LEGISLATING AGAINST PERPETUITY: THE LIMITS OF THE LEGISLATIVE BRANCH'S POWERS TO MODIFY OR TERMINATE CONSERVATION EASEMENTS

Clemens Muller-Landau*

"Politics is for the present, but an equation is for eternity"[1]

I. INTRODUCTION

Conservation easement laws provide a seemingly perfect legal equation for landowners to perpetually protect their land while circumnavigating both the law's traditional suspicion of perpetual restrictions on land and the whims of present politics. But as the use of conservation easements continues to grow, and the supply of conservable private land diminishes, the role of organizations holding conservation easements will necessarily change. Over the next twenty years, it is likely that the institutional focus of the land trusts and government entities holding conservation easements will shift from the acquisition of new easements to the stewardship of existing easements. As conservation easements age, and the environmental, political, and social landscape evolves, the pressure to modify or even terminate easements will inevitably grow.[2]

This increasing desire to modify or terminate conservation easements may tempt state legislatures, prompted by contemporary political pressures, to enter into the modification and termination fray in two ways. First, legislatures may attempt to pass legislation modifying or terminating a particularly vexing conservation

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[1] Albert Einstein.

[2] Professor Nancy McLaughlin has observed that,

> [a]s the cache of conservation easements in this country continues to grow, and those easements, the vast majority of which are perpetual, begin to age, it will become increasingly important to determine whether, when, and how easements that no longer accomplish their intended conservation purposes can be modified or terminated.

Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 424 (2005) (citation omitted).

easement. Second, legislatures may attempt to pass general legislation lessening the procedural or substantive burdens associated with modifying or terminating conservation easements in general. This Article addresses whether the passage of such acts would be a permissible expression of legislative power. The answer lies in the interplay of several intertwined legal doctrines that attempt to limit the impairment of contract, ensure the separation of powers, limit "dead hand" control, and ensure that donor intent is followed "as nearly as possible."

This Article assumes that conservation easements are governed by charitable trust principles. Although conservation easements are undoubtedly partial interests in real property and a form of contract, they are also held in trust for conservation purposes in perpetuity. The Uniform Conservation Easement Act, the Uniform Trust Code, the Restatement (Third) of Property: Servitudes, the Treasury Regulations interpreting the charitable income tax deduction provision of the Internal Revenue Code, and several scholarly articles support the interpretation of conservation easements as charitable trusts.[3] It is beyond the scope of this Article, and unnecessarily duplicative, to revisit those arguments here.

Part II of this Article provides historical background on the evolution of several of the legal doctrines at play when perpetual trusts are modified or terminated. Part III addresses the constitutionality of legislation attempting to modify or terminate a specific conservation easement. Part IV addresses the constitutionality of legislation purporting to lessen the procedural and substantive burdens associated with the modification and termination of conservation easements in general. Part V concludes.

II. HISTORICAL BACKGROUND: HOW PAST PROMISES OF PERPETUITY HAVE FARED

At the outset, it is important to note that the tension between administering a perpetual trust in accordance with its terms and stated purpose and modifying the trust to respond to changing conditions is nothing new. In addition, when such situations have arisen in the past, there has been a certain degree of confusion as to which branch of government had the legal authority to resolve the problem. For example, in sixteenth century England, the charitably inclined established a number of schools for the instruction of Latin and Greek.[4] In the nineteenth century, when the need for exclusively classically trained students was no longer as great, several schoolmasters attempted to broaden their curriculum to include writing, arithmetic, and other more modern subjects.[5] The courts initially refused to allow such modifications based upon their understanding of donor intent.[6] In the

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[3] *See, e.g.,* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond,* 34 ECOLOGY L.Q. 101 (2007).

[4] Austin Wakeman Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 3–4 (1920).

[5] *Id.* at 4.

[6] A.G. v. Whiteley, 11 Ves. 241, 247 (1805) ("The question is, not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists, but what are the qualifications intended.").

face of continued societal change, however, this strict interpretation of donor intent could not prevail. Eventually, courts began to allow changes to these perpetual trusts.[7] Ultimately, Parliament also entered the fray. Several statutes were enacted to provide

> a simple method whereby the changes necessary to enable the schools to play their proper part in modern education could be systematically made under the supervision of the courts or of public officials, who should have regard to, but who should not be absolutely bound by, the intentions of the founders and benefactors.[8]

These acts vested various newly established boards with the authority to make "changes of curriculum and changes as to religious qualifications of governors and masters and pupils."[9] Though it is perhaps not presently fathomable that the natural, open, scenic, historic, or ecological values protected by the conservation easements of today will become the Latin and Greek of tomorrow, the underlying tension between dead hand control and contemporary needs is the same.

A. The Limits of Dead Hand Control over Future Land Uses

The limits on dead hand control over land evolved in seventeenth century England.[10] In 1860, in response to attempts by landowners to dictate the use to which their property would be put in perpetuity, Lord Campbell explained:

> A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed in *saecula saeculorum* when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law to be strictly watched and regulated.[11]

The close regulation of dead hand control envisioned by Lord Campbell never materialized. Rather, the fears of dead hand control were balanced against the

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[7] *See, e.g.*, A.G. v. Caius College, 2 Keen, 150 (1837); A.G. v. Gascoigne, 2 Myl. & K. 647 (1832).

[8] Scott, *supra* note 4, at 5 & n.7.

[9] *Id.* at 4 n.7. Professor Scott cites several acts, including, The Grammar Schools Act, 1840; The Endowed Schools Acts, 1860, 1869, 1873, 1874; The Elementary Education Act, 1870; The Board of Education Act, 1899; The Education Act, 1902. *Id.*

[10] *See* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 261 (1995). For a brief history of the evolution of the limits on dead hand control, see also Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 n.7 (1985).

[11] Jeffries v. Alexander, 8 H.L.C. 594, 648 (1860).

advantages of allowing individuals to designate the use of their property after their death in certain situations. One scholar has noted that the interplay between these two forces resulted in "a set of enduring compromises between two competing impulses: The need to maintain a market in land satisfactory to meet rising levels of demand, on the one hand, and the desire of the gentry, on the other, to conserve their landholdings and pass them down intact to the next generation."[12]

One such enduring area of compromise is the allowance of perpetual grants for charitable purposes. Such grants are permissible, indeed favored, because a grant to a charitable purpose in perpetuity does not raise the same concerns that are raised when property is perpetually vested in private individuals for their own private purposes.[13] But even perpetual charitable grants are inherently limited by the interest of the public. When the purpose of a charitable grant becomes illegal, against public policy, impossible, impracticable, or perhaps even just wasteful, the public interest—the same interest that allowed the grant to come into being in the first place—may require the purportedly perpetual grant to be altered or even terminated.

Permitting such a grant to persist would, according to John Stuart Mill, be akin to "making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow."[14] The modern principle that perpetual charitable grants are limited by the public interest is reflected in other English sources:

> It seems, indeed, desirable in the interest of charities in general . . . that it should be clearly laid down as a principle, that the power to create permanent institutions is granted, and can be granted, only on the condition implied, if not declared, that they be subject to such modifications as every succeeding generation shall find requisite.[15]

This condition, implied in every perpetual grant, became known in England as the doctrine of cy pres. U.S. courts, wary of cy pres's royal pedigree, were initially slow to adopt it by name, and instead vested similar powers in various

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[12] Reid, *supra* note 10, at 261-62.

