contract and property provides a new and helpful aperture through which to better assess the nature of trust law itself.

I. DILEMMAS IN THE CHARITABLE SECTOR

Historically, courts have used cy pres to modify gift conditions and trust terms when the purpose becomes obsolete or exceedingly outdated.[21] Cy pres modifications remedy value-impairing conditions placed on gifts, correct inefficiencies and complications associated with dead-hand control, and recalibrate the equilibrium between donor control and public benefit.[22] Broadly construed, cy pres is a delicate balancing act between keeping promises and using property efficiently. In this way, the cy pres doctrine is also a balancing act between the normative goals of contract and property. In this Part, I provide an overview of the cy pres doctrine prior to analyzing three recent cases that demonstrate how nonprofit institutions can be handicapped by unclear trust standards of impracticability.

A. TRUST LAW AND THE CY PRES DOCTRINE

According to the cy pres doctrine, a court can modify the terms of a charitable trust or restricted charitable gift (the doctrine does not apply to private trusts[23]) if the trust terms have become *impossible to achieve* or *impracticable* to perform.[24] The Uniform Trust Code (UTC) adds that "the doctrines of cy pres

21. Tait, *supra* note 2, at 1681.

22. For example, one court modified gift terms on a fund that provided a baked potato at each meal for each young woman at Bryn Mawr College. Julius Rosenwald, *Principles of Public Giving*, ATLANTIC MONTHLY, May 1929, at 601.

23. Private trusts can be changed using the Claflin doctrine or administrative/equitable deviation. *See* JESSE DUKEMINIER, JAMES LINDGRIN, & ROBERT H. SITKOFF, WILL, TRUSTS & ESTATES 759–60 (10th ed.).

24. Cy pres may also be judicially applied when the terms are unlawful or wasteful. Drafters of the UTC added the category of wasteful in 2000 and wasteful entered into the Restatement (Third) of Trusts in 2003. The Restatement defines wasteful as meaning that the funds far exceed what is necessary, rendering it imprudent not to expand the purposes for which the funds can be applied. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003). I discuss impracticability (and impossibility, to a lesser degree) and not wastefulness because of the similarities that exist between cy pres impracticability and doctrines in both contract and property law. I therefore set aside the question of wastefulness for another venue and time.

and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts."[25] Similarly, the Uniform Prudent Management of Institutional Funds Act (UPMIFA) permits the use of cy pres as a tool for modifying restrictions placed on any nonprofit institutional funds.[26] Cy pres, therefore, has a wide reach and potential application for any nonprofit organization that holds restricted funds, including major universities, hospitals, and museums.

To begin the cy pres process, the trustees or directors of a charitable institution must file a petition seeking judicial modification. Generally, the fiduciaries and parties with a special interest are the only ones with standing to seek such modifications.[27] The general rule, relayed for example in UPMIFA, is that the trustees or directors also "shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard."[28] Once the petition has been filed, courts apply a multipart test to evaluate whether cy pres is appropriate. In the absence of contravening language in the trust itself, courts must determine that (1) a valid charitable trust exists; and (2) the trust's purpose is illegal, impractical,

25. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 4 (UNIF. LAW COMM'N 2006). The comment to UTC section 413 states that: "The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations." UNIF. TR. CODE § 413 (UNIF. LAW COMM'N 2010).

26. UPMIFA section 6(c) states:

> If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument.

UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (UNIF. LAW COMM'N 2006). Forty-nine states as well as the District of Columbia and the U.S. Virgin Islands have adopted the UPMIFA as of 2018. *Legislative Fact Sheet—Prudent Management of Institutional Funds Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Prudent%20 Management%20of%20Institutional%20Funds%20Act (last visited Apr. 12, 2018). UPMIFA applies primarily to funds held by charities organized as nonprofit corporations. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT 1 prefatory note (UNIF. LAW COMM'N 2006).

27. DUKEMINIER ET AL., *supra* note 23, at 782 (discussing the problem of standing with respect to the enforcement of charitable trusts); *see also* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1197–1206 (2007) (detailing which parties have standing under common law charitable trust doctrine).

28. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (UNIF. LAW COMM'N 2006).

impossible, or wasteful.[29] If these conditions are met, the court has the power to modify the terms of the trust, as long as the modifications are in alignment with the donor's original intent. The common law doctrine provides "that equity will . . . substitute another charitable object which is believed to approach the original purpose *as closely as possible*."[30] The UTC has softened this requirement somewhat, stating that the court may apply cy pres by directing that the trust property "be applied or distributed, in whole or in part, *in a manner consistent with* the settlor's charitable purposes."[31]

A dispositive question, then, for proceeding to cy pres analysis is whether gift terms are either impossible or impracticable. Courts have not clearly differentiated between impracticability and impossibility. Pressed to articulate a difference, courts have traditionally interpreted impossible quite literally, meaning that the object of funding has ceased to exist. For example, a gift dedicated to curing polio is faced with an impossible application of funds because the disease has been eliminated. A gift to an institution that subsequently merges with another one or otherwise ceases to exist in its original form is

29. The current version of the UTC presumes general charitable intent, unlike the previous versions. In states that have not adopted the UTC, fiduciaries also have to prove that the donor had general charitable intent. *See* UNIF. TR. CODE § 413 (UNIF. LAW COMM'N 2010) ("Subsection (a), which is similar to Restatement (Third) of Trusts § 67 . . . modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent."); RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003). This formulation has been widely adopted by courts as well. *See, e.g.*, Kolb v. City of Storm Lake, 736 N.W.2d 546, 555 (Iowa 2007).

30. RONALD CHESTER ET AL., THE LAW OF TRUSTS & TRUSTEES ch. 22, § 431 (3d ed. 2017) (emphasis added).

31. UNIF. TR. CODE § 413 (UNIF. LAW COMM'N 2010) (emphasis added). A comment to section 67 of the Restatement (Third) of Trusts states that the modified purpose "need not be the nearest possible but one reasonably similar or close to the settlor's designated purpose." RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (AM. LAW INST. 2003). This relaxes the previous standard, which was that courts must generally seek a purpose that conforms to the donor's objective "as nearly as possible." *In re* Elizabeth J.K.L. Lucas Charitable Gift, 261 P.3d 800, 809 (Haw. Ct. App. 2011) (citing 15 AM. JUR. 2D *Charities* § 157 (2011)). UPMIFA section 6(c) states that the proposed modification be "in a manner consistent with the charitable purposes expressed in the gift instrument." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (UNIF. LAW COMM'N 2006).

similarly impossible to administer.[32] In a recent New York case, the court found a gift to a hospital that had "ceased operating as a hospital, modified its corporate name and changed its corporate function to promoting health and well-being" was subject to cy pres modification because circumstances rendered the gift terms impossible to satisfy as written.[33] This standard of impossibility is embodied in some state statutes, such as Rhode Island's, which provides, in relevant part, that "[a]pplication of the cy pres doctrine, under Rhode Island law, is limited to circumstances where the purposes of a donor cannot be literally carried into effect."[34] Impossibility, therefore, generally provides "relief only on a narrow set of grounds,"[35] in the face of changed circumstances that bring about a clear frustration of the original purpose.

The standard for impracticability is less extreme and also less clear. The Restatement (Third) of Trusts states that "[t]he doctrine of cy pres may also be applied, even though it is *possible* to carry out the particular purpose of the settlor, if to do so would not accomplish the settlor's charitable objective, or would not do so in a reasonable way."[36] The impracticability standard, therefore, recognizes and acknowledges that circumstances may arise in which the trust terms cannot be carried out without substantial burden to the institution or substantial impairment of the charitable purpose.[37] In practice, however, this standard does not always provide sufficient clarity for courts trying to determine what kinds of conditions unduly burden institutions and impair donor intent.

32. *Cf.* Goodwin, *supra* note 2, at 101–02 ("The *cy pres* doctrine harbors no criterion by which to evaluate the continued social efficacy of a nondiscriminatory restricted gift short of showing that its object ceased to exist.").

33. *In re* Lally, 112 A.D.3d 1099, 1101 (N.Y. App. Div. 2013). The court reformed the terms of the trust and directed the funds to the institution that "assumed all responsibility for the hospital and related healthcare services previously provided by [the former hospital]." *Id.*

34. 18 R.I. GEN. LAWS § 18-4-1 (1956).

35. Goodwin, *supra* note 2, at 101.

36. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. c (AM. LAW INST. 2003).

37. 15 AM. JUR. 2D § 151 (2011) (citing insufficiency of funds as one reason why it may be difficult to accomplish the charitable purpose of a gift); Mark Dennison, *Circumstances Warranting Application of Cy Pres Doctrine To Modify Terms of Charitable Trust*, *in* 88 AM. JUR. 3D *Proof of Facts* 469, 496 § 10 (2006) ("A purpose becomes impracticable when the application of [trust] property to such purpose would not accomplish the general charitable intention of the settlor.").

A Hawaiian state appellate court decision, *In re Elizabeth J.K.L. Lucas Charitable Gift*,[38] exemplifies a relatively broad judicial interpretation of the impracticability standard. In that case, the donor gifted interest in a parcel of land to the Hawaiian Humane Society, with the restriction that the property "be used for the benefit of the public for the operation of an educational preserve for flora and fauna."[39] The Humane Society made "numerous attempts" to use the land within the parameters established by the gift deed.[40] However, the State of Hawaii determined that the land was mostly unsuitable for use as a public park[41] and all possible plans were ultimately rejected as "physically or economically unfeasible."[42] The Humane Society finally brokered a deal to exchange one small, usable part of the land to the State and to sell the rest to a private partnership.[43] The funds would be put toward environmental stewardship programming.[44] The appellate court concluded that cy pres was applicable "where a settlor creates a charitable trust of real property to be used for a particular purpose, but the property turns out to be unsuitable for that purpose."[45]

Impracticability represents a lower threshold than impossibility—compliance is not technically impossible but, rather, impossible without the recipient institution taking on an excessive burden. Impracticability combines notions of the unworkable, the inefficient, and the unaffordable. There is no consistent standard, however, for what constitutes hardship or excessive

38. 261 P.3d 800, 807 (Haw. Ct. App. 2011).

39. *Id.* at 803.

40. *Id.*

41. *Id.* at 812.

42. *Id.* at 803.

43. *Id.*

44. *Id.* at 804. In order to effectuate the deal, the Humane Society filed a petition with the probate court, requesting a modification of the gift terms. *Id.* The probate court concluded that the gift terms were not capable of being modified through the use of cy pres because an alternative use had been identified in the gift deed. *Id.* at 805.

45. *Id.* at 807 (citing Roberds v. Markham, 81 F. Supp. 38, 40 (D.D.C. 1948)) (recognizing that courts may order sale of gifted land if conditions have drastically changed or land otherwise becomes unsuitable for its dedicated purpose); *see* Bd. of Educ. v. City of Rockford, 24 N.E.2d 366, 369–73 (Ill. 1939) (applying cy pres to allow sale of land in charitable trust where its dedicated use as school became impracticable due to shifting populations, deterioration of existing building, and existence of another school that met needs of the area); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 39.5.2, at 2724–25 (4th ed. 1988).

burden, and courts are left to speculate while public charities try to navigate troubled financial waters.

B. Charitable Institutions in Distress

Recent cy pres cases confirm that the cy pres standard is inconsistent and hard to pin down. In this Section, I discuss three cases and explore how doctrinal inconsistency may be harming charitable organizations more than it is helping. In certain cases, like the Corcoran Gallery case, a good result for the institution ensues and the institution benefits from new forms of flexibility. In other cases, such as the Girard College and Sweet Briar cases, cy pres may not be available to the institution and there is, consequently, no clear path out of financial difficulties.

1. The Corcoran Gallery: The Desperation Standard

One of the most recent and highly publicized cy pres cases involved the closing of the Corcoran Gallery, and the takeover of its assets and functions by the National Gallery of Art (NGA) and the George Washington University (GWU). The case, *The Trustees of the Corcoran Gallery of Art v. District of Columbia*,[46] turned on questions of financial hardship and the possibilities available to the Corcoran Gallery for raising money.

The Corcoran was established in 1869 through a deed of trust executed by William Wilson Corcoran.[47] The goal of the trust was to fund an institution in Washington D.C. that was "dedicated to Art, and used solely for the purpose of encouraging American Genius."[48] The deed of trust also created a board of trustees and vested them with general management authority of the institution.[49] In the following decade, the trustees established Corcoran College, "which was integrated into the overall institution and which emphasized student access to the art collection."[50]

A little over a century after the Corcoran was created, however, the institution's financial condition began to deteriorate.[51] The court found that, since 2001, the Corcoran had ex-

46. Trs. of the Corcoran Gallery of Art v. District of Columbia, 142 Daily Wash. L. Rptr. 2213 (D.C. Super. Ct. Aug. 18, 2014).