[13] *See* GEORGE G. BOGERT & GEORGE T BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 351 (2d ed. 1991) [hereinafter BOGERT ON TRUSTS] ("A point which stands out clearly in the law is that charitable trusts may be created to endure forever . . . ."). The rationale underlying this exception to the dead hand rule is that "the social advantages of [charitable trusts] more than offset the disadvantages of permitting a donor to make provisions for the disposition of his property far into the future and to fix the status of property indefinitely." *Id.* (listing cases that support this rationale); *see also* Scott, *supra* note 4, at 1 ("It is because [gifts for charitable purposes] are supposed to be beneficial not merely to particular persons but to the public in general, or to some portion of the public, that gifts for charity are favored.").

[14] 1 JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 36 (1882) ("No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found.").

[15] 1 REPORT OF COMMISSION ON POPULAR EDUCATION 477 (1861).

"approximation" and "deviation" doctrines.[16] Most U.S. states, either through judicial decision or statutory enactment, authorize courts to alter charitable trusts pursuant to two doctrines: the doctrine of cy pres, which allows a court to alter the purpose of a charitable trust, and the doctrine of administrative or equitable deviation, which allows a court to alter the means chosen to achieve the charitable purpose of a trust.

B. Cy Pres Doctrine

Cy pres is derived from the Norman French phrase "*cy pres comme possible*," meaning "as near as possible."[17] In essence, the cy pres doctrine allows a court to modify the purpose of a charitable trust if that purpose becomes illegal, impossible, impracticable, or, in a growing number of jurisdictions, wasteful, while nevertheless remaining "as near as possible" to the donor's original intent.[18] In England, two forms of cy pres existed: judicial and prerogative.[19] Judicial cy pres, as its name implies, was originally vested in the English Court of Chancery.[20] Prerogative cy pres, in contrast, was "vested in the crown and exercised at the direction of the king."[21] While judicial cy pres remained anchored to the original requirement to remain as near as possible to donor intent, prerogative cy pres, in contrast, "allowed the king to apply the property for any charitable purpose he might select, without considering what the wishes of the testator would have been."[22]

Cy pres was slow to be adopted by American courts due to its less favored royal English pedigree.[23] Indeed, the Bogert treatise states that U.S. courts generally hold that the prerogative cy pres power "does not exist in the United States. Neither national nor state executives nor legislative persons or bodies possess it . . . ."[24] Though two early U.S. court decisions implied that the prerogative cy pres power may be vested in U.S. legislatures,[25] as discussed below,

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[16] *See infra* note 48 and accompanying text.

[17] EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 1 (1950).

[18] *See* GEORGE G. BOGERT & GEORGE T BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 433 (2d ed. 1991) [hereinafter BOGERT ON TRUSTS].

[19] Vanessa Laird, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 974 (1988).

[20] FISCH, *supra* note 17, at 56.

[21] Laird, *supra* note 19, at 974 (citing Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 377 (1953)).

[22] Laird, *supra* note 19, at 974-95.

[23] Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 642 (1988).

[24] BOGERT ON TRUSTS, *supra* note 18, § 147.

[25] *See, e.g.*, Lewis v. Gaillard, 56 So. 281 (1911); *In re* Lott's Will, 214 N.W. 391 (1927). Even these two cases provide only marginal support for the proposition that the legislature has any cy pres type authority. The *Lewis* case is arguably simply a matter of administrative deviation, as no change in the overall charitable purpose of the settlor was made. *Lewis*, 56 So. at 842-43. *Lott*, by contrast, is distinguishable because the statute at issue was in existence when the testator drafted her will. 214 N.W. at 393 ("[The] statute was in existence when the testator made her will, and she is presumed to have known the law; hence it is reasonable to infer that the testator intended that in case the express

the prevailing view is that the legislature is not vested with either the prerogative or the judicial cy pres power, and that the exercise of the cy pres power is the exclusive province of the courts.[26] U.S. courts' suspicion of the prerogative cy pres doctrine undoubtedly stems from the realization that "[p]urposes to which the king might apply the property could be diametrically contrary to the intentions of the decedent."[27]

Judicial cy pres has fared significantly better in the United States. However, despite its strong mooring to donor intent, U.S. courts were also slow to adopt the judicial cy pres power, and many interpreted it conservatively.[28] Its uncertain beginnings notwithstanding, judicial cy pres—or a substantial equivalent, such as the approximation doctrine—has been adopted in most U.S. jurisdictions.[29] Though the doctrine of cy pres is applied somewhat differently in different jurisdictions, three factors generally must be present for a court to modify a particular charitable trust under the doctrine. First, the trust must be charitable rather than private in nature.[30] Second, the court must find that the charitable purpose of the trust has become impossible, impracticable, or, in a growing number of jurisdictions, wasteful.[31] Third, the donor must manifest a general charitable intent.[32]

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trust should fail, the statute would apply . . . ."). Accordingly, support for the argument in favor of legislative cy pres power is very thin.

[26] BOGERT ON TRUSTS, *supra* note 18, § 434. One of the cases cited in the *Bogert* treatise, *Opinion of the Justices*, 133 A.2d 792 (N.H. 1957), explicitly holds, "The prerogative cy pres power does not exist in the United States, not even in the legislature, although the latter body may enact general rules as to use of judicial cy pres power by the courts." *Id.* at 795.

[27] Estate of Bletsch v. Barth, 130 N.W.2d 275, 277 (1964); *see also* Jackson v. Phillips, 96 Mass. (14 Allen) 539, 575 (1867) (citing to the infamous English case of *De Costa v. De Paz*, 36 Eng. Rep. 715 (1743), in which charitable funds a donor intended to be used for the instruction of the Jewish religion were diverted instead to promote the Church of England).

[28] FISCH, *supra* note 17, at 115-20, 140-42; *see also Estate of Bletsch*, 130 N.W.2d at 277 ("[I]n judicial cy pres the court's burden [is] to effectuate as closely as possible the testator's plan."). The Bogert treatise notes that case law from several jurisdictions, including Alabama, Arizona, Delaware, District of Columbia, Kentucky, North Carolina, South Carolina, and Tennessee initially repudiated both the judicial and prerogative cy pres doctrines. BOGERT ON TRUSTS, *supra* note 18, § 433.

[29] BOGERT ON TRUSTS, *supra* note 18, § 433 n.6 (listing states that have adopted cy pres by statute); 15 AM. JUR. 2D *Charities* § 150 n.26-27 (2008) (listing case law adopting cy pres).

[30] FISCH, *supra* note 17, at 128-38.

[31] *See, e.g.*, UNIF. TRUST CODE § 413(a) (2000) (defining wasteful as "a situation where the amount of property held in trust exceeds that which is required to carry out the charitable purpose and to use all of the property as directed would result in a waste of the property"); RESTATEMENT (THIRD) OF TRUSTS § 67 (2004) (allowing a court to "broaden the purpose of the trust, direct application of the surplus funds to a like purpose in a different community, or otherwise direct the use of funds not reasonably needed for the original purpose to a different by reasonably similar charitable purpose"); BOGERT ON TRUSTS, *supra* note 18, § 439 n.7.

[32] FISCH, *supra* note 17, at 147-58. The purpose of the third prong is to ensure that the court's power is used to further "an actually formed and expressed intent of the settlor." BOGERT ON TRUSTS, *supra* note 18, § 436 ("[T]he selection of a secondary charitable objective is not because the court thinks such a result desirable but rather because the donor would have desired it."). The general charitable intent requirement has been expressly abolished by statute in some states. *See, e.g.*, 20 PA. CONS. STAT. § 6110(a) (2004). The Uniform Trust Code applies a presumption of general charitable intent, and both the Restatement (Third) of Trusts and the Bogert treatise recommend applying a

The prevailing view is that "judicial" cy pres—the power to alter the purposes of a trust—is only vested in the judiciary. The classic statement of this view comes from an opinion delivered by the Massachusetts Supreme Court, which held that "[i]t is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres."[33] The Justices of the New Hampshire Supreme Court similarly opined that "it is well established . . . that the administration of charitable trusts falls within the jurisdiction of courts of equity, which have unquestioned authority in appropriate circumstances to permit departure from the literal terms of such a trust by exercise of the power of cy pres."[34] The strongest statement of this position, however, was made by the Connecticut Supreme Court in *Bridgeport Public Library & Reading Room v. Burroughs Home*.[35] In reference to the line between judicial and legislative power, the court held:

> We have no occasion to attempt to define the exact limits of either the judicial or the legislative power, or to draw the dividing line between the two. It is certain, wherever that dividing line may be, or however indefinite it may be at points, that jurisdiction over this charitable trust to see that it is properly and beneficially administered, that the purpose of the donor does not fail, and that the interests of the beneficiaries, under changing conditions and with the lapse of time, *belongs to the judicial department of the government, and is in no respect an incident of the legislative*.[36]

The Bogert treatise affirms this view, stating explicitly that "a legislature has no power to alter the purpose of a charitable trust by statute."[37]

But there are cases to the contrary as well. For example, in *Delaware Land & Dev. Co. v. First & Central Presbyterian Church of Wilmington*, the Delaware Supreme Court explicitly held that the legislature's power to exercise a "judicial"-

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presumption of general charitable intent in order to reduce litigation costs by resolving and removing unnecessary factual issues. BOGERT ON TRUSTS, *supra* note 18, § 436.

[33] Opinion of the Justices, 131 N.E. 31 (Mass. 1921) ("Gifts to trustees or to eleemosynary corporations, accepted by them to be held upon trusts expressed in writing or necessarily implied from the nature of the transaction, constitute obligations which ought to be enforced and held sacred under the Constitution."). See also the more recent case, *Opinion of Justices*, 374 Mass. 843 (1978), discussing Ben Franklin's will.

[34] Opinion of the Justices, 133 A.2d 792, 794 (N.H. 1957). In this case the New Hampshire Supreme Court stated that a proposed statutory amendment was unconstitutional as an invasion of established equitable powers of the courts and in violation of the New Hampshire Constitution, which provided for the separation of the legislative, executive, and judicial powers. The proposed statutory amendment was not concerned with a particular charity, but with all dispositions of a certain kind, namely those made to towns for maintaining burial lots. The justices opined that the cy pres power must be exercised through the courts. *Id*. at 795-96.

[35] 82 A. 582 (Conn. 1912) (emphasis added).

[36] *Id.* at 585-86.

[37] BOGERT ON TRUSTS, *supra* note 18, § 397.

type cy pres power was coequal with the judiciary's.[38] The importance of the *Delaware Land* decision, however, was subsequently limited by the Delaware Supreme Court in *Trustees of New Castle Common v. Gordy*.[39] The *Gordy* decision first cites the *Delaware Land* decision as standing for the proposition that "the legislature, as successor to the prerogative powers of the English Crown over charitable trusts, has a like power to authorize the sale of real property held in such a trust."[40] Next, the *Gordy* decision cites the Scott treatise as standing for the broad proposition that "[i]n this country, however, the power of the legislature over charitable trusts is not co-extensive with the prerogative of the Crown. It is limited by principles of American constitutional law."[41] The decision then cites the Bogert treatise for additional support: "The legislature may not exercise the power of a Chancellor under the doctrine of cy pres and thus divert the corpus of the trust to uses other than those specified . . . [n]or may it terminate a charitable trust or change the methods of its administration."[42] Later in the opinion, the court rationalizes the position taken by both the treatises, noting that "the decision whether or not changed conditions justify the overriding of a donor's intent in the administration of a trust is one which seems naturally to belong to the judicial rather than the legislative process."[43]

Ultimately, the *Gordy* court deals the legislature a compromise package. Noting the "history of unchallenged assertion of legislative power over [trusts]" in the state and the express holding of *Delaware Land*, the *Gordy* opinion concludes:

> We think that the power of the General Assembly of this state to enact legislation respecting lands held for charitable uses is not to be denied, provided its exercise be limited to acts which are in aid of the trust and in the interest of the beneficiaries and which (among other things) do not attempt to abrogate or impair the constitutional powers of the Court of Chancery . . . .[44]

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[38] Delaware Land & Dev. Co. v. First & Central Presbyterian Church of Wilmington, 147 A. 165 (Del. 1929). In *Delaware Land*, the court first states that the legislature "has the same right" as a Court of Equity to order the conversion of trust. *Id.* at 174. Additionally, the court states that both these rights require that "the conversion of [trust] property is essential to properly carry out the purposes of the trust." *Id.* This focus on donor intent would seem to indicate that the court is referring to *judicial*, not *prerogative*, cy pres. Yet, the court adds that while both rights are based in *parens patriae* powers, the judiciary's right descends from "the English Court of Chancery by delegation from the King," whereas the legislative right descends from "the original sovereign rights of the King." *Id.* In doing so, the court muddies the distinction between judicial and prerogative cy pres discussed *supra* note 20-22 and accompanying text.

[39] 93 A.2d 509 (Del. 1952).

[40] *Id.* at 515. This is likely a misstatement of the history of the cy pres doctrine as applied in the United States. *See supra* notes 23-27 and accompanying text.

[41] *Gordy*, 93 A.2d at 515 (citing 3 SCOTT ON TRUSTS § 399.5).

[42] *Id.* at 515 (citing 2 BOGERT ON TRUSTS, *supra* note 18, §§ 398, 434).

[43] *Id.* at 517.

[44] *Id.* at 518.

The difficultly the *Gordy* court has reconciling the holding of *Delaware Land* with the established law from other jurisdiction confirms, rather than detracts from, the majority position that the legislative branch does not possess cy pres powers, at least not in their pure form. As *Gordy* demonstrates, individual jurisdictions often craft trust altering doctrines of varying levels of potency to reconcile past case law and legislative practices with prevailing legal trends.