47. *Id.* at 2214.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 2215.

perienced significant budget problems and had "been operating at a deficit for . . . the majority of the last thirteen years."[52] The Corcoran was struggling to make payments on loans that were in default and to meet even basic payroll obligations.[53] Furthermore, even though the Corcoran had net assets of more than seventy-three million dollars, only four million dollars of these assets were unrestricted, giving the trustees little flexibility within the budget to cover emergency expenses or reorganize spending.[54]

> In an attempt to decrease operating expenses, the Trustees had voted to decrease staff and had deferred necessary building maintenance.[55] Deferred maintenance, however, raised questions about the building's capacity to house the art as well as the College.[56] A report from consultants stated that the building's old systems were "not capable of reliably maintaining museum-level exhibit and conservation standards."[57]

Seeking a way out of this financial distress, the trustees filed a cy pres petition,[58] requesting that the court permit the Corcoran to be subsumed jointly into GWU and the NGA. GWU would establish a new school for art and design, incorporating the Corcoran College students into this new school. The NGA would acquire the bulk of the artwork and establish a "new contemporary art program, incorporating the Corcoran name."[59] The threshold question before the court was whether the trustees had "established that it [was] impracticable to car-

52. *Id.* at 2220.

53. *Id.* at 2215.

54. *Id.* at 2221.

55. *Id.* at 2215.

56. *Id.* at 2221.

57. *Id.* Because of these problems, the college's accreditation was at stake. *Id.* at 2215. The commission charged with reaccreditation reported that: "The College lacks the resources to operate much beyond the next academic year . . . . Most of our negative evaluation judgments are about standards that are directly affected by dwindling resources." *Id.*

58. *See* D.C. CODE § 19-1304.13 (2004) ("Except as otherwise provided in the terms of the trust, if a particular charitable purpose is or becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) The trust does not fail, in whole or in part; (2) The trust property does not revert to the settlor or the settlor's successors in interest; and (3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.").

59. Trs. of the Corcoran Gallery of Art v. District of Columbia, 142 Daily Wash. L. Rptr. 2213 (D.C. Super. Ct. Aug. 18, 2014).

ry out the [d]eed of [t]rust that created the Corcoran given the Corcoran's current financial condition."[60]

Regarding the question of impracticability, the court could find no relevant cy pres case law, in its own jurisdiction or elsewhere.[61] The court added that the legislative history of the Uniform Trust Act "does not elucidate this issue."[62] Because of this relative lack of guidance, the court turned to contract law and commercial impracticability to gain new insights:

> In the contract context, the Court of Appeals has defined "impracticable" to mean that a party is excused from performing its obligations under a contract due to an unexpected contingency only if that contingency causes the party "extreme or unreasonable difficulty" in performing its obligations under the contract, and not if the contingency is "a mere inconvenience or unexpected difficulty."[63]

The court concluded that "a party seeking *cy pres* relief can establish impracticability only if it demonstrates that it would be unreasonably difficult, and that it is not viable or feasible, to carry out the current terms and conditions of the trust."[64]

A group called Save the Corcoran, intervening to block the cy pres petition, argued that the Corcoran could raise funds through a major deaccessioning effort, as well as increased fundraising.[65] The intervenors proposed that the Corcoran sell more than 17,000 pieces from the collection, and that the funds from these sales could bridge the budgetary gap.[66] The court, however, found compelling evidence that the Corcoran would face sanctions from the American Association of Museum Directors (AAMD) if deaccessioning money were to be spent on

60. *Id.* at 2213. The second question was, if impracticable, whether "the plan proposed by the Trustees [is] as near as possible to the intent of William Wilson Corcoran when he established the Trust." *Id.* I discuss the first question here, and the question of donor intent is addressed in the following section. *See infra* Part II.B.2.

61. *Id.* at 2218 (noting that neither the court nor the parties have identified case law explicitly defining impracticable in the court's jurisdiction and little case law exists in other jurisdictions on the issue). The court did find that "the D.C. Circuit has noted that a party fails to establish impossibility or impracticability when it seeks to modify a charitable trust 'merely because it suits its own convenience to do so.'" *Id.* (quoting Conn. Coll. v. United States, 276 F.2d 491, 499 (D.C. Cir. 1960)).

62. *Id.*

63. *Id.* (quoting Island Dev. Corp. v. District of Columbia, 933 A.2d 340, 350 (D.C. 2007)).

64. *Id.* at 2219.

65. *Id.* at 2221 ("Intervenors have argued that the Corcoran can address this shortfall of funds both by selling some of the more than 17,000 pieces in the Corcoran's collection and by increasing its fundraising efforts.").

66. *Id.*

operating costs.[67] These sanctions, the court observed, could be "painful" and produce "substantial risks" for the institution, because the gallery would not be able to host traveling exhibitions or receive loans from other AAMD accredited museums.[68] Sanctions, including loss of accreditation, would also make it difficult for the Corcoran to retain high-quality curatorial staff and could disqualify the gallery from receiving federal grants and other funds.[69]

The intervenors argued that a new fundraising program could bring the Corcoran back to financial health and stability.[70] The court was equally skeptical of this proposition. Indeed, the court noted that even the intervenor's own witnesses acknowledged that "fundraising campaigns take significant time to plan and execute" and that the planning period alone for a capital campaign was several years, followed by the multiyear campaign.[71] The court mentioned that, in the past, "the Corcoran's fundraising department has been plagued by vacancies and high staff turnover" that would make the job of building a top-rate board difficult.[72] The court also remarked that global recession had made fundraising difficult even in the best of circumstances.[73]

Crediting a report that stated the Corcoran board was "working tirelessly . . . to come to terms with the institution's significant financial challenges and to identify creative solutions,"[74] the court concluded that the trustees had not only established their own good faith, but also that the Corcoran's circumstances were indeed impracticable. Severe financial distress combined with a paucity of plausible alternatives persuaded the court that the hardship was sufficiently severe to merit cy pres application.[75] Consequently, the result was a good

67. *Id.* (discussing the possibility of sanctions).

68. *Id.* at 2221–22. For more on the regulation of deaccessioning, and the problems with the current framework, see Allison Tait, *Publicity Rules for Public Trusts*, 33 CARDOZO ARTS & ENT. L.J. 421 (2015).

69. Trs. of the Corcoran Gallery of Art v. District of Columbia, 142 Daily Wash. L. Rptr. 2213, 2215 (D.C. Super. Ct. Aug. 18, 2014).

70. *Id.* at 2221.

71. *Id.* The fundraising consultants proposed increasing donations through "better 'Board-building' practices," which the court found speculative at best. *Id.*

72. *Id.* at 2222.

73. *Id.*

74. *Id.*

75. *See id.* at 2215–23 (discussing the court's reasoning for finding the "first requirement for *cy pres* relief" was met).

one for the Corcoran, releasing it from the strictures imposed by the original deed of trust. Nevertheless, the bar the court established for relief was a high one—the threat of institutional failure and financial insolvency. Had the Corcoran Gallery not been facing imminent failure and shuttering, it is not clear that the court would have reached the same decision.

2. Girard College: Is the Hardship Permanent?

Following the Corcoran case, the question of hardship arose again in *In re Estate of Girard*, requiring a Pennsylvania court to press further into what constitutes a sufficient showing of need. The case was not as clear-cut as it was with the Corcoran and, consequently, the court was not as sympathetic to the plaintiff institution.

The Girard will—called by the trial court the "most litigated will in history"[76]—memorialized the last wishes of Stephen Girard. In this will, Girard left the majority of his "considerable estate" to be used to educate the poor and improve their circumstances: "I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of public funds."[77] The will stipulated that these needy students be "fed . . . clothed . . . and lodged in a plain but safe manner."[78]

Over the years, Girard College fiduciaries had successfully sought judicial permission for various deviations, including the admission of women, students of color, and children with one living parent.[79] In 2013, however, the Girard College Board of Directors (Girard College Board) sought permission to deviate from the terms of the will by eliminating the boarding function

76. Orphans' Ct. Op. Sur Decree, Aug. 21, 2014 (Orphans' Ct. Op.) at 1, https://z.umn.edu/OrphansCtDecree (quoting Hershel Shanks, *State Action and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956)). The will was the subject of multiple cases, starting as early as 1844. In fact, the 1844 case of *Vidal v. Girard's Executors* was the case that established the validity of the charitable trust in American law. *See* Vidal v. Girard's Ex'rs, 43 U.S. 127, 196 (1844). For a discussion of the case, see Robert A. Ferguson, *The Girard Will Case: Charity and Inheritance in the City of Brotherly Love*, *in* PHILANTHROPY AND AMERICAN SOCIETY: SELECTED PAPERS 1 (Jack Salzman ed., 1987).

77. *In re* Estate of Girard, 132 A.3d 623, 625 (Pa. Commw. Ct. 2016).

78. *Id.*

79. Orphans' Ct. Op. Sur Decree, Aug. 21, 2014 (Orphans' Ct. Op.) at 17, https://z.umn.edu/OrphansCtDecree.

because of financial hardship.[80] The college's funding derived from coal revenue, rental income, and interest on a residuary fund.[81] The Girard College Board alleged that there had been a decrease in revenue produced from all these sources due to the economic crisis of 2008.[82] The Girard College Board stated that the available income was "insufficient to fund the financial requirements of the college, requiring shortfalls to be funded by the use of Trust principal."[83] Moreover, the Girard College Board claimed that, in the absence of change, the residuary fund "would be exhausted within 25 years."[84]

Like the Corcoran trustees, the Girard College Board detailed the steps it had taken to address the budget shortfalls. The Girard College Board stated it had "significantly reduced expenses" by reducing the student population, and had reduced the college's debt through refinancing.[85] Furthermore, the Girard College Board had decided to defer certain maintenance repairs, including "$3.8 million for deficiency repairs and in excess of $110 million for complete renovations."[86] In an effort to cut costs, the Girard College Board also "froze raises and the defined benefit retirement plan for administrative employees."[87]

The Girard College Board created a strategic steering committee to review proposals for long-term solutions to the college's financial problems.[88] The steering committee's recommendation was that the residential program was too costly and that it should be suspended, at least temporarily, "given the financial limitations and conditions of the physical plant."[89] The college could then focus on a nonresidential program for grades one through eight, consolidating those grades into the lower school building, which would still require four million dollars in

80. The Girard College Board sought to make these changes via both administrative deviation and cy pres. *See* In re *Estate of Girard*, 132 A.3d at 631 (listing the issues raised by the Girard College Board).

81. *Id.* at 626.

82. *Id.*

83. *Id.* at 625.

84. *Id.* at 626.

85. *Id.*

86. *Id.* at 626–27 (internal quotations omitted).

87. Orphans' Ct. Op. Sur Decree, Aug. 21, 2014 (Orphans' Ct. Op.) at 10, https://z.umn.edu/OrphansCtDecree.

88. *See* In re *Estate of Girard*, 132 A.3d at 627.

89. *Id.* The steering committee also presented the Board with the "Girard College Growback Framework and Transition Initiatives." *Id.* The goal was to grow the residuary fund back to $350 million in ten years. *Id.*

renovations.[90] Based on these recommendations, the Girard College Board requested in its cy pres petition to "temporarily modify the provisions of the Will to allow the elimination of the residential program and instead provide an extended day program."[91]

In court, defining what sounded like impossibility rather than impracticability, the judges stated that "the cy pres doctrine cannot be invoked until it is clearly established that the directions of the donor cannot be carried into effect."[92] The court also focused on the temporary nature of the problem. The court noted that the Orphans' Court found it significant, and they did not disagree, "that the Board does not represent that the residential aspect of Girard or the high school are permanently impracticable" and, due to market upturns, the college was in a position to "cover the projected budget for the college for the coming year, operating with both a residential program and a high school."[93] Looking only at one year was deceptive, the Board claimed, because it did not take into account "necessary infrastructure improvements," tenancy loss in some of the college's real estate holdings, or "an increase in capital expenditures for properties held in the Estate's real estate portfolio."[94] The Girard College Board contended that the appropriate question was "whether the Estate will have sufficient financial resources to operate Girard College in perpetuity, as Stephen Girard desired."[95] This argument, however, did not persuade the court.[96]

The problems with the judicial decision were many. The court never articulated a standard for evaluating cy pres based on impracticability. This absence of a standard allowed the court to reject the cy pres petition simply because of the per-

90. *Id.* (noting that "[u]nder the proposal, grades 1 through 8 would be consolidated in the lower school buildings, which were the newest buildings on campus" but even so, "[f]our million dollars in renovations to the lower school buildings would be necessary").

91. *Id.* at 626.

92. *Id.* at 629, 637 (noting the Orphans' Court conclusion and affirming its holding).

93. *Id.* at 629–30, 634.

94. *Id.* at 635.

95. *Id.* ("By limiting the scope of its review to 2013 and 2014, the Orphans' Court failed to appreciate the critical financial challenges facing the Estate that inevitably will lead to an inability to continue operating the College as an educational institution.").