C. Administrative or Equitable Deviation Doctrines

The doctrine of administrative deviation[45] has evolved alongside the doctrine of cy pres but serves a different purpose. While the cy pres authorizes a court to redirect trust property from charitable purposes that have become impossible, impracticable, or illegal, the doctrine of administrative deviation allows courts to deviate from the administrative terms of a trust if compliance with those terms is impossible, illegal, impracticable, or wasteful.[46] The Court of Appeals of New York eloquently described the distinction between the two doctrines as follows:

> When an impasse is reached in the administration of a trust due to an incidental requirement of its terms, a court may effect, or permit the trustee to effect, a deviation from the trust's literal terms. This power differs from a court's *cy pres* power in that "[t]hrough exercise of its deviation power the court *alters or amends administrative provisions in the trust instrument but does not alter the purpose of the charitable trust or change its dispositive provisions*." [47]

In essence, whereas cy pres is applied to cure defects in the particular ends chosen by the donor, the doctrine of administrative deviation is applied when the particular means, not the ends, are the source of the deficiency.[48] Because a court's power to encroach upon donor intent under administrative deviation is more limited than under cy pres, the threshold requirements are somewhat less strict. For

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[45] This doctrine is also known as the approximation doctrine, equitable deviation doctrine, or reasonable deviation doctrine, depending on jurisdiction. *See, e.g.*, Museum of Fine Arts v. Beland, 735 N.E.2d 1248 (Mass. 2000) (not differentiating between the cy pres and the doctrine of reasonable deviation); *In re* Barnes Foundation, 684 A.2d 123, 130 (Pa. 1996) (describing the doctrine of deviation); *In re* Public Benev. Trust of Crume, 829 N.E.2d 1039 (Ind. App. Ct. 2005) (describing doctrine of equitable deviation).

[46] *See* Nat'l City Bank of Michigan/Illinois v. Northern Illinois Univ., 818 N.E.2d 453 (Ill. App. Ct. 2004). Under the UTC §412(b), the current standard is more liberal, eliminating the impossible or illegal requirements and allowing a court to "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."

[47] Matter of Estate of Wilson, 452 N.E.2d 1228, 1234 (N.Y. 1983) (emphasis added).

[48] Burr v. Brooks, 393 N.E.2d 1091, 1095 (Ill. Ct. App. 1979) ("[E]quitable deviation concerns the administration of the trust while Cy pres permits the application of the trust proceeds to purposes other than those provided for in the trust instruments."). Because administrative deviation represents a less substantial imposition on donor intent, it is approved of by even those courts that still reject the cy pres doctrine. *See* Epworth Children's Home v. Beasley, 616 S.E.2d 710, 716-17 (S.C. 2005).

example, no showing of general charitable intent is required,[49] the doctrine may be applied even if the donor provides an alternate purpose,[50] and courts are generally willing to deviate from the terms of a trust if those terms have become merely undesirable, inexpedient, or inappropriate. Finally, though the administrative deviation doctrine applies to both private and charitable trusts, several courts have noted, "it is a power which may be exercised with particular liberality in the case of charitable trusts."[51]

Although it is clear that the legislature has the power to enact statutes calculated to increase the efficiency of trust administration consistent with the donor's stated charitable purpose, courts have struggled with just how much power state legislatures have to alter the terms of charitable trusts. The one opinion that addresses the matter, *Opinion of the Justices to the House of Representatives*, relies heavily on cases that address the propriety of legislative application of cy pres, as opposed to administrative deviation.[52] The court justifies this reliance by noting that the distinction between administrative deviation and cy pres "is irrelevant to a consideration of the separation of powers issue."[53] The court notes "[a] major reason for refusing to authorize the Legislature to apply cy pres to charitable trusts is that the existence of the prerequisites for the application of the doctrine is a determination which courts should make."[54]

Nevertheless, the Massachusetts Supreme Court acknowledges that the legislature possess "some authority to alter charitable trusts," although it notes that this authority is "narrowly limited."[55] As examples of permissible legislative action, the court cites to cases allowing the legislature to "prescribe who shall administer a charitable trust and how such persons shall be selected when these matters are not provided for in the instrument creating the trust,"[56] and allowing the legislature to "provide for the incorporation of the present managers of a charitable trust."[57] The court draws the line between legislative alterations that allow the trust to "remain[] unimpaired as to title, use and management,"[58] and those that seek to "terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres."[59] It therefore appears that while the legislature has some authority to with regard to the regulation of charitable trusts, such power may not be as great as the

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[49] *Burr*, 393 N.E.2d at 1091.

[50] *Id.*; Northern Illinois Medical Center v. Home State Bank of Crystal Lake, 482 N.E.2d 1085, 1101 (Ill. Ct. App. 1985).

[51] Shriners Hospitals for Crippled Children v. Maryland Nat. Bank, 312 A.2d 546, 582-83 (Md. 1973); *see also* Gordon v. City of Baltimore, 267 A.2d 98, 111 (Md. 1970).

[52] Opinion of the Justices to the House of Representatives, 371 N.E.2d 1349, 1355 (Mass. 1978).

[53] *Id.* at 1355 n.7.

[54] *Id.*

[55] *Id.* at 1355.

[56] *Id.* (citing Ware v. Fitchburg, 85 N.E. 951 (Mass. 1908)).

[57] *Id.* (citing Boston v. Curley, 177 N.E. 557 (Mass. 1931)).

[58] *Id.* (quoting Boston v. Curley, 177 N.E. 557, 560 (Mass. 1931)).

[59] *Id.* (quoting Opinion of Justices, 131 N.E. 31, 32 (Mass. 1921)).

judiciary's power to alter administrative terms pursuant to the doctrine of administrative deviation.

D. The Underlying Legislative Power to Regulate Charitable Trusts

Legislatures undeniably possess the *parens patriae* power to pass "general laws respecting the regulation of charitable trusts."[60] Indeed, several of the cases cited in reference to the cy pres and deviation doctrines first refer to this residual power of the legislature before addressing whether the legislature enjoys additional powers under those respective doctrines. For example, the New Hampshire *Opinion of the Justices* states that "the legislature . . . may enact general rules as to the extent and the exercise of the judicial [cy pres] power of the court[s]."[61] Likewise, the Massachusetts *Opinion of the Justices to the House of Representatives*—in distinguishing the legislature's powers under the deviation doctrine—also confirms that the legislature possess some, albeit limited, inherent power to alter trusts.[62] The Bogert treatise summarizes this position, stating that "[t]here is no doubt of the legality of statutes which apply to all trusts and which are calculated to increase the efficiency of trust administration and insure that the public will obtain the benefits prescribed by the settlor."[63] It is somewhere between this *parens patriae* power floor (the legality of which there is no doubt) and the cy pres ceiling (the legality of which is sharply questioned) that a given legislature's power to modify the terms of a trust resides.

Armed with this brief background on the development of perpetual charitable grants (as an exception to property law's disdain for dead hand control), and the cy pres and deviation doctrines that have evolved to ensure such charitable grants continue to serve the public's interests in perpetuity, I will now turn to the question at hand: whether a legislative attempt to modify or terminate conservation easements violates either the constitutional separation of powers principles or the constitutional prohibition on the impairments of contracts.

III. LEGISLATION ATTEMPTING TO MODIFY OR TERMINATE A PARTICULAR CONSERVATION EASEMENT

In 2003, a bill was introduced in the Virginia Senate that would have ordered the exchange of a conservation easement encumbering a valuable 78.6-acre parcel of land located in Chesterfield county (near the Richmond metro area), for a different conservation easement encumbering a 260-acre parcel located in Giles

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[60] 14 C.J.S. *Charities* § 58 (2007).

[61] Opinion of the Justices, 133 A.2d 792, 795 (N.H. 1957) (quoting RESTATEMENT OF TRUSTS § 399 cmt.e (1935)).

[62] 371 N.E.2d at 1355.

[63] BOGERT ON TRUSTS, *supra* note 18, § 397 (stating strongly that the constitutionality of such statutes "has never been questioned").

County in rural, southwest Virginia.[64] Though the bill did not ultimately pass, it serves as an indication of the types of legislative actions that might become more prevalent as the pressure to modify or terminate conservation easements grows. To determine the validity of this type of bill, it is first necessary to explore in greater detail the cases addressing the validity of similar types of legislative actions.

A. The Supreme Court's Decision in Dartmouth College

The natural starting point for addressing the constitutionality of legislative acts directed at a particular charitable trust is the Supreme Court's decision in *Dartmouth College*.[65] The facts of the case are well known.[66] In 1769, Dartmouth College was granted a royal charter under the seal of the then province of New Hampshire.[67] Several years after the Declaration of Independence, in 1817, the New Hampshire Legislature passed an act that added several members to the

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[64] S.B. 898, 2003 Gen. Assem., Reg. Sess. (Va. 2003), *available at* http://leg1.state.va.us/cgi-bin/legp504exe?031+ful+SB898; H.B. 2727, 2003 Gen. Assem., Reg. Sess. (Va. 2003), *available at* http://leg1.state.va.us/cgi-bin/legp504exe?031+ful+HB2727. The house bill states in full:

> § 1. That the Virginia Outdoors Foundation shall in consultation with the Office of the Attorney General divert certain real property consisting of approximately 78.6 acres located at 600 Courthouse Road in Chesterfield County acquired and designated as open-space land under the authority of the Open-Space-Land Act (§ 10.1-1700 et seq. of the Code of Virginia), from open-space land use if other certain real property consisting of approximately 260 acres located at Mountain Lake in Giles County is provided as a substitute to be preserved under the Open-Space-Land Act.

Va. H.B. 2727. Though the act would result in a net gain in the acreage protected by a conservation easement, it is likely that the economic value of the easement encumbering the 78.6 acres of land, located in the metro Richmond area, was substantially greater than the economic value of the easement that was to be received in exchange, which would have encumbered 260 acres in rural Giles County (Giles County was approximately twelve times less densely populated than the metro Richmond area). *Compare* U.S. Census Bureau, State & County QuickFacts: Chesterfield County, Virginia, http://quickfacts.census.gov/qfd/states/51/51041.html, *with* U.S. Census Bureau, State & County QuickFacts: Giles County, Virginia, http://quickfacts.census.gov/qfd/states/51/51071.html.

For more info. about this situation, see Rex Springston & Meredith Fischer, *Old Moody Farm; Protected Property?/ Group Wants to Sell Land for Development*, RICHMOND TIMES DISPATCH, Jan. 24, 2003, at A1; Meredith Fischer & Rex Springston, *"No Reason" To Develop Property, Some Say; Opposition Surfaces to Plans for Old Moody Family Farm*, RICHMOND TIMES DISPATCH, Feb. 8, 2003, at B1; Rex Springston & Meredith Fischer, *Trade Land Here for Some There?/ Shifting Protections From Moody Property Would Permit Growth*, RICHMOND TIMES DISPATCH, Nov. 29, 2003, at A1; Rex Springston, *Shift State Protections on Land?/ Agency Suggests Opening the Chesterfield Property to the Public as a Park Instead*, RICHMOND TIMES DISPATCH, Dec. 4, 2003, at A1.

[65] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[66] For a brief account, see Walker Lewis, *Backstage at Dartmouth College*, 1977 SUP. CT. HIST. SOC'Y Y.B. 29, *available at* http://www.supremecourthistory.org/myweb/77journal/ lewis77.htm; *see also* JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE U.S. (1879) (for a more thorough account); FRANCIS S. SITES, PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE 1819 (1972).

[67] *Dartmouth College*, 17 U.S. (4 Wheat.) at 519.

college's board of trustees, gave the Governor the power to appoint the additional trustees, changed the college's name to Dartmouth University, and effectively seized control of the college.[68]

In response, eight of the Dartmouth trustees brought suit "to recover the corporate seal and other property" from William H. Woodward, a trustee who had sided with the legislature. Their case relied primarily upon the New Hampshire Constitution, and alleged the act was an improper exercise of legislative power and a prohibited taking of property. As an afterthought, Dartmouth's counsel, a team of leading lawyers including Daniel Webster, also alleged that the act violated the Contracts Clause of the U.S. Constitution "[t]o give themselves a ground for possible appeal to the U.S. Supreme Court."[69]

The outlook for Dartmouth's attorneys was bleak. Indeed, in a letter to New Hampshire Governor William Plumer in support of the legislative act, Thomas Jefferson wrote, "The idea that institutions established for the use of the nation cannot be touched or modified . . . is most absurd. . . . Yet our lawyers and priests generally inculate this doctrine, and suppose . . . that the earth belongs to the dead and not the living."[70] The New Hampshire Supreme Court in 1817 held the act constitutional, dismissing Dartmouth's three arguments.

Dartmouth appealed the decision to the U.S. Supreme Court. But without their two most plausible arguments,

> Webster and Hopkinson went into the case as underdogs. Webster himself believed their case weak. Their strongest arguments had been under the New Hampshire Constitution. The Contract Clause point had been added primarily as kind of makeweight, to afford a possibility of appeal in the event of an adverse state decision. Now because of the way in which the case had reached the Supreme Court, it was the only point they were entitled to argue.[71]

In his stirring argument before the court, Webster, in defense of his alma mater, famously proclaimed in his closing argument that "[Dartmouth] is, Sir, as I have said, a small college. And yet, there are those who love it!"[72] Regardless of whether Chief Justice Marshall was moved to tears by Webster's eloquence (as legend has it) or whether his "peroration had no more than a passing effect on the Court" (as Lewis claims)[73]—the Supreme Court resoundingly backed Dartmouth's position in reversing the decision of the N.H. Supreme Court.

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[68] *See id.* at 539-41.

[69] Lewis, *supra* note 66, at 29.

[70] Letter from Thomas Jefferson to William Plumer (July 21, 1816), *reprinted in* 15 THE WRITINGS OF THOMAS JEFFERSON 46, 46 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

[71] Lewis, *supra* note 66, at 29.

[72] Daniel Webster, *Peroration to the* Dartmouth College *Case*, *in* 15 THE WRITING AND SPEECHES OF DANIEL WEBSTER 11 (J. McIntyre ed., 1903).

[73] Lewis, *supra* note 66, at 29 (Lewis somewhat cryptically writes that Webster's peroration "was like the strawberry embosomed in whipped cream at the center of a shortcake. It added immeasurably to the lusciousness of the image, but it had nothing to do with the cookery").

Marshall held that Dartmouth was a private, not public institution, decisively undermining the New Hampshire Supreme Court's decision which rested largely on a finding to the contrary.[74] Further, Marshall stated that charitable corporations, such as Dartmouth, "form[] the means by which the donors addressed their goals, and [are not tools] of the state legislature to be used to serve state interests."[75] Rather, such charitable institutions allow individuals "to come together to exert greater influence as a group . . . and to do so perpetually, without restrictions from the government."[76] Finally, Marshall reaffirmed that under the Constitution "legislative perceptions of the public good cannot overcome the rights of individuals expressed in contracts."[77]

One of the less remembered aspects of *Dartmouth College* is the role the corporation's lack of consent played in the decision. Dartmouth's counsel conceded, but the court did not necessarily agree, that "the act of the legislature would have been valid if the trustees of the college had consented to it [and] the Supreme Court placed its decision on the ground of the lack of such consent."[78] Indeed, Justice Story's opinion tells a more complex story of a web of implied contracts and the important role of consent:

> From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter.[79]

This statement—laying bare an intricate overlay of implied contracts between the government, donors, beneficiaries, and trustees, as well as the important, but yet unexplored role of trustee consent—foreshadows much of the tension in the subsequent case law addressing legislative alterations of existing trusts. Indeed, most of the subsequent cases addressing the issue center on two arguments: the impairment of contracts defense Dartmouth presented to the U.S. Supreme Court, and the separation of powers defense—the stronger defense in the Webster's

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[74] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (4 Wheat.) 658-59 (1819).