96. *Id.* at 636 (stating that the Girard College Board's arguments from a fact and law argument lack merit and do not support reversal).

ceived temporary nature of the college's problems. The court focused on the college being able to operate for one year, implying that normal operations were not impossible, thereby confusing the impossible and impracticable standards. A cy pres analysis centered on impracticability rather than impossibility might have focused on the long-term sustainability of the college and balanced donor intent with the burden to the institution created by donor conditions.

Equally problematic, in denying the cy pres petition, the court substituted its judgment about strategic planning and the exercise of discretion for the Girard College Board's. The steering committee's findings and the Girard College Board's knowledge of the college's financial situation both suggested that the college's then-current operations were not sustainable, given declining revenue coupled with rising operational expenses. The court, however, denied the Girard College Board the opportunity to exercise discretion and control in governing the institution. This rejection of the Girard College Board's discretion runs contrary to powers attributed to fiduciaries in, for example, the Restatement (Third) of Trusts, which states: "A court will not interfere with a trustee's exercise of a discretionary power (or decision not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties."[97]

Ultimately, then, the court declined to approve any modifications based on the Girard College Board's projections because of an uncertain standard that confused impossible with impracticable. The Girard College Board, consequently, was denied the ability to properly exercise its judgment as a fiduciary and use its institutional expertise to govern the institution. Modification, in this case, was not available as a means to further institutional strategic planning or help improve the college's position prospectively because the financial situation was not sufficiently dire.

3. Sweet Briar College: A Case Study in Donor Governance

This need for discretionary latitude in governance flexibility was apparent in the recent near-failure of Sweet Briar College. Sweet Briar opened its doors in 1906, founded with a bequest from Indiana Fletcher Williams, a wealthy Virginia

97. RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. b (AM. LAW INST. 2007).

woman.[98] Williams left all her "plantation and a tract of land known as Sweet Briar Plantation" for the purposes of forming "a school or seminary for the education of white girls and young women" in memory of her deceased daughter, Daisy.[99] From the time of its opening onward, Sweet Briar remained a women's college dedicated to preparing young women to "be useful members of society."[100]

Suddenly and without warning, Sweet Briar College's Board of Directors (Sweet Briar Board) announced in March 2015 that the college would be closing its doors at the end of the academic year because of financial difficulties.[101] President of the college, James F. Jones Jr., stated that "two key realities" had become inalterable obstacles to the college's financial sustainability: "the declining number" of women selecting to attend single-sex institutions, as well as "the increase in the tuition discount rate" that the college was extending to each new class of incoming students.[102] From 2009 to 2015, enrollment had dropped from 611 students to 561; at the same time, the discount rate had increased from 48.9% to 61.9% for first year students.[103] The Sweet Briar Board also reported that deferred maintenance expenses "were a factor in its decision to close."[104]

In an effort to control expenses, the college suspended all retirement contributions on behalf of employees for five months, the president worked for two weeks without pay, and a small number of administrative and support staff positions were eliminated.[105]

98. *About: History*, SWEET BRIAR COLL., http://sbc.edu/about/history (last visited Apr. 12, 2018).

99. INTERNET ARCHIVE, WILL OF INDIANA FLETCHER WILLIAMS 2–4, https://www.archive.org/stream/willofindianafle00unse#page/n5/mode/2up (last visited Apr. 12, 2018).

100. *Id.*

101. Christy Jackson, *Board of Directors Votes To Close College at the End of 2014–2015 Academic Year*, SWEET BRIAR COLL. (Mar. 4, 2015), http://sbc.edu/news/board-of-directors-votes-to-close-college-at-the-end-of-2014-2015-academic-year.

102. *Id.*

103. Scott Jaschik, *Shocking Decision at Sweet Briar*, INSIDE HIGHER ED. (Mar. 4, 2015), https://www.insidehighered.com/news/2015/03/04/sweet-briar-college-will-shut-down.

104. John T. Casteen, *Learning from Sweet Briar*, ASSOC. OF GOVERNING BOARDS (2015), http://agb.org/trusteeship/2015/julyaugust/learning-from-sweet-briar.

105. Scott Jaschik, *The Price of an Enrollment Shortfall*, INSIDE HIGHER ED. (Nov. 30, 2009), https://www.insidehighered.com/news/2009/11/30/sweetbriar.

At the time that the Sweet Briar Board announced the closing, however, the college's endowment was valued at approximately eighty-five million dollars.[106] Moreover, the endowment value, with some negligible fluctuation, had held steady since 2009.[107] The Sweet Briar Board chair therefore remarked in an interview that he knew one particular question was on the minds of many: "Why don't you keep going until the lights go out?"[108] The total value of the endowment was, nevertheless, a misleading figure. According to Standard and Poor's, only about one-fourth of the endowment funds were unrestricted.[109] The restricted funds could not be used for general operations or as needed by college leadership, thereby rendering the college's financial situation bleaker than the endowment value alone suggested. Despite the endowment value, the college was projecting a two million dollar deficit in 2015 and owed creditors about twenty-five million dollars.[110] One retired college president explained: "[The endowment is] not like a cookie jar that Sweet Briar can use to cover increasing deficits year after year."[111]

One solution would have been for the college to modify conditions placed on restricted endowed funds through cy pres. Lifting restrictions on potentially three-fourths of the endowment—upward of sixty million dollars—could only have helped the college navigate its financial straits. The process might have been burdensome, petitioning for cy pres modifications on each restricted fund. Nevertheless, the option was there for the Sweet Briar Board as its members sought strategic ways to increase disposable, unrestricted income.

Instead, the Sweet Briar Board addressed another cy pres question: what to do with the college assets during and after the school's closure. One month after announcing the closure, college administrators sent letters to living donors requesting permission to use restricted endowed funds for "general charitable purposes . . . including costs that the Sweet Briar Board (or a committee acting on its behalf) determines are necessary and proper to effect the closure of the college and winding up of

106. Jaschik, *supra* note 103.

107. *Id.*

108. *Id.*

109. Ry Rivard, *Who Gets the Endowment?*, INSIDE HIGHER ED. (Mar. 5, 2015), https://www.insidehighered.com/news/2015/03/05/where-will-sweet-briars-85m-endowment-go.

110. *Id.*

111. *Id.*

its affairs."[112] An outraged alumnae group quickly mobilized and responded by requesting an injunction that would prevent the college from using any donor funds in service of closing the school.[113] Before litigation could get too far, however, the parties reached a settlement and an infusion of cash from alumnae allowed Sweet Briar to keep its doors open.[114] As part of the settlement, the state attorney general agreed to lift restrictions on sixteen million dollars in the college's endowment fund.[115]

Left unanswered were questions about how the court would have treated any cy pres claims if the Sweet Briar Board had pursued modifications instead of settling with the alumnae. Whether the Sweet Briar Board had asked to lift restrictions to continue operating, or, alternately, to proceed with the closure, it is possible that a court evaluating the school's finances might have been inclined to reject the petitions because of the relatively robust endowment fund that existed. Sweet Briar was not in the immediate financial crisis that the Corcoran was when the trustees submitted their cy pres petition. Sweet Briar looked more like Girard College than the Corcoran in that the present crisis was based on future predictions of unsustainable finances caused, in part, by restricted gifts. And, similar to the Girard case, these restrictions on endowed funds had created a system of donor governance that hampered Sweet Briar's leadership from fulfilling fiduciary duties and exercising strategic control over college operations.[116] But,

112. Complaint at 41, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 15009373 (Va. Cir. Ct. Mar. 30, 2015).

113. *Id.* at 3. The alumnae group argued that all donor contributions—including college property and land given by Indiana Williams—were subject to trust rules and had to be treated as charitable gifts. *Id.* The alumnae group based their argument concerning Williams' founding gift on the fact that Indiana Williams' bequest provided for the perpetual existence of Sweet Briar and stated: "No part of the [donated land] shall at any time be sold or alienated by the corporation . . . [and] the personal property herein given shall be kept inviolate as an endowment fund . . . ." *Id.* at 16. The question of whether trust rules could apply to the college as a nonprofit corporation went to the Virginia Supreme Court and the conclusion was that trust law could indeed apply. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 WL 3646914, at *2 (Va. June 9, 2015).

114. Scott Jaschik, *Sweet Briar Survives*, INSIDE HIGHER ED. (June 22, 2015), https://www.insidehighered.com/news/2015/06/22/deal-will-save-sweet-briar-college.

115. *Id.*

116. David Yermack, *Donor Governance and Financial Management in Prominent US Art Museums*, 41 J. CULTURAL ECON. 215, 216 (2017) (discussing how donor restrictions "limit operating flexibility in a way that could com-

without additional evidence of imminent failure, a court may not have been convinced that cy pres modification was appropriate as a means of solving Sweet Briar's financial predicament.

As the Corcoran, Girard, and Sweet Briar cases all demonstrate, income flexibility is critical when institutions are in financial distress, whether the distress is caused by decreased government funding, increased operational costs, or endowment erosion. And in all cases, gift restrictions hampered the ability of institutional fiduciaries to fulfill their duties to the institution by undertaking creative solutions to financial problems. Without a clear standard for cy pres in the context of financial hardship, institutions like Sweet Briar and Girard will continue to find themselves in an unenviable position, unable to either use gift funds or escape from the gift restrictions until their position is one of financial desperation like the Corcoran.

As one commentator has noted, "Boards at other institutions will face issues not unlike the ones Sweet Briar is facing now."[117] A confused impracticability standard will leave these institutional leaders without the ability to exercise their best judgment in administering institutional assets during the times when managerial expertise and flexibility are most needed.

II. TRUST LAW'S BALANCING ACT

In the search for a more consistent cy pres standard, contract and property law are both effective tools for rebuilding trust law. Trust law shares important architectural features with both contract and property law, resembling each in certain doctrinal ways and replicating both in conceptual terms. Contract law offers lessons in promise keeping and agreement compliance. Property law, on the other hand, evidences a strong concern for meeting needs through the productive use of assets. This Part analyzes how contract and property doctrines address questions analogous to those posed in the cy pres context and how those doctrines resolve the questions.

promise an organization's efficiency . . . because they constrain the opportunities for non-profit managers to expropriate resources").

117. Casteen, *supra* note 104.

A. RULES FOR KEEPING PROMISES

Contract law is the only other body of law with an actual doctrine of impracticability, and it shares many qualities with the trust law doctrine. For this reason alone, an inquiry into the relationship between contract and trust is warranted. The trust and contract law comparison is also appropriate because the two bodies of law share theoretical underpinnings. This Section explores the historical connection between trust and contract, and then analyzes the contract doctrine of impracticability.

1. The Trust-Contract Connection

Trust and contract law are built around similar conceptual puzzles concerning how agreements are made, what promises must be kept, and what the default rules of obligation are. In the following discussion, I explore the similarities between trust and contract law, paying particular attention to the status of charitable trusts and gifts.

a. Making the Historical Connection

Trust law shares a conceptual relationship with contract law because both bodies of law have historically carried with them the idea of agreement and obligation. Maitland, writing in the early 1900s, observed that "when the English Chancellor first began to enforce the trust, the trust 'generally ha[d] its origin in something that we can not but call an agreement.'"[118] Maitland also observed that "[the] trust was originally regarded as an obligation, in point of fact a contract though not usually so called."[119] Likewise, Holdsworth wrote, "Chancellors carried with them into the court of Chancery the idea that faith should be kept; and enforced agreements, . . . whenever they thought that in the interests of good faith and honest dealing, they ought to be enforced."[120] A guiding principle in Chancery,

118. Langbein, *supra* note 17, at 628. Langbein states: "Sensitivity to the contractarian character of the trust can be traced to Maitland's celebrated lectures on Equity, published posthumously in 1909." *Id.*

119. *Id.*

120. WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 456 (1922). *See also* W.T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 166 (1914) (discussing that there is "a moral duty" to fulfill promises and that such promises should be enforced).

the site of all trust litigation, was *pacta sunt servanda* (promises must be kept).[121]

In the late seventeenth and early eighteenth centuries, legal scholars and commentators posited that trust claims could be categorized as either property or contract claims.[122] And while the majority of commentators pressed the property law connection, scholars like Henry Ballow made attempts to further the analogy between trust and contract law. Ballow identified the trust "as a species of contract"[123] and the analogy between trust and contract, as imagined by Ballow, was a productive means "of integration of the trust concept both into the general body of the law"[124] and of "analyzing and classifying the case-law on trusts."[125] Furthermore, Ballow observed that trust and contract law both had a jurisdictional home in Chancery, where claims "regard[ed] not the outward form, but the inward substance and essence of the matter, . . . where the persons interested fully intend[ed] to contract a perfect obligation, though, by mistake or accident, they omit[ted] the set form of law."[126] Legal historians note, however, that the contract analogy was ultimately overshadowed by the analogy to property.[127]

In a modern context, John Langbein has argued that it is important to revive this understanding of trusts as contracts.

121. JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 311 (2009) ("Almost all cases in Chancery can be reduced to this simple formula, and the answer of conscience was as simple: promises have to be kept—*pacta sunt servanda* . . . ." (citing Franz Metzger, *The Last Phase of the Medieval Chancery*, *in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 79, 84 (Alan Harding ed., 1980))).

122. Michael Macnair, *The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries*, *in* ITINERA FIDUCIAE 207, 235 (Richard Helmholz & Reinhard Zimmermann eds., 1998). Hansmann and Mattei remark that "in the continental legal tradition it was obligation that played the most important role in framing trust-like arrangements." Hansmann & Mattei, *supra* note 13, at 441.

123. Jones, *supra* note 16, at 162 (citing HENRY BALLOW, A TREATISE OF EQUITY (1737)).

124. Macnair, *supra* note 122. Ballow is generally credited with writing the 1737 A TREATISE OF EQUITY. *See, e.g.*, WILLIAM & MARY L. LIB., *A Treatise of Equity*, WYTHEPEDIA: THE GEORGE WYTHE ENCYCLOPEDIA, http://www.lawlibrary.wm.edu/wythepedia/index.php/Treatise_of_Equity (last visited Apr. 12, 2018).

125. *Id.*

126. JOHN LORD ELDON, A TREATISE OF EQUITY 40–41 (1820).

127. Macnair, *supra* note 122 ("English law schools . . . teach trusts as a branch of property law, not a branch of obligations.").

Langbein writes that the contract analogy has become increasingly apt "in light of the great changes that have occurred in the character and function of the modern trust."[128] Langbein observes that "[t]he modern trust has become a management regime for a portfolio of financial assets,"[129] making the contractual nature of trusts readily apparent. Langbein points specifically to changes in the fiduciary-duty standard in trust law, the new prevalence of institutional trustees, and the reliance on the remedy of specific performance as evidence of the likeness between trust and contract.[130] Trusts, like contracts, may also share long-term goals since "contracting parties may be assumed to desire a set of contract terms that will maximize the value of the exchange."[131] The bottom line: "Trusts are contracts."[132]

b. Are Charitable Gift Agreements Contracts?

Private trusts may indeed be contracts, but there is still a question about whether charitable trusts fit the rubric. Langbein excludes charitable trusts from his account of trust as contract, stating that "contractarian autonomy is more restrained" with the charitable trust.[133] Trust and gift instruments are, he observes, a highly specialized form of contract with a third-party beneficiary: "Charitable trusts are quasi-public institutions that must satisfy standards of public benefit articulated both in the common law and in the tax code and regulatory law."[134] Donors and institutions are not, therefore, contracting with full freedom. Donors must align charitable gifts with the institution's mission, which is in turn circumscribed by the charitable purposes doctrine and tax law.[135] Charitable trusts

128. Langbein, *supra* note 17, at 643.

129. *Id.* at 629.

130. *Id.* at 628 ("The law of fiduciary administration, which is the centerpiece of the modern trust, is overwhelmingly contractarian.").

131. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89 (1977).

132. Langbein, *supra* note 17, at 627.

133. *Id.* at 631.

134. *Id. See also* William P. Sullivan, *The Restricted Charitable Gift as Third-Party Beneficiary Contract*, 52 HIGHER REAL PROP. TR. & EST. L.J. 79 (2017) (stating that contract is the appropriate lens for analyzing restricted gifts because of the principle of private autonomy).

135. The charitable purposes doctrine is codified by the UTC and states that: "A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or munic-

and gift agreements are, from this perspective, a carve-out from his general proposition.

In other respects, however, the analogy still stands. Alex Johnson and Ross Taylor have taken up this question and concluded that charitable trusts are best understood as relational contracts. "[T]he charitable trust," they observe, "is in some respects the prototypical relational contract: it is a long-term, inherently flexible arrangement that employs fiduciary standards as a bonding mechanism . . . and in which the precise terms of the agreement (trust) are incapable of resolution ex ante."[136] Charitable trust and gift agreements can be understood as relational contracts in the sense that "the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate."[137] Charitable gift agreements, like relational contracts, are defined by the impossibility of complete knowledge. Gift agreements cannot ever be drafted such that they are responsive to and address all the external events as well as administrative problems that come with time.[138]

In addition, charitable gift agreements are almost always long-term agreements, even when the agreement governs the terms of a spend-down gift instead of an endowed one. In this respect, gift agreements—like relational contracts—tend to be agreements in which "the parties are presumed to have intended an open-ended relationship, with the contract providing a framework within which adjustment may continually take place."[139] Endowed gift agreements that exist in perpetuity, in particular, share with relational contracts this quality of open-endedness given that the gift restrictions on these gifts may govern the gift administration for not just decades, but centuries. In such cases, "[w]here the future contingencies are pecu-

ipal purposes, or other purposes the achievement of which is beneficial to the community." UNIF. TR. CODE § 405(a) (UNIF. LAW COMM'N 2000).

136. 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, 571 (1989).

137. Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon*,*"* 135 U. PA. L. REV. 1123, 1171 (1987) (quoting Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569).

138. For this reason, the prevailing tendency in development offices is therefore to draft agreements that specify fewer details and build in more flexibility rather than less.

139. Halpern, *supra* note 137 at 1171.

liarly intricate or uncertain"—as happens with both long-term gift agreements and relational contracts—"practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting."[140] From this perspective, charitable gift agreements strongly resemble relational contracts.

2. Contract Law and Commercial Impracticability

Contract law, like trust law, has doctrines that allow one party's obligations to be excused in limited circumstances. The doctrines of impossibility, impracticability, and frustration—collectively named the doctrines of excuse—are available in cases of changed circumstances, frustration of purpose, and economic hardship. This Section analyzes the contours of commercial impracticability and explains how the doctrine has played out in several landmark cases.

a. Contract's Doctrines of Excuse

Before 1863, the leading case concerning excuse and discharge from contract terms was *Paradine v. Jane*.[141] In *Paradine*, the landlord brought an action to recover unpaid rent from a tenant who raised the defense that he had been deprived of enjoying the rented property because an invading enemy army had demolished it.[142] The tenant argued that he should have been excused from paying further rental payments to the landlord, once the army had laid waste to the property.[143] The court did not find this defense persuasive and concluded that the tenant bore the risks of performance since he could have made contractual provisions to guard himself against unforeseen contingencies.[144]

In 1863, however, the doctrine changed. *Taylor v. Caldwell*[145] established the doctrine of impossibility.[146] Caldwell

140. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090 (1981).

141. Paradine v. Jane (1647) 82 Eng. Rep. 897.

142. *Id.* at 897.

143. *Id.*

144. *Id.*

145. Taylor v. Caldwell (1863) 122 Eng. Rep. 309.

146. One scholar argues that three cases excusing performance predate *Taylor*: Williams v. Lloyd (1628) 82 Eng. Rep. 95 (detailing a case where the subject matter of the contract of bailment was destroyed); Hyde v. Dean & Canons of Windsor (1557) 78 Eng. Rep. 798 (articulating a situation where a party to a personal services contract died); Abbott of Westminster v. Clerke

owned a music hall that he rented to Taylor for use as a concert venue, but before the concerts could take place, the hall burned to the ground.[147] Taylor then sued Caldwell for breach of contract.[148] *Taylor* held that an implied condition did exist in the contract that would excuse one party from performance under certain, exceptional circumstances, in the absence of express terms to the contrary.[149] The court stated: "[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[150] After *Taylor*, courts began to allow discharge from obligation and performance "[w]here the parties' particular purpose [had] been frustrated by an unanticipated contingency, . . . since the bargain [had] lost its value."[151]

The doctrine of commercial impracticability first emerged in *Mineral Park Land Co. v. Howard* in 1916.[152] The parties had entered into a written agreement obliging the defendants to haul gravel from the plaintiff's land to prepare it for the construction of a bridge.[153] When a conflict arose because the defendants had hauled less than expected or bargained for, the court ruled in favor of the defendants. The court wrote that the defendants could not have hauled out any more gravel "'by ordinary means,' or except by the use, at great expense, of a stream dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay."[154]

Following the logic of *Taylor* and its progeny, the *Mineral Park* court observed that it was "well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, perfor-

(1536) 73 Eng. Rep. 59 (describing a case where a supervening illegality due to a subsequent Act of Parliament excused performance). *See* John Henry Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 420 (1969).

147. *Taylor*, 122 Eng. Rep. at 310.

148. *Id.* at 311.

149. *Id.* at 312.

150. *Id.* at 314.

151. Paula Walter, *Commercial Impracticability in Contracts*, 61 ST. JOHN'S L. REV. 225, 232 (1987).

152. Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916).

153. *Id.* at 458.

154. *Id.* at 459.

mance is excused to the extent that the thing ceases to exist or turns out to be nonexistent."[155] Extending this logic, the court concluded that impossibility meant more than a literal change in circumstance: "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[156] The court qualified this statement, however, by adding that a defendant could not raise this defense solely because costs exceeded original estimations and therefore entailed a financial loss for the defendant.[157] Rather, "where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."[158]

The question left unanswered by *Mineral Park* has persisted, that is, at what point does cost and hardship become prohibitive. Put another way: "When does a difference in degree become a difference in kind?"[159] As *Mineral Park* concluded, "Economic events which are unpredictable to some extent cannot be the subject of an action to discharge or to reform merely because the parties are disappointed with the manner in which events unfolded."[160] A number of courts have declined to extend *Mineral Park*'s broad holding to other scenarios. In *W.H. Edgar & Son v. Grocers' Wholesale Co.*, an Eighth Circuit case not long after *Mineral Park*, the court returned to a dictionary definition of impracticable—"[i]ncapable of being practiced, performed, or accomplished by the means employed or at command"[161]—and concluded that this "common and ordinary"[162] meaning was appropriate in the absence of "financial panic or depression."[163]

The bulk of impracticability cases, however, have arisen only in the past half century, as "courts have attempted to

155. *Id.* at 459 (citing Williams v. Miller, 68 Cal. 290 (Cal. 1885); Brick Co. v. Pond, 38 Ohio St. 65 (Ohio 1882); *see also* Ridgely v. Conewago Iron Co., 53 F. 988 (E.D. Pa. 1893)).

156. *Mineral Park Land Co.*, 156 P. at 460 (citing 1 BEACH ON CONTRACTS § 216 (1897)).

157. *Id.* at 460.

158. *Id.*

159. Walter, *supra* note 151, at 234.

160. *Id.* at 253.

161. W.H. Edgar & Son v. Grocers' Wholesale Co., 1 F.2d 219, 223 (8th Cir. 1924).

162. *W.H. Edgar & Son*, 1 F.2d at 223.

163. *Id.*

make sensible application of the doctrine to a confused and complex commercial world in which contractual relations were formed in a context, if not of war, then of the rumors of war, embargo, shortages, and inflation."[164] In this modern context, the Third Circuit has articulated the general standard: "The party seeking to excuse his performance must not only show that he can perform only at a loss but also that the loss will be especially severe and unreasonable."[165] Section 2-615 of the Uniform Commercial Code, followed by the Restatement (Second) of Contracts,[166] sets forth the minimum requirements for excusing contract performance, stating that nonperformance is excused "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." Neither courts nor uniform law provides any additional guidance on how to "define or categorize those contingencies which entitle a party to claim impracticability."[167]

Like trust law impracticability, then, contract impracticability can be a blurry doctrine that forces judicial guesswork about the intention of contracting parties.[168] Nevertheless, the focus is on extreme cost in the context of extreme circumstances brought on by war, natural disaster, unforeseen events, and financial panic.

b. ALCOA*: The Role of Financial Hardship*

The modern commercial impracticability doctrine was forged in a time of international crisis and inflation when "the uncertainty surrounding the growth and development of private nuclear power . . . [and] the sharp increase in fuel costs . . .

164. Halpern, *supra* note 137, at 1145.

165. Gulf Oil Corp. v. Fed. Power Comm'n., 563 F.2d 588, 600 (3d Cir. 1977).

166. U.C.C. § 2-615 (AM. LAW INST. & UNIF. LAW COMM'N). The Restatement "treats impracticability of performance and frustration of purpose as tandem concepts, placing each squarely in the realm of inherent judicial power to do what justice requires by way of relieving contractual obligation where extraordinary circumstance so requires." Nicholas R. Weiskopf, *Frustration of Contractual Purpose—Doctrine or Myth*, 70 ST. JOHN'S L. REV. 239, 259 (1996).