[75] Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 554-55 (1999).

[76] *Id.*

[77] *Id.* at 555 (citing *Dartmouth College*, 17 U.S. 518 (4 Wheat.) at 660-63).

[78] Scott, *supra* note 4, at 18.

[79] *Dartmouth College*, 17 U.S. (4 Wheat.) at 689 (J. Story).

view—that Dartmouth unsuccessfully argued before the New Hampshire Supreme Court. To help make sense of the case law, I have divided the cases into two groups: those involving legislative acts that attempt to alter the purpose of a charitable trust (and thereby encroach upon the judicial cy pres power), and those involving legislative acts that attempt to alter only the administrative terms of a charitable trust (and thereby implicate only the lesser administrative deviation power).[80]

B. Dartmouth's Progeny Part I: Legislative Acts Altering Charitable Purposes

Cases subsequent to *Dartmouth College* involving legislative attempts to modify or terminate the charitable purpose of an established trust generally focus on a combination of both the impairment of contracts and separation of powers argument. Several of the cases involve legislation attempting to rededicate parkland held in perpetual trust by local government entities to other, non-park purposes. Courts have held unconstitutional legislation purporting to authorize the building of skating rinks,[81] restaurants,[82] and schools[83] on lands encumbered by perpetual trusts. For example, in *Dunphy v. Commonwealth*, the park at issue was deeded to the town in 1917 "to be kept and used as a Public Park in perpetuity for the public good."[84] In 1971, the town council voted to convey the site to the Commonwealth of Massachusetts for the purpose of erecting an artificial ice skating rink.[85] A group of several citizens of the town and several of the grantor's descendants brought suit to declare the conveyance unlawful.[86] The Massachusetts Supreme Court reversed the lower court and found the act unconstitutional, finding the act inconsistent with the grantor's requirement that the land be used as a public park in perpetuity.[87] The court relied upon a mixture of impairment of contract and separation of powers theories, stating that "[i]t is not within the power of the Legislature to impair those [contractual] obligations by legislation, and [the act at issue] does not validate the diversion of the property from public purposes to other uses and purposes."[88] In reaching its decision, the court did not consider whether the continued use of the land as a public park had become "impossible or

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[80] The distinction is helpful, even though difficult to apply in cases where the legislative act at issue falls somewhere in the borderlands between a modification of charitable purpose and a modification of administrative means. For example, *Dartmouth College* arguably only involved a change in the administrative terms of the trust—the number of trustees on the board. But because this change effectively gave the State of New Hampshire control over the new board, it is more appropriately understood as an attempted change to the charitable purpose of the trust, rather than its administrative terms.

[81] *See* Dunphy v. Commonwealth, 331 N.E.2d 883 (Mass. 1975).

[82] *See* Kapiolani Park Preservation Soc. v. City & County of Honolulu, 751 P.2d 1022 (Haw. 1988).

[83] *See* City of Salem v. Attorney General, 183 N.E.2d 859 (Mass. 1962).

[84] *Dunphy*, 331 N.E.2d at 884.

[85] *Id.* at 884-885.

[86] *Id.* at 883-884.

[87] *Id.* at 887.

[88] *Id.*

impracticable," although it did note the size of the parcel (3.64 acres) and the presence of a "stand of trees of great age."[89] The court similarly did not consider the public benefits that might be derived from the new skating rink.[90] This clear refusal to consider these issues indicates that the court viewed the act as impermissible, regardless of whether the court might have authorized the termination of the trust in the context of a cy pres proceeding. The Hawaii Supreme Court reached the same result in *Kapiolani Park Preservation Society v. City and County of Honolulu*.[91] In *Kapiolani Park*, members of the public sued to prevent a portion of Kapiolani park—a park comprising land that the city had received on the condition that it be used "permanently as a free public park"—from being leased pursuant to a legislative enactment for the purpose of building a restaurant.[92] The court held the act unconstitutional, relying primarily upon *Dartmouth College* in concluding that the act at issue "impaired the obligations of the contract under which the trust was created, contrary to [the Contracts Clause]."[93] The *Kapiolani Park* court also noted an "even more fundamental[]" problem with the act: namely, "that it should have been beyond the legislature's power because it would have violated the basic principles of equity."[94] The court determined that the legislature's attempt to authorize a use of the land for a purpose contrary to that specified by the donors amounted to an attempt to "defraud the donors."[95]

Similarly, in *City of Salem v. Attorney General*, the Massachusetts Supreme Court held that a statute authorizing the building of a public school on a public park was unconstitutional.[96] The park had been conveyed to "the City of Salem to be used forever as Public Grounds for the benefit and enjoyment of the citizens of said City."[97] The court focused on the strength of the donor's intent that the land be used as a park in perpetuity and found that insofar as the act is "at variance with the use for which the city holds the land, it impairs the obligation of the contract

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[89] *Id.* at 885 (during the course of the litigation, some of these were apparently cut down by overly eager construction workers).

[90] The court in *City of Reno v. Goldwater* similarly refused to consider the potential benefits of allowing the activity authorized by the legislation to go forward. 558 P.2d 532, 534 (Nev. 1976). In *City of Reno*, the City of Reno attempted to trade parkland forever protected in trust for a parcel of land the city needed to widen an avenue and create an approach to a bridge. *Id.* The court refused to allow the conveyance, noting that the trust obligation could not be "impaired by legislative enactment" and the City's demonstrated need for certain property "did not authorize the City to trade trust property to those persons for a nonpublic use." *Id.*

[91] Kapiolani Park Preservation Soc. v. City & County of Honolulu, 751 P.2d 1022 (Haw. 1988).

[92] *Id.* at 570-71 (describing terms of the lease agreement).

[93] *Id.* at 1028. In relying on *Dartmouth College*, the court failed to address the significance of trustee consent, present in *Kapiolani Park*, but critically absent in *Dartmouth College*. *See* text accompanying *supra* notes 81-82.

[94] *Id.* at 1027.

[95] *Id.* at 1028. For an in depth discussion of the *Kapiolani Park* case, see Mary A. Renfer & Douglas C. Smith, Note, Kapiolani Park Preservation Society v. City and County of Honolulu*: The Lease of Public Park Land as a Breach of a Charitable Trust*, 11 U. HAW. L. REV. 199 (1989).

[96] City of Salem v. Attorney General, 183 N.E.2d 859 (Mass. 1962).

[97] *Id.* at 860.

and affords no right to the school committee to use the land for school purposes."[98] Unlike the courts in *Dunphy* and *Kapiolani Park*, the *Salem* court also stressed the "eminent suitability of [the location] for park purposes," noting the land's favorable location and history of use.[99] It is difficult to discern whether inclusion of these facts was an indication that the act *might* have been constitutional *if* the parkland were no longer so well-suited or simply reflected the court's desire to wax prophetic about the value of this particular "public pleasuring ground."[100]

In *Cohen v. Lynn*, however, the court engaged in a cy pres analysis before declaring unconstitutional an act that purported to convey parkland held in trust to a developer.[101] In *Cohen*, the court first established that the grantor's specification that the land be used "forever" and "in perpetuity" for park purposes clearly created a public charitable trust.[102] But before moving to what other courts have found to be the crux of the matter—the underlying question of the legislature's power to impair charitable trusts—the court first addressed whether it had become impossible or impracticable to use the land as a public park.[103] The court refuted the town's argument that the small size and awkward location of the land established that it was impossible or impracticable to use it for park purposes and noted that even solely "ornamental" parks that only "promote public enjoyment of the 'views' and 'sea breezes'" can be used by the public for valid park purposes.[104] After completing this cy pres analysis, the court ultimately also noted Massachusetts' strong policy against legislative tinkering with charitable trusts. Yet, it is again unclear whether the case *might* have been decided different *had* the court found that it had become impossible or impracticable to continue to use the land as a park.

Two cases from Delaware also show that sometimes courts hold specific legislation that alters the purpose of a charitable trust permissible.[105] As noted above, the state of Delaware follows a slightly different approach in it's application of the doctrine of cy pres.[106] As a result perhaps of this more permissive view of legislative power over trusts, the Delaware Supreme Court approved of legislative acts authorizing the sale of religious trust property in *Delaware Land* and of a portion of the town commons in *Gordy*. In *Delaware Land*, a Presbyterian Church sued a developer for specific performance of a

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[98] *Id.* at 862.

[99] *Id.* at 861.

[100] *Id.* at 860.

[101] *See* Cohen v. City of Lynn, 598 N.E.2d 682, 686 (Mass. App. Ct. 1992).

[102] *Cohen*, 598 N.E.2d at 685. The court found a charitable trust had been established even though the grantors were compensated for part of the purchase price. It further noted that "[w]e have found no authority, nor is nay cited to us, to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such manner as to establish a public charitable trust." *Id.* at 685.

[103] *Id.* at 686.

[104] *Id.*

[105] *See, e.g.*, Trustees of New Castle Common v. Gordy, 93 A.2d 509 (Del. 1952); Delaware Land & Dev. Co. v. First & Central Presbyterian Church of Wilmington, 147 A. 165 (Del. 1929).

[106] *See supra* notes 41-47 and accompanying text.

contract in which the developer had agreed to purchase certain lands. Because the lands were held in charitable trust, the developer claimed that the church was unable to convey fee title to the land.[107] The original deed from 1737, required the land to be used "for a meeting house, burying ground and such other good and pious uses as to the grantees, or their successors, might, at any time thereafter, seem most fitting and convenient, and to no other use, intent or purpose, whatsoever."[108] As noted above,[109] the court held that the legislature's power under the cy pres doctrine was coequal with the judiciary's.[110] The facts showed that an act passed in 1915 authorized religious societies upon incorporation to "grant, demise or dispose" of their property.[111] In addition, a special act was also passed in 1929, specifically authorizing the Presbyterian Church to convey the land at issue. The court concluded that these acts operated to give the church the power to convey fee title to the defendant developer.

Thankfully, the facts of *Trustees of New Castle Common v. Gordy* are significantly less convoluted.[112] As in *Delaware Land*, the trustees sued for specific performance of a contract under which the defendants had agreed to buy certain trust lands[113] and the defendants asserted that the plaintiffs lacked the power to convey fee title to the lands.[114] The question before the court was whether a legislative act authorizing the sale of the New Castle Commons was valid. The language of the original combined charter and deed, as well as that of the subsequent modifications authorized by the grantor's heirs and the legislature, were all worded to prevent the trustees from conveying any portion of the commons.[115] The last iteration stated, "neither the said trustees, nor their successors, shall have power to sell the said tract of land, nor any part or parts thereof, absolutely, nor lease, nor otherwise dispose thereof for a longer term than thirty years from the commencement of the lease or other contract."[116] Importantly, the second revision, authorized by the grantor's heirs, removed the original limitation that the land be solely used as a common.[117]

Subsequently, the Delaware legislature passed legislation authorizing the trustees to convey the commons, in whole or in part, in fee simple.[118] After sifting through the contrary statements appearing in *Delaware Land* ("It is . . . generally held that the legislature . . . has a like power [as a court of equity] to authorize the

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[107] *Delaware Land*, 147 A. at 167-68.
[108] *Id.* at 172.
[109] *See supra* notes 41-47 and accompanying text.
[110] *Delaware Land*, 147 A. at 174.
[111] *Id.* at 175.
[112] 93 A.2d 509 (Del. 1952).
[113] *Id.* at 510.
[114] *Id.*
[115] *Id.* at 511-12.
[116] *Id.* at 512.
[117] *Id.* at 511.
[118] *Id.*

sale of real property held in such a trust"),[119] and leading trust treatises ("the legislature may not exercise the power of a Chancellor under the doctrine of cy pres and thus divert the corpus of the trust to uses other than those specified"),[120] the *Gordy* court set a new tack, holding that "[l]egislation respecting a charitable trust is valid if in aid of its purpose and not in destruction or impairment of the interests arising under it."[121] After enunciating this standard, the court then offered several arguments that augured in favor of the validity of the act.

Notably, the court construed the act not as an alteration of charitable purpose, but rather as a mere deviation of means that "is not only consistent with the fundamental purpose of the trust but in all likelihood will promote it."[122] The court justified this position by noting that the revised deed no longer required the land to be used as a common, and posited that these changes rendered the "species of property in which the trust corpus may be invested . . . of secondary importance,"[123] despite the revised deed's renewed requirement that the land not be sold. Further, the court also noted that the "greatly changed economic conditions" of the county made this position reasonable.[124] Based upon these findings, and upon Delaware's tradition of permitting the legislative branch to play a more active role in the modification and termination of charitable trusts, the court held that the act authorizing the sale of the land was constitutional.

Though the outcome of the Delaware cases appears to be inconsistent with the majority of those from other jurisdictions, many of the underlying legal principles are similar. Like the cases finding the legislative acts invalid, the *Gordy* court attempts to determine the exact nature of the donor's intent. In addition, the *Gordy* court, like the *Salem* and *Cohen* courts, also assesses whether any changed circumstances might justify the legislative action. Though Delaware's approach is certainly more permissive than that of other jurisdictions, the inconsistent outcomes may be a result of distinguishable facts rather than those doctrinal differences. But *Gordy* does introduce a new twist in emphasizing the difference between an act that changes the underlying charitable purpose of a trust and an act that only alters the means used to achieve that purpose. It is this distinction to which I will now turn.

C. Dartmouth's Progeny Part II: Acts Altering Administrative Terms

Trust law generally differentiates between alterations of a charitable trust's purpose and alterations of the specific means of accomplishing that purpose, and is also generally more permissive of the latter.[125] The only judicial statement directly

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[119] *Id.* at 514 (citing Delaware Land & Dev. Co. v. First & Central Presbyterian Church of Wilmington, 147 A. 165 (Del. 1929)).

[120] *Id.* at 515 (citing 2 BOGERT ON TRUSTS, *supra* note 18, § 434).