167. Walter, *supra* note 151, at 227.

168. *See* Marianne M. Jennings, *Commercial Impracticability—Does It Really Exist?*, 2 WHITTIER L. REV. 241 (1980); Schlegel, *supra* note 146; John H. Stroh, *The Failure of the Doctrine of Impracticability*, 5 CORP. L. REV. 195 (1982); George Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt To Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME L. REV. 203 (1979).

provided the dramatic setting for the troubled and, to many, troubling, judicial treatment of impracticability."[169] One reason for increased fuel costs was the closure of the Suez Canal, which forced ships to travel around the Cape of Good Hope.[170] This rerouting resulted in extra expense, which in turn led to a spate of cases turning on the claim of commercial impracticability.[171] Consequently, "[t]he modern . . . doctrine of commercial impracticability . . . finds its most recognized illustrations in the so-called 'Suez cases,' arising out of the various closings of the Suez Canal."[172]

In *Transatlantic Financing Corp. v. United States*, for example, the plaintiff company claimed it had a right to be paid the increased cost of shipping a full cargo of wheat from Texas to Iran via the Cape of Good Hope because of the Suez Canal closure.[173] The court held that performance was not impracticable and therefore not excused.[174] That the Suez Canal might be closed, the court remarked, was foreseeable, and the conditions the ship faced taking the alternate route were not onerous.[175] The only difference, the court stated, was the cost.[176] The court added that cost could, potentially, render performance impracticable.[177] However, the court concluded, "to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative."[178] The *Transatlantic* court set forth what would be a recurring refrain—cost may count, but not here. Other courts followed this line of reasoning, and the vast majority of commercial impracti-

169. Halpern, *supra* note 137, at 1145.

170. *See, e.g.*, Transatlantic Financing Corp. v. United States, 363 F.2d 312, 314–15 (D.C. Cir. 1966).

171. *Id.*

172. E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975).

173. *Transatlantic*, 363 F.2d at 315.

174. *Id.* at 320.

175. *Id.* at 319 ("The goods shipped were not subject to harm from the longer, less temperate Southern route.").

176. *Id.* ("The only factor operating here in the appellant's favor is the added expense, [which was] allegedly $43,972.00 above and beyond the contract price of $305,842.92.").

177. *Id.* ("[I]t may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability. . . .").

178. *Id.*

cability claims failed. One major exception was the *ALCOA* case.[179]

In *Aluminum Co. of America v. Essex Group, Inc.*, (*ALCOA*), the two parties entered into an agreement that ALCOA would provide Essex with its long-term aluminum needs, so that Essex could expand its operations into the manufacture of aluminum wire products.[180] The contract contained a price escalation formula that varied the price per pound in accordance with changes in the Wholesale Price Index–Industrial Commodities (WPI).[181] This escalation formula "was intended by the parties to reflect actual changes in the cost of the non-labor items utilized by ALCOA in the production of aluminum from alumina at its Warrick, Indiana smelting plant."[182] The problem began in 1973, when "OPEC actions to increase oil prices and unanticipated pollution control costs greatly increased ALCOA's electricity costs."[183] Electric power rates rose much more rapidly than the WPI, and ALCOA was faced with a substantial cost increase.[184] The court credited ALCOA's evidence that the company stood to lose in excess of $75,000,000 if forced to carry through on its contractual obligation.[185]

The court set forth the Restatement and the UCC standards and stated:

> A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.[186]

The court also noted that variations in value and price "are the rule rather than the exception," and that relief could only be granted "when the variation in value is very great and is caused by a supervening event that was not in fact contemplated by the parties and the risk of which was not allocated by them."[187]

179. Aluminum Co. of Am. v. Essex Grp., Inc. (*ALCOA)*, 499 F. Supp. 53 (W.D. Pa. 1980).

180. *Id.* at 55–56.

181. *Id.* at 56.

182. *Id.*

183. *Id.* at 58.

184. *Id.*

185. *Id.* at 59.

186. *Id.* at 72 (citing RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d (AM. LAW INST. 1981)).

187. *Id.* at 72–73 (quoting ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1355 (1962)).

The court nevertheless observed that there could be exceptional circumstances that merited relief, such as "a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance."[188] The ALCOA situation, the court concluded, was such a case.[189]

Ruling in favor of ALCOA, the court stated: "This strict standard of severe disappointment is clearly met in the present case."[190] The court found that ALCOA had sufficiently proved that the company stood to lose "well over $60 million dollars out of pocket over the life of the contract due to the extreme deviation of the WPI-IC from ALCOA's actual costs."[191] Preceding cases, the court reasoned, had not shown such a "gravity of harm."[192] Moreover, the court mentioned that "the circumstances surrounding the contract show a deliberate avoidance of abnormal risks."[193]

Later cases have consistently declined to follow this example, which now stands out as an outlier result and has been widely criticized.[194] Nevertheless, the court's decision in *ALCOA* offers a useful benchmark for demonstrating that financial hardship is sometimes so severe that a party merits relief. Indeed, *ALCOA* stands for the proposition that there is a point at which contract enforcement would be manifestly unjust to one party, and that party would suffer economic consequences capable of changing the entire financial life of the company. In *Transatlantic*, the court observed: "The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of

188. *Id.* at 74. (quoting U.C.C. § 2-615 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM'N 1977)).
189. *Id.* at 76.
190. *Id.* at 73.
191. *Id.*
192. *Id.* at 76.
193. *Id.* at 75.
194. Halpern, *supra* note 137, at 1126 (stating "in the seven years since the case was decided, *ALCOA* has had little impact on judicial thought").

requiring performance."[195] In *ALCOA*, the court identified that line.[196]

c. Westinghouse*: Why Is Hardship So Hard*

Westinghouse, like *ALCOA*, is a story of the energy crisis and it tracks the history of nuclear power.[197] In 1964, Congress enacted legislation that permitted private ownership of uranium, an essential component of nuclear power.[198] Westinghouse was optimistic about the future of nuclear power: "Westinghouse, a manufacturer of [nuclear steam supply] systems, was most anxious to enter into a contract with Florida for its proposed plants . . . ."[199] The court remarked that there was great uncertainty in the industry: "While the potential for nuclear powered plants for the production of electricity was considered bright, reactor sales were not abundant . . . . [U]ncertainty existed during the period of 1965–66 as to whether nuclear power could compete economically in most areas of the country with fossil fuels."[200]

Westinghouse nevertheless entered into negotiations with Florida to build nuclear reactors for the state.[201] Because the state of Florida had no expertise in nuclear power at the time, Florida officials insisted on Westinghouse providing a full package of services.[202] In order to finalize the contract and in anticipation of profit, "Westinghouse took a calculated risk,"[203] agreeing to "a guaranteed ten year fuel cycle cost"[204] that included "the cost of uranium and the purchase and disposal of the spent fuel as a part of the fuel cycle."[205] The contract obligated Westinghouse to dispose of the fuel "as [the company] sees fit," and both parties contemplated reprocessing as the most likely mode of disposal.[206] However, commercial repro-

195. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966).

196. *ALCOA*, 499 F. Supp. at 79.

197. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440, 443 (E.D. Va. 1981).

198. *Id.*

199. *Id.*

200. *Id.*

201. *See id.*

202. *Id.* at 444.

203. *Id.* at 446.

204. *Id.* at 444.

205. *Id.*

206. *Id.* at 443.

cessing was not a common technique used for disposal and Westinghouse "fully understood" that the deal was premised on what the company then deemed to be a reasonable business risk that "commercial reprocessing would come to pass and would be economically feasible."[207]

Reprocessing, unfortunately for Westinghouse, never became economically feasible.[208] Moreover, eleven years after the signing of the contract, a presidential ban was placed on reprocessing, sealing Westinghouse's fate.[209] Consequently, except for eighteen spent fuel assemblies that Westinghouse removed (out of an estimated 981 spent fuel assemblies over the life of the contract), the company did not dispose of any spent fuel.[210] Because of Westinghouse's refusal to remove the spent fuel and consequent breach of contract, Florida was forced to spend approximately ten million dollars to store the spent fuel, which resulted in "increased operating and maintenance costs, as well as potential environmental difficulties."[211] Florida subsequently filed a breach of promise claim against Westinghouse, seeking monetary damages for the money spent to store the spent fuel, as well as a court order for Westinghouse to remove this fuel.[212] Westinghouse claimed commercial impracticability as a defense.[213]

The court concluded that "the facts simply do not support the conclusion that Westinghouse's performance has been rendered impracticable"[214] and referred to the "plain language of the contract"[215] that obligated Westinghouse to remove the spent fuel. The court recognized that Westinghouse had anticipated a profit from reprocessing the fuel, which had not come to pass, but noted that increased expense was not generally a winning argument.[216] Furthermore, the court explained: "[I]mpracticability by reason of additional expense is not to be determined by reference to the loss, or failure to profit, from one particular contract term in isolation. Rather, it is to be

207. *Id.* at 447.
208. *See id.*
209. *Id.* at 449.
210. *Id.*
211. *Id.* at 448.
212. *Id.* at 443.
213. *Id.* at 450.
214. *Id.* at 452.
215. *Id.*
216. *Id.* at 453.

judged from the perspective of the entire undertaking."[217] According to this holistic analysis, Westinghouse had assumed a certain risk and the fact that no profit had been obtained from fuel reprocessing did not lead to a finding of impracticability.[218]

The larger part of the court's analysis, however, dealt with the foreseeability of the result. If a "promisor had no reason to anticipate a supervening event which radically increases the difficulty of performance, or which renders performance impossible, it is manifestly unfair to hold him to the agreement."[219] The relevant example for the court was a total crop failure.[220] The rationale for holding parties to a high standard of foreseeability was that, if the parties could have reasonably anticipated an event, then the parties should have bargained for provisions to protect themselves in the eventuality of such occurrences.[221] The court acknowledged that "the future is by definition unknowable," but a party to a contract could, or should be "aware of a certain trend, or that a given state of affairs is in flux, or that an assumption is more than usually uncertain."[222]

The court further emphasized that Florida had specifically bargained to have no responsibility for fuel removal. The court repeated the statement of Florida's chief executive officer, who said: "I do not want to buy a sheep to get a suit of clothes, and have the sheep sheared, dyed, treated, woven into cloth, cut, and sewn into a suit . . . . I want to buy a suit already made."[223] The court also had little doubt about Westinghouse's assumption of risk: "Westinghouse was, in its eagerness to construct the power plants, willing to accept risks which Florida was not willing to take."[224] In short, Westinghouse had been eager to reap anticipated profit and had failed to bargain for any provisions that would have saved the company in the event of market changes and new regulation.

Westinghouse, consequently, affirmed the proposition that, absent cataclysmic intervening circumstances, parties were re-

217. *Id.* (citing E. Air Lines v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); United States v. Wegematic, 360 F.2d 674 (2d Cir. 1966)).

218. *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. at 454.

219. *Id.*

220. *Id.*

221. *See id.*

222. *Id.*

223. *Id.* at 444.

224. *Id.* at 447.

sponsible for creating various forms of self-protection through bargaining.[225] While degree of monetary loss and economic hardship are factors, then, in the assessment of commercial impracticability, corporate and contract norms place even greater weight on the ability of contracting parties to bargain and create their own contractual exit mechanisms. Financial hardship may create impracticable circumstances. Companies, however, are expected to bargain around foreseeable difficulties.

B. RULES FOR MEETING NEEDS

If contract law provides lessons about keeping promises, property law provides lessons about meeting needs. And if contract law is about managing the relationship between parties, property law is about the managing the asset. In this Section, I explain the longstanding connections between trust and property law and analyze relevant doctrines that property law has to offer as examples of what property owners can do in situations of difficulty, need, and impracticability.

1. The Trust-Property Connection

However compelling the comparison between trust and contract is, the comparison between trust and property is the conventional one. Trust has long been considered a form or branch of property law, and most accounts focus on trust's "proprietary interests and relations."[226] This approach is often based on the trust's origin as a means of conveying land.[227] Moreover, historically, a trust could not exist without the res.[228] Whereas a maxim of equity is that a trust will not fail for the want of a trustee, the same cannot be said when the trust asset is absent. The asset—property—is critical to the creation and maintenance of a trust.

a. The Roots of the Connection

Early modern legal writers, including Blackstone, analogized the trust to a Roman form of property ownership called the *fideicommissum*, which emphasized the proprietary nature

225. *Id.*
226. Macnair, *supra* note 122, at 213.
227. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 628–29 (2004).
228. The UTC has abrogated this rule and a completely unfunded trust can now exist. *See* UNIF. TR. CODE § 401 (UNIF. LAW COMM'N 2000).

of the trust.[229] Another analogy, that between the trust and the usufruct, also strengthened the property facet of the trust.[230] To further these analogies and draw out the property nature of trusts, commentators have routinely highlighted the beneficiary's interest in the trust property, and the fact that trusts are a vehicle for wealth transfer: "trusts of land descend as land should, including following local custom of the land where the property is located."[231]

The more modern debate concerning the nature of trust extended these conversations and became, in many ways, a dialogue between Frederic W. Maitland and Austin W. Scott.[232] Maitland was "the greatest scholar of the common law" and "got the contractarian basis of the trust right," according to Langbein. Nevertheless, Scott "had the fortitude to write his error into the Restatement of Trusts."[233] The first Restatement of Trusts, from 1935, said "[t]he creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract."[234] More recently, Henry Hansmann and Ugo Mattei supported the trust-as-property theory by highlighting the importance of trust law's asset partitioning function. Hansmann and Mattei suggest "that it is precisely the property-like aspects of the trust that are the principal contribution of trust law."[235] Of particular importance to Hansmann and Mattei is the way in which spendthrift and discretionary trusts enable a beneficiary to shelter assets from creditors. Hansmann and Mattei observe, "[w]hen we say that assets are someone's property, we generally mean (among other things) that those assets are presumed available to satisfy claims of that person's creditors."[236] Trust law modifies these property rules by taking trust assets out of the reach of creditors and "thus appropriately can be said to involve property law."[237]

229. Macnair, *supra* note 122, at 214.

230. *Id.* at 215–16.

231. *Id.* at 222.

232. Langbein, *supra* note 17, at 644.

233. *Id.*

234. RESTATEMENT (FIRST) OF TRUSTS § 197 cmt. b (AM. LAW INST. 1935). Scott resisted the contract analogy because it did not account for self-settled trusts or equitable tracing against nonparties to the trust deal. *See* Austin Wakeman Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917).

235. Hansmann & Mattei, *supra* note 13, at 469–70.

236. *Id.*

237. *Id.*

A trust may be a contract. But a trust is also property. Trusts involve the keeping and care of assets, and trust law both builds on and modifies property law in regulating this specialized form of property ownership and management.

b. Charitable Trusts Are a Special Property Type

Charitable trusts and gifts are also types of property. Charitable giving is the transfer of property, and the gift itself is solicited, transferred, and ultimately managed as an institutional asset. But charitable gifts are a special kind of property because they are exempt from the rule against perpetuities. Detailed gift conditions placed on endowed gifts therefore allow donors to control their contributions well past the end of their own lives.[238] Charitable gifts are also subject to special tax rules. Since the introduction of the charitable deduction in 1917, a donor has been allowed to deduct charitable contributions, subject to certain limitations.[239] These charitable contributions can be made either as trusts, as lifetime gifts, or bequests.[240] A donor can deduct up to fifty percent of her annual adjusted gross income in charitable gifts and can also take carryover gift deductions for five years.[241] This includes gifts made as charitable trusts, for which donors can take a tax deduction at the time the trust is created.[242]

238. In addition, nonprofit corporations can exist in perpetuity.

239. The deduction is codified at I.R.C. § 170 (2012). I.R.C. § 170(c)(2) defines entities to which deductible contributions may be made. Congress first adopted a contributions deduction in 1917. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330.

> Until the mid-1950s, the Code limited most people to a deduction equal to fifteen percent of their income; this limit rose to thirty percent in 1954 and remained at that level until 1969. Also prior to 1969, individuals whose charitable gifts and income taxes together surpassed ninety percent of their taxable income in eight of the ten preceding years were allowed an unlimited deduction . . . . Also in 1969, the general AGI limit rose to its current level of fifty percent.

Miranda P. Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 171–72 (2008) (footnotes omitted); *see also* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 411 (7th ed. 2013) ("Although Congress provides incentives for individuals to donate significant portions of their income to charities, it does not believe individuals should be permitted to eliminate their tax liability entirely . . . ."). Charitable contributions can also reduce tax liability in the context of both gift and estate taxes as well.

240. *See supra* note 239 and accompanying text.

241. *See* I.R.C. § 170(b)(1)(A), (b)(1)(D)(ii).

242. *See* I.R.C. § 170(c)(2).

These exemptions and various forms of special treatment exist because charitable gifts are supposed to provide public benefit by funding the purposes stated in the charitable purposes doctrine.[243] In this way charitable gifts are intrinsically different from ordinary property. Addressing the question of tax treatment for charitable institutions, the Supreme Court in *Bob Jones University v. United States* stated: "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."[244] Charitable gifts are a form of property meant to provide specific benefits not just to an institution but also to the public.

2. Property Doctrines of Necessity and Hardship

Property rules focus heavily on questions about how to enable productivity, efficiency, and alienability with respect to property. In particular, the doctrines of necessity and variance have bearing on trust law because, with these doctrines, "[t]he focus is on use rather than ownership."[245] In this Section, I analyze in detail how easements by necessity and variances operate. I also address how these doctrines solve problems of necessity and hardship and how these approaches have salience for trust law.

a. Easements by Necessity: Learning from the Landlocked

Easements by necessity are implied easements that arise "when there is no feasible way to enter or leave a property without trespassing on another person's land."[246] The Restatement (Third) of Property defines an easement by necessity as follows: "A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies

243. *See* Eason, *supra* note 2, at 124 ("[G]ifts for charitable purposes must by definition inure to the public good.").

244. Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

245. John G. Cameron, Jr., *What You Should Know About Easements*, PRAC. REAL EST. LAW., Mar. 2010, http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/PREL1003_Cameron_thumb.pdf.

246. DANIEL B. BOGART & JOHN MAKDISI, INSIDE PROPERTY LAW: WHAT MATTERS AND WHY 228 (2009).

the creation of a servitude granting or reserving such rights."[247] Similarly, the Restatement drafters noted: "Access rights are almost always necessary to the enjoyment of property. In a conveyance that would otherwise deprive the owner of access to property, access rights will always be implied."[248]

The common law rule can be traced back to the thirteenth century in England. A maxim dating from the time of Edward I (1239–1307) declared that "one who grants a thing must be understood to have granted that without which the thing could not be or exist."[249] A fourteenth-century English case held that a grantee was allowed to use a fishing net or other, similar device to take fish if there was a grant of the pond with the fish. The grantee could not, however, "cut a ditch and drain the pond for the purpose of getting the fish."[250]

The case and maxim both exemplify the theory of the easement by necessity, which is that property law presumes the intention of the parties is to convey benefit. Otherwise stated, "the law will not presume that was the intention of the parties, that one should convey land to the other, in such a manner that the grantee could derive no benefit from the conveyance."[251] Later cases have also articulated a complementary public-policy rationale. In *Buss v. Dyer*, a case that turned on access to a chimney, the court, in declining to grant the easement, stated: "by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation."[252] Public policy favors the productive use of property.[253]

Standards vary by state, but the general framework for easements by necessity requires that there must be unity of ownership of the entire tract prior to division, the necessity for easement must have existed at time of severance, and necessity

247. RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 2.15 (AM. LAW INST., Tentative Draft No. 1, 1989).

248. *Id.*

249. *Id.* § 2.15 cmt. a.

250. *See* James W. Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 572 (1925). Simonton provides a good overview of the history of the doctrine. *Id.*; *see also* Peter G. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C. L. REV. 223 (1980).

251. Simonton, *supra* note 250, at 576.

252. Buss v. Dyer, 125 Mass. 287, 291 (1878).

253. *Id.* (noting that, as a matter of public policy, "no land should be left inaccessible for purposes of cultivation").

for the particular easement must be great.[254] Within this framework, judicial inquiry focuses on what degree of necessity the grantee must experience and what the scope of the easement is.[255] With respect to the degree of necessity, property standards are somewhat akin to contract impracticability and financial hardship standards and "the overwhelming majority of jurisdictions hold that an easement by necessity must be more than simply a matter of convenience."[256] For this reason, if the landowner has alternative access, even if the alternative is substantially less convenient, courts hesitate to grant the easements.[257]

The test then becomes whether reasonable or strict necessity exists for an easement. The majority rule is reasonable necessity, and "courts will normally consider the circumstances of both parties and then balance the needs of the claimant against the burden that will be placed on the servient estate."[258] This majority standard is based on the notion that property should be used productively and "to accomplish this goal, a court will lend its hand to establish a right of ingress and egress where none exists."[259]

Easements by necessity most frequently occur when a parcel of property is landlocked. Courts grant property owners easements so they can access their property, exit their property, and—in the intervening time—put the property to productive use. As one scholar has said: "Because the doctrine of implied easements is firmly rooted in public policy favoring the productive use of land, there are very few cases in which the owner of landlocked property has been denied an easement by necessity."[260]

For example, a recent Connecticut case turned on the question of whether an easement by necessity could be created to

254. Some states have statutory rules for easement by necessity, but most have a common law rule.

255. *See* Simonton, *supra* note 250, at 580.

256. Hunter C. Carroll, *Property—Easements by Necessity: What Level of Necessity Is Required?*, 19 AM. J. TRIAL ADVOC. 475, 476 (1995).

257. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 101 (1987).

258. Carroll, *supra* note 256, at 476–77.

259. *Id.*

260. *Id.* at 476.

"provide commercial electricity to a parcel cut off from commercial electricity."[261]

In 2001, the plaintiff and his neighbors had entered into an agreement with the defendant to improve an existing right-of-way easement by installing a utility distribution system under it.[262] The defendant charged each neighbor $7500 for use of the new utility easement, demanding in addition that the plaintiff pay not only the $7500 but also grant the defendant the "power to move the location of the easement at will."[263] After refusing the defendant's terms, the plaintiff was cut off from access to commercial electricity. The plaintiff powered his house with a generator, but alleged that the generator did not provide adequate power for "powering security devices, turning on automatically in the event of a flood, and running a refrigerator to preserve perishable food without constant operation of the generator."[264] The trial court nevertheless granted summary judgment for the defendant, concluding that easements by necessity could not be created to provide utilities.[265]

The appellate court disagreed. The appellate court admitted that classic examples of easements by necessity involved a grantee's inability to "use his property beneficially because he lacks physical access to it."[266] The same reasoning about presumed intent that operated in the classic examples, the court concluded, also could be extended to use of utilities:

> Utilities are so obviously necessary for the reasonable use and enjoyment of all types of property that the law will assume that parties to a land conveyance intend to convey whatever is necessary to ensure a property's access to utilities in the same way that the law presumes the parties intended to convey an easement for physical access.[267]

The court mentioned that "because utilities are required for most reasonable uses of property, public policy dictates that access to utilities be implied to ensure 'that no land should be left . . . incapable of being put to profitable use.'"[268] The plaintiff was entitled to an easement by necessity.

261. Francini v. Goodspeed Airport, LLC, 134 A.3d 1278, 1283 (Conn. App. Ct. 2016), *aff'd* 174 A.3d 779 (Conn. 2018).
262. *Id.* at 1281.
263. *Id.*
264. *Id.*
265. *Id.* at 1282.
266. *Id.* at 1283.
267. *Id.* at 1285.
268. *Id.*

As for the scope of the easement and the duration, the court concluded that the plaintiff had the right to use the easement "for all purposes consistent with the reasonable use of the benefited land."[269] The easement was not limited to "those purposes that existed at the time the benefited and burdened properties were created."[270] Original conditions did not dictate present of future conditions. This conclusion followed, the court remarked, from the general rule that "the need constituting the necessity that implies an easement by necessity may change over time."[271] Necessity, then, for the court was a changing measure requiring flexible judicial relief in order to ensure productive use of the property.

The implications for trust law and cy pres are clear. Property doctrine assumes that a grantor does not generally intend to give a gift that cannot be properly or effectively used. Furthermore, public policy dictates that a grantee should not and need not be stuck with property that cannot be put to productive use. Property rules on policy emphasize efficient asset use, productive property, and grantee need.

b. Looking to Variance: Zoned for Impracticability

Variance is another means of exempting property from regulatory requirements—zoning ordinances, in this case—when compliance would present undue hardship for the property owner. Variances are, therefore, "referred to as a type of safety valve against overly intrusive land use regulation," and they provide "a means for a landowner to obtain relief where hardship imposed on an individual parcel of land by a zoning ordinance outweighs the public benefit sought by the regulation."[272]

Property owners may seek variance in a range of situations, most particularly when the property owner wishes to use her property in a way that is prohibited by applicable zoning laws.[273] The key to a successful variance application is establishing that "an unnecessary or undue hardship would befall the land in question—and not the landowner personally—if the

269. *Id.* at 1284.

270. *Id.*

271. *Id.*

272. 131 AM. JUR. PROOF OF FACTS 3D 253, 261 (2013).

273. There are both use and dimensional variances. Here, I focus on use variances. *Id.* at 263.

letter of the zoning ordinance were strictly observed."[274] The result is that a "use variance gives a property owner permission to use the property in a manner inconsistent with a local zoning ordinance."[275]

Use-based zoning and variance laws emerged in the context of Euclidian or single-use zoning, which was established as constitutional by *Village of Euclid v. Ambler Realty Co.* in 1926.[276] The variance ensured that zoning ordinances would "remain constitutional by building in a mechanism that would avoid imposing hardship on individual landowners."[277] Variance doctrine developed alongside questions of governmental takings and land-use regulation, and the variance helped to circumvent charges of regulatory takings. By 1939, in *Otto v. Steinhilber*, the New York Court of Appeals established a framework for evaluating the merits of a variance request that many jurisdictions have adopted.[278] In *Otto*, the court stated that a zoning board could exercise discretion and grant a variance only: (1) if the property would not yield a reasonable return if used only as allowed by zoning ordinances; (2) if the hardship was due to unique circumstances and not to the general conditions in the neighborhood; and (3) that the use to be authorized would not alter local conditions or any public benefit provided.[279]

Unnecessary or undue hardship is therefore a key factor in granting variances. Also important, as highlighted by the *Otto* framework, is the notion of reasonable return. Courts will not, traditionally, grant a variance solely because of financial hardship or profit loss. However, if an owner can show that "no reasonable return is possible under permitted uses,"[280] her variance request is more likely to be successful. Accordingly, variances, like easements by necessity, accentuate the efficient use of property and the right of a property owner to get value from her land. Variance doctrine also underscores that produc-

274. *Id.* at 262.