[121] *Id.* at 515.

[122] *Id.*

[123] *Id.* The proceeds of the sale were an acceptable "species of property" because the act expressly required these "to be held upon the same uses and trusts as the real estate is now held." *Id.*

[124] *Id.*

[125] *See supra* Part II.C.

addressing the legislature's power to authorize such deviations in administrative terms appears in *Opinion of the Justices to the House of Representatives*.[126] The Massachusetts Supreme Court concludes that while the legislature's power under the administrative deviation doctrine is not coequal with judiciary's power, the legislature nevertheless has some authority to make certain limited changes to the administration of a charitable trust.[127] There are, however, other cases—like the Delaware *Gordy* case discussed above[128]—that address the propriety of such legislative acts without explicitly mentioning the deviation doctrine. I will now discuss several of these cases involving legislatures making deviation-type changes to charitable trusts.

1. The Cases Striking Legislative Alterations of Administrative Terms

The cases addressing the validity of legislative deviations of trusts are split and their outcomes appear to turn more on the particular facts—especially particular facts regarding donor intent—than on any overarching legal doctrines.[129] For example, in the 1890 *Cary Library v. Bliss* case, the Supreme Judicial Court of Massachusetts held that a legislative act authorizing a change in the administration of a charitable trust was impermissible, largely based upon the strength of the trust donor's intent.[130] The donor, Maria Cary, donated money for the purpose of establishing a library in her hometown of Lexington, Massachusetts. The funds were donated on the condition that they be held solely for the support of the library and by a certain group of selectmen, school committee members, and ministers.[131]

The court noted that the designation of the trustees "was carefully regarded by the town in all its proceedings, and was treated as an important element in the agreement which resulted from the acceptance of her offer."[132] The important

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[126] 371 N.E.2d 1349 (Mass. 1978). For a discussion of the case, see *supra* notes 55-62 and accompanying text. For another strong articulation of this position, see Goldstein v. Trustees of the Sailor's Snug Harbor, 277 A.D. 269 (N.Y. Ct. App. 1950) ("The legislature is without power to alter the directions of a testator or divest vested rights and cannot enact any statute at variance with the terms of the will of Captain Randall.").

[127] *Opinion of the Justices*, 371 N.E.2d at 1355.

[128] *See supra* note 125.

[129] Of the eight cases I found addressing legislation authorizing trust deviations, three upheld the legislation, one struck the legislation in part, and four struck the legislation completely. For the cases upholding the trust deviation authorizing legislation, see Trustees of New Castle Common v. Gordy, 93 A.2d 509 (Del. 1952); Trustees of Rutgers College in New Jersey v. Richman, 125 A.2d 10 (N.J. 1956); Wilbur v. University of Vermont, 270 A.2d 889 (Vt. 1970). For the case holding the legislation unconstitutional in part, see St. John the Baptist Greek Catholic Church of Perth Amboy, N.J. v. Gengor, 189 A. 113 (N.J. 1937). For the cases holding the legislation unconstitutional in full, see Adams v. Plunkett, 175 N.E. 60 (Mass. 1931); Cary Library v. Bliss, 25 N.E. 92 (Mass. 1890); Board of Regents of the Univ. of Maryland v. Trustees of the Endowment Fund of the Univ. of Maryland, 112 A.2d 678 (Md. Ct. App. 1955); Goldstein v. Trustees of the Sailor's Snug Harbor, 277 A.D. 269 (N.Y. Ct. App. 1950).

[130] *Cary Library*, 25 N.E. at 95-96.

[131] *Id.* at 92-93.

[132] *Id.* at 93. The court noted, at great length, that the trustees in this case "had not a mere naked power, but a power coupled with a trust." *Id.* The court described the donor's scheme as follows:

element was that "she thought it wise to select for her board of trustees those public officers who have in their special charge the business interests of the town, and those whose duty it is to superintend the education of children, together with such reverend gentlemen as regularly minister in the churches, and are expected earnestly to desire the moral and religious welfare of all the people."[133]

Subsequent to the establishment of the trust, a statute was passed authorizing the transfer of the management and control of the trust to a corporation. Under the statute, the corporation's trustees were to be elected from [its] members, a group of town citizens substantially different from one specified by the donor.[134] The court held that it was "quite clear" that it could not "upon grounds of mere expediency, and in the absence of an emergency requiring it . . . decree such a change in the administration of the trust as is contemplated by this statute."[135] Further, it held that after *Dartmouth College*, it was also equally clear that the administrative terms negotiated for by the donor were protected from legislative modification under the Contracts Clause.[136]

The court did, however, state that the legislature's action would have been appropriate had there been an exigency for the modification. Specifically, the court stated:

> [Ms. Cary] impliedly agreed that the court might make any reasonable modification of her scheme which might at any time become necessary. The town might become a city, and the board of selectmen or the school committee might be abolished by law, or many other things might occur which would render it impossible or impracticable literally to follow her directions. She impliedly agreed that in such a case the court or the Legislature might modify her method to adapt it to changed conditions. But she did not agree that any material change might be made unless there should be an exigency for it.[137]

Four decades later, in *Adams v. Plunkett*, the Massachusetts Supreme Court again reached the conclusion it had in *Cary Library*—that a statute mandating a trust management scheme substantially different from the one envisioned by the grantor was unconstitutional.[138] The case involved a hospital that had been donated

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> It prescribed the method of administering the charity which she thought best adapted to the accomplishment of her purpose. She chose to give her money to be used in that way. She did not authorize the use of it in any other way, unless for some reason it should become impracticable to pursue the course which she prescribed.

Id.

[133] *Id.*
[134] *Id.*
[135] *Id.* at 94.
[136] *Id.* at 95.
[137] *Id.* at 94.
[138] Adams v. Plunkett, 175 N.E. 60, 64 (Mass. 1931).

in perpetual trust to the town of Adams, Massachusetts. In crafting the administrative terms of the trust, the donor "considered it of the utmost importance that the management of the hospital be kept out of politics."[139] To that end, the donor's "gift was made upon condition that [the hospital board] be chosen and vacancies therein filled in some other manner than by popular vote."[140]

Thirteen years after the establishment of the trust, a statute was passed authorizing the citizens of Adams to "elect at a special town meeting a board consisting of seven trustees to manage the W.B. Plunkett Memorial Hospital."[141] The court, relying on *Cary*, found the statute to be in clear violation of the Contracts Clause.[142] The court made no attempt to inquire whether there were any changed conditions that required the administrative terms to be adjusted. The court also noted in passing that "[t]here was nothing unreasonable about the plan adopted by the parties for selecting the trustees,"[143] implying perhaps that unreasonable terms might be considered an exigency justifying legislative action.

The third case disallowing a legislative modification of the administrative terms of a trust is *Board of Regents of the Univ. of Maryland v. Trustees of the Endowment Fund of the Univ. of Maryland*.[144] There, the legislature had passed an act vesting control of a University endowment fund in the Board of Regents. The court first noted that "[i]n soliciting contributions to the Endowment Fund, emphasis has always been placed on the permanence of the Endowment Fund, the fact that only interest would be expended, and that the Fund would always be managed and controlled by a separate corporation completely independent of the governing body of the University."[145]

The Board of Regents argued that the statute only altered the charter, and that such alterations were "within the power reserved to the Legislature."[146] The