275. 7-Eleven v. Vill. of Mineola, 7 N.Y.S.3d 1209, 1210 (N.Y. App. Div. 2015).

276. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

277. Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 330 (1995).

278. 131 AM. JUR. PROOF OF FACTS 3D 253, 297 (2013); *see also* Cohen, *supra* note 277, at 333–38.

279. Otto v. Steinhilber, 24 N.E.2d 851, 853 (N.Y. 1939).

280. Cohen, *supra* note 277, at 336.

tive use is a justification for modifying conditions of ownership and setting aside certain forms of regulatory control. Variance statutes differ somewhat by state, but the differences are minor. Virginia's statute, for example, states: "[A] reasonable deviation [is granted] when the strict application of the ordinance would *unreasonably restrict the utilization of the property*, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance."[281]

Judicial analysis of variance requests focuses accordingly on both the level of hardship and the concept of reasonable return.[282] For example, in *Nowicki v. Zoning Hearing Board*, a 2014 Pennsylvania case, the court evaluated whether a couple who had bought property for a family home experienced unnecessary hardship when the property was rezoned for commercial use before they could construct their residence.[283] The question was whether this change in zoning denied the couple all economically viable use of the property and created unnecessary hardship.[284]

The background was this: two days before the couple executed the sales agreement on the property in question, the borough enacted an ordinance that changed the zoning from residential to the Planned River-Oriented Development District (PROD) category. The stated goal was to "to take advantage of the views of the river, the recreational opportunities afforded by the river and the Pump Station, as well as the shopping and services available within walking distance in the business district."[285] The couple had not yet begun construction on their planned residence when the zoning change passed, and they applied for a variance to build a single-family dwelling on the property.[286]

At their hearing before the zoning board, eight neighbors who had residential dwellings in the rezoned area appeared in support of their request. Borough leaders also attended, however, and argued that the couple was not unnecessarily burdened

281. VA. CODE ANN. § 15.2-2201 (West 2015) (emphasis added).

282. Other questions courts must confront are whether the burden was self-created, whether it is unique to the property, and whether the variance will cause any public detriment.

283. Nowicki v. Zoning Hearing Bd., 91 A.3d 287, 290 (Pa. Commw. Ct. 2014).

284. *Id.*

285. *Id.*

286. *Id.*

by the new restrictions because the new borough rules "permitted the Property to be used for both noncommercial and public recreation."[287] The zoning board denied the request on the grounds the couple had failed to establish unnecessary hardship.[288] On appeal, the trial court reversed the zoning board and the case subsequently went to the state appellate court.[289]

Addressing the question of value loss, the court remarked that financial loss or failure to profit alone were not sufficient grounds for a variance.[290] On the other hand, the appellate court remarked, "an applicant seeking a use variance need not demonstrate that the property is rendered valueless as zoned in order to show that a variance is needed to make reasonable use of the property."[291] In the couple's case, the court concluded, because the property was located within a residential portion of the PROD rezoned district, "it would be undesirable and ultimately unmarketable for an economically viable recreation use, such as the golf practice facility or skating rink delineated in the Ordinance."[292] This lack of marketability of the property was sufficient to establish unnecessary hardship.

In another variance case, from the Supreme Judicial Court of Maine in 2009, the court analyzed the question of hardship through a similar lens but used the reasonable-return framework.[293] That case, *Wister v. Town of Mount Desert*,[294] turned on the right of a property owner to build a driveway that did not fit the zoning regulations. The proposed driveway was "not wide enough to accommodate the proposed fourteen-foot-wide driveway and allow a minimum five-foot setback on either side as required by the driveway setback provision."[295] The property owner applied to the zoning board for a variance in order to

287. *Id.*

288. *Id.*

289. *Id.* at 290–91.

290. *Id.* at 293 ("Evidence that the zoned use is less financially profitable than the proposed use is insufficient to grant a variance.").

291. *Id.*

292. *Id.* at 295.

293. "The 'reasonable return' element of the 'unnecessary hardship' standard may be interpreted as requiring proof by the applicant that the zoning restriction destroys or greatly diminishes the value of a specific piece of property." 131 AM. JUR. PROOF OF FACTS 3D 253, 306–07 (2013).

294. Wister v. Town of Mount Desert, 974 A.2d 903, 906 (Me. 2009).

295. *Id.*

construct this driveway, which would have helped provide access to a second lot he owned that was landlocked.[296]

The zoning board approved the variance, finding that a hardship existed because the property owner could not "get a reasonable return on the lots without a driveway."[297] The decision was appealed up to the state supreme court, where the court affirmed the board's decision. The court agreed that "undue hardship" meant that "[t]he land in question can not yield a reasonable return unless a variance is granted."[298] Applying the rule to the facts, the state supreme court concluded: "[a]lthough Moore's lots might have held some value without driveway access, given its proximity to a golf course and conservation lands, the [zoning board's] determination that, without a driveway allowing access to the lots, Moore will suffer the practical loss of all beneficial use of the lots is not clearly erroneous."[299]

Use variances, then, like easements by necessity, privilege the productive use of and a reasonable return on an asset. Variances allow for flexibility within a regulatory system, and create exemptions based on owner need. Variances provide a way for property owners to meet their needs when compliance with rules and restrictions is both costly and inefficient.

III. CRAFTING A CLEAR CY PRES STANDARD

What should the trust law standard for impracticability look like? Both contract and property law are sufficiently similar to trust law in foundational ways such that their doctrines can and should help inform the cy pres standard. In this Part, I discuss exactly how contract and property rules can be used to clarify trust law and, subsequently, aid institutional fiduciaries as they confront recurring fiscal challenges.

A. USING CONTRACT: REPURPOSING FINANCIAL HARDSHIP

There is one clear lesson from the commercial impracticability doctrine: financial hardship should be a standard criteri-

296. *Id.*

297. *Id.* at 907.

298. *Id.* at 911–12. The other requirements were: "B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; C. The granting of a variance will not alter the essential character of the locality; and D. The hardship is not the result of action taken by the applicant or a prior owner." *Id.*

299. *Id.* at 912.

on for evaluating cy pres impracticability. Charitable institutions confront financial problems for any number of reasons including increases in costs over time, steep maintenance costs, and decreases in income—whether from investments or new gifts.[300] Accordingly, court dockets contain cy pres requests from nonprofit institutions looking to gain flexibility in endowment spending by loosening donor conditions placed on restricted gifts. And the petitions that succeed, like the Corcoran's, are from institutions on the brink of failure.

For example, in *In re Polytechnic University*, a New York court granted cy pres relief allowing Polytechnic University to modify gift restrictions on a bequest in order to avoid institutional failure.[301] The donor had specified that the bequest was meant for a professorship, research fellowships, and building construction.[302] However, as the court remarked, unforeseen circumstances—including the "the terrorist attacks on the World Trade Center and its effect on the local economy, combined with the near meltdown of technological companies in 2001"[303]—substantially diminished the university's revenue. This drop in revenue forced the institution to fall below the liquidity covenant on some of its loans and below the "composite score requirements necessary for the University to participate in federal financial aid programs."[304] The court observed that the donor's "charitable intentions [would] be frustrated if Polytechnic University [were] forced to suspend operations."[305] Consequently, the court concluded that removing the restrictions was the best approach, which allowed the university to reclassify the bequest as unrestricted income.[306]

300. Christian H. Brill, *Art or Assets: University Museums and the Future of Deaccessioning*, 28 T.M. COOLEY L. REV. 61, 64 (2011) ("The decline in the stock market caused extreme drops in museum endowments. Wealthy donors chose to give to human services rather than the arts, and institutions were forced to reduce hours, cut staff, increase fees, or consider more drastic measures."). For example, the New York Metropolitan Museum of Art's endowment shrank twenty-four percent from 2008 to 2009. *See* MET. MUSEUM OF ART, ANNUAL REPORT FOR THE YEAR 2008–2009, at 52 (2009). Meanwhile, the operating deficit increased from \$1.9 million to \$8.4 million from fiscal 2008 to fiscal 2009. *Id.* at 50.

301. *In re* Polytechnic Univ., 812 N.Y.S.2d 304, 311 (Sup. Ct. 2006).

302. *Id.* at 306.

303. *Id.* at 311.

304. *Id.*

305. *Id.*

306. *Id.*

Fisk University is another example of an institution that sought cy pres relief in the midst of financial distress. Fisk University, a historically black university founded in 1866, was the recipient of 101 paintings that were donated by Georgia O'Keeffe to the school in the late 1940s and early 1950s.[307] The gift was conditioned on the requirement that the pieces could not be sold and that they all be displayed at Fisk University as one collection.[308]

In 2005, in an attempt to remain financially solvent, the university sought permission to sell two valuable paintings.[309] It claimed that its "bleak financial circumstance"[310] rendered it "'impractical to comply with the literal terms' of the gifts,"[311] as did "other material changes in circumstances that have occurred in the more than fifty years since the conditional gifts were made."[312] The complaint stated that the "purpose of the proposed sale was to generate funds for the University's 'business plan' to restore its endowment, improve its mathematics, biology, and business administration departments, and build a new science building."[313]

In concluding that the circumstances were impracticable, the trial court relied on the testimony of Fisk's president, who "discussed the many cuts that had been implemented in an effort to reduce expenses, such as eliminating educational programming for students, reducing the salary of faculty and staff,

307. Georgia O'Keeffe Found. v. Fisk Univ., 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009). Four of the paintings were the property of Georgia O'Keeffe, and the rest O'Keeffe gave to the school from the Alfred Stieglitz collection, in her capacity as executrix of the estate. *Id.*

308. *Id.*

309. *Id.* While pending, the university's request for relief morphed into a request for the approval of a proposed settlement agreement with the Crystal Bridges–Museum of American Art, Inc., "whereby the University would sell a 50% undivided interest in the entire Collection for $30 million . . . . [and] the University and Crystal Bridges would each have the right to display the Collection at their respective facilities six months of each year." *Id.* at 5.

310. *Id.* at 15.

311. *Id.*

312. *Id.*

313. *Id.* at 4; *see also* Brill, *supra* note 300, at 65 ("[U]niversity museums serve two masters, answering to both museum and university boards. Because a university museum cannot act completely independently, it is more susceptible to closure if its parent university decides that another priority—such as chemistry labs—would better fulfill its educational mission. This is made unmistakably clear by the fundamentally different missions of independent museums and university museums.").

and mortgaging buildings on campus."[314] Asked whether Fisk was "viable" given the numerous financial challenges it faced, the president stated "No, not at all."[315] Accordingly, the trial court allowed Fisk to modify the gift terms.[316]

These examples show that financial distress does sometimes obtain the desired result. Currently, however, because financial hardship is not explicitly recognized as a core component of cy pres impracticability, judicial results are not predictable. Consequently, institutions that are unable to show immanent insolvency, like Girard College and Sweet Briar, will not necessarily obtain cy pres relief. Moving forward, charitable institutions should be able to receive cy pres relief based upon the fiduciaries making a strong showing of unsustainable financial circumstances and recommending modifications. The fiduciaries can and should be presumed to be acting in the best interest of the institution and using their discretion appropriately. Therefore, cy pres modification is appropriate under such circumstances, not only to give institutions additional operational latitude in crisis situations, but also to credit fiduciaries with the authority and discretion to perform their job.

B. Why a Property Standard Is Better

If financial hardship is a key criterion, the next question is how to apply this standard of financial hardship. Not every case is as clear-cut a case of financial need as were the cases with Corcoran, Polytechnic University, or Fisk University, and institutions should not be forced to the point of closure in order to obtain cy pres relief. However, the same question that drives commercial impracticability emerges in cy pres analysis—how severe must the economic hardship be? The contract standard would ensure that very few nonprofit institutions receive cy pres relief. In this Section, I explain why the contract measure of hardship is conceptually inappropriate in the cy pres context, based on differences in bargaining and public benefit.

1. Bequests, Not Bargains

One reason that the trust law measure of hardship should be lower than the contract law one is that the parties to gift agreements do not necessarily bargain like ordinary contractu-

314. *In re* Fisk Univ., 392 S.W.3d 582, 588 (Tenn. Ct. App. 2011).
315. *Id.* Furthermore, O'Leary testified that the annual cost of $131,000 to maintain and display the collection was burdensome to the university. *Id.*
316. *Id.* at 591.

al bargaining partners. The high contract-law standard is based on the idea that the parties could and should have bargained for protections. Excuse is therefore not available "in situations in which the impossibility results from the actions of one of the parties to the contract or where the promisor could have relatively easily taken actions to avoid the failure of the underlying condition."[317] Bargaining is a central part of the contractual relationship.

In charitable giving, bargaining plays a different and more peripheral role. While the donor or the donor's family is alive, there is sometimes bargaining, to be sure. And for some major gifts, there is even substantial bargaining. Gifts negotiations can center, for example, on the amount of control retained by the donors. When Lee Bass gave Yale University twenty million dollars in 1991, "[i]t was an unusual gift . . . because of the specificity of its academic purpose."[318] The gift was meant to support the study of Western Civilization by creating seven endowed faculty positions for senior faculty and four new junior faculty positions.[319] Four years after the gift was announced, however, Yale returned the money, stating that the parties could not negotiate acceptable terms for use of the gift.[320] The gift, and its ultimate return, came to represent for some "the hazards of accepting gifts with special conditions"[321] as well as a failure of negotiation.[322]

Donor recognition is similarly a subject of negotiation. When Edith and Henry Everett made a multimillion dollar

317. Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 154–55 (1977).

318. Jennifer Kaylin, *Bass, Yale, and Western Civ.*, YALE ALUMNI MAG. (Summer 1995), http://archives.yalealumnimagazine.com/issues/95_07/bass .html.

319. *Id.*

320. *Id.*; *see also* Jacques Steinberg, *Yale Returns $20 Million to an Unhappy Patron*, N.Y. TIMES (Mar. 15, 1995), http://www.nytimes.com/1995/03/15/us/yale-returns-20-million-to-an-unhappy-patron.html ("To the best of my knowledge, this is the largest gift that has ever been returned by an institution to a donor.").

321. Kaylin, *supra* note 318.

322. Despite this cautionary tale, bargaining between institutions and donors over program control has continued. Controversy has, for example, emerged over the desire of the Koch brothers to select faculty for the chairs they endow based on political and philosophical preferences. Alex Pareene, *Right-Wing Billionaires Purchasing Own Professors*, SALON (May 12, 2011), http://www.salon.com/2011/05/12/buying_professors_kochs; Kris Hundley, *Billionaire's Role in Hiring Decisions at Florida State University*, TAMPA BAY TIMES (May 10, 2011).

pledge in 1996 to support the renovation of the Children's Zoo in Central Park, they bargained with the Wildlife Conservation Society (WCS), the group overseeing the renovation. The Everetts wanted their name engraved in the stone archway at the entrance to the zoo, erasing the name of the original donors. The Everetts proposed replacing the engraving of the original donors' family name with small recognition plaques on either side of the archway. The New York City Art Commission rejected this proposal and the Everetts withdrew their gift.[323]

Once the gift has been paid in full or the trust created, however, there is little legal opportunity for renegotiation. After the execution of the gift instrument, the assets are in care of the institution and, under traditional law, the donor no longer has standing, nor do her descendants.[324] An institution may of course return to a donor, while she is still living, or the donor's family, and ask permission to redirect funds or redraft the gift terms. This was what Sweet Briar did in anticipation of closing the college doors. Institutions engage in this type of outreach even when they are not legally obligated to do so for public relations reasons and because of stewardship best practices. Bargaining once the gift has been completed is not, however, the norm in charitable giving.

Moreover, many times there is no bargaining at all. In the cases of the Corcoran or the Barnes Trust, the donors created stand-alone institutions through testamentary trusts and there were no other parties to check, counter, or decline the terms of the trusts. John Langbein says of these situations: "the deal is of the take-it-or-leave-it type, like the movie-theater ticket or the vending-machine contract; there is no negotiating terms with a decedent."[325]

Likewise, donors may create a testamentary trust or leave a bequest to an already existing institution without giving any notice to the institution. Donors have no obligation to bargain or even notify an institution, and the norm historically has been to create trusts or give gifts without much back and forth

323. The *New York Times* reported the retraction of the pledge. David W. Dunlap, *$3 Million Zoo Gift Revoked Because Plaque Is Too Small*, N.Y. TIMES (May 15, 1997), http://www.nytimes.com/1997/05/15/nyregion/3-million-zoo-gift-revoked-because-plaque-is-too-small.html.

324. *See* Brody, *supra* note 27, at 1187 ("The reason for disabling the donor might be to recognize the completeness of the gift for public purposes."). The UTC, however, has been revised and now allows for settlor standing. UNIF. TRUST CODE § 405 (c) (UNIF. LAW COMM'N 2010).

325. Langbein, *supra* note 17, at 637.

between donor and institution. For this reason, a number of institutions have implemented donor recognition societies for those who plan their giving as a bequest in order to encourage early communication about the gift.[326]

Bargaining plays a different role in charitable giving than it does in commercial contract law.[327] Bargaining happens, to be sure. Nevertheless, it is not usually the robust bargaining imagined by contract law. And sometimes there is no bargaining at all. Consequently, presumptions about bargaining—and standards based on these presumptions—should be recalibrated.

2. Public Benefit, Not Private Desire

Another factor that works in favor of a lower impracticability measure is the public benefit intervention. Nonprofit institutions must provide public benefit and contribute to the public good, as mandated by the charitable purposes doctrine and tax rules.[328] Donors are similarly circumscribed by the charitable purposes doctrine in that their gifts must go to support these same institutional objectives in order to receive tax deductions. In other words, charitable giving is charitable because of the public purpose it serves.

There is, therefore, a third party to the gift giving whose benefit should be considered in the cy pres calculus—the public.[329] A charitable gift's impracticability does not impact the donor and institution alone; it also impacts the various publics

326. Stanford, for example, clearly states on its planned giving website: "If you let Stanford know about your intended bequest or other planned gift, you will be invited to enjoy special events and recognition as a member of the Founding Grant Society." *Planned Giving*, STANFORD UNIV., http://giving.stanford.edu/planned-giving/overview/founding-grant-society (last visited Apr. 12, 2018). Columbia says: "Once you complete your estate plan, please let us know. Columbia would like to thank you for your generosity by including you in the 1754 Society." *Ways To Give: Planned Giving*, COLUMBIA UNIV., http://columbia.giftplans.org/index.php?cID=111&msect=1&create=1&mID=19 (last visited Apr. 12, 2018).

327. *See* Brody, *supra* note 27, at 1258 ("[A]lthough a restricted gift constitutes an agreement between the donor and the charity, it is not merely a contract in the private law sense—rather, an unascertainable group constitutes the true beneficiaries.").

328. The IRS defines exempt or charitable purposes in *Exempt Purposes—Internal Revenue Code Section 501(c)(3)*, IRS (June 30, 2017), https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501-c-3.

329. *See* Susan N. Gary, Restricted Charitable Gifts: Public Benefit, Public Voice 21–24 (on file with author).

who benefit from the gift and who are not party to any bargaining or negotiations around the terms of the gift. Accordingly, public benefit should factor into cy pres considerations and any increase or decrease to the public benefit should have a weight equivalent to that placed on donor wishes. Public benefit is, of course, not always easy to measure, and the relevant publics can be many—with conflicting needs.[330] Nevertheless, the public has a continuing interest in receiving the benefit intended by the gift, equal to or possibly greater than the donor's interest in restricting gift usage.[331]

In *Kolb v. City of Storm Lake*, for example, the Iowa Supreme Court concluded that the terms of a gift to the city were impracticable, allowing the city to override the donor conditions to better serve "societal needs."[332] The donor had left a bequest funding the creation and maintenance of a garden and fountain in the center of the city. Years later, the city developed "plans for an economic revitalization project."[333] The project was intended to "provide a new public beach, a lighthouse, a family playground, a lodge, and an indoor/outdoor water park."[334] Critical to the project's implementation, however, was the relocation of the gardens and fountain in a different city park. The court remarked:

> Such a massive project should be planned in a way that maximizes its potential, and when the location of the garden and fountain jeopardize that potential it becomes impractical not to relocate them. As a result, we think it would be impracticable to fund the garden at its original location.[335]

Public benefit prevailed and the outcome underscored the importance of this third-party beneficiary to the gift "contract."

Public benefit is a condition of the gift, a primary point of charitable giving, and a predicate to the functioning of the nonprofit sector. This benefit should not be constrained because of outdated or inefficient donor conditions. Put differently, cy pres impracticability should not be so difficult a standard to reach as to preclude the provisioning of public benefit.

330. *See* Tait, *Publicity Rules for Public Trusts*, *supra* note 68, at 421.

331. Moreover, donors have already received multiple benefits, financial and other, from their donations. They have received benefits, and so should the relevant public. *See* Tait, *The Secret Economy of Charitable Giving*, *supra* note 2, at 1667.

332. Kolb v. City of Storm Lake, 736 N.W.2d 546, 558 (Iowa 2007).

333. *Id.* at 551.

334. *Id.*

335. *Id.* at 557.

C. USING PROPERTY: PRODUCTIVE USE AND REASONABLE RETURN

Property rules offer a model for crafting an appropriate measure for cy pres hardship. Property rules focus, like contract rules, on hardship and necessity, but property rules are conceptually grounded in notions of productive property use and reasonable return. These are concepts that transfer easily into the cy pres context. To be sure, an institution can prove financial hardship through financial statements, budgeting plans, and annual audits, as happened in the Fisk University and Corcoran cases. Institutions should also, however, be able to obtain cy pres relief by demonstrating that a restricted fund is sitting unused or rarely used when the funds could be put to more effective use.[336]

For example, if a university fund dedicated to bringing in visiting lecturers in a particularly narrow field is rarely used because of the limiting conditions, an institution should be able to expand the scope—perhaps to funding research more generally in the chosen field—thereby gaining more budgeting flexibility. An underutilized gift clearly contravenes the notion of productive use and reasonable return. Likewise, an endowed fund at a university that is restricted to providing scholarship money to students from a particular, limited geographic region and is rarely awarded could be modified in order to expand the region and capture more students. Possible examples abound, but the lesson is the same: expanding the scope of permissible spending may help put the gift to productive use. Accordingly, when an institution can demonstrate that a certain restricted fund has not been used or used only very infrequently for a sustained length of time, then cy pres modifications should be available in order to put the gift to productive use and obtain a reasonable return.

In addition to measuring the use—or disuse—of a gift, the concepts of productive use and reasonable return can be repurposed to apply when nonprofit institutions are not able to spend gift funds in such a way as to create public benefit. A situation involving "unreasonable" return might therefore occur when a

336. UPMIFA allows nonprofit institutions to modify restricted funds with a value of $25,000 or less that are over twenty years old without obtaining judicial approval. The institution must only notify the state attorney general. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6 (UNIF. LAW COMM'N 2006), http://www.uniformlaws.org/shared/docs/prudent%20mgmt%20of%20institutional%20funds/upmifa_final_06.pdf.

gift that is restricted to a certain spending priority—a particular center or program that, while it still exists, no longer requires the same level of funding that it once did because it has decreased its activities. Obtaining a reasonable return of the gift might therefore require modifying the spending conditions such that the scope, as well as the public benefit, could be expanded. The concept of reasonable return could be defined in various ways in order to be useful in the cy pres context. What is important is that institutions have the opportunity to demonstrate why they are not getting a "reasonable return" on the gift because of its restrictions and how they could improve the return by slightly modifying the gift terms while still funding a similar project, department, or initiative.

In all of the scenarios above, institutions would not have to prove financial insolvency or desperation. Instead, they could obtain cy pres relief through a showing of how the restricted funds are not being used at all, not being used productively, or not being used to the institution's reasonable advantage. This would allow public charities to use more of their restricted gifts fund, obtain increased flexibility in their financial operations, and deter the problem of donor governance.

CONCLUSION

Currently, the vagaries of an unclear cy pres standard are harming public charities, binding the fiduciaries in their governance role and impairing budgetary flexibility by leaving outdated donor restrictions in place. The problem is that trust law, in search of a consistent cy pres standard, is caught between two competing, conceptual goals: keeping promises and meeting needs. The question for trust law is which path to follow. Trust law shares historical connections as well as conceptual underpinnings with both contract and property law, making them fitting lenses through which to examine and clarify the contours of cy pres impracticability. Contract and trust law share not only doctrinal architecture but also a particular theoretical mandate—promises must be kept. Property and trust law share a deep conceptual foundation relating to asset management and productive property use. How, then, should trust law navigate between these two poles? I propose that trust law should use the contract criterion of financial hardship coupled with a property measure of hardship, focusing on productive use and reasonable return. This hybrid standard reflects the dual nature of trust law, shedding light on how trust law is a composite of both contract and property. This standard is also appropriate given the distinctive design and demands of charitable institutions. Ultimately, using contract and property to build a stronger and more consistent cy pres standard not only reveals trust law's multifaceted nature but also the proper approach to regulating charitable giving in a modern landscape of both promise and need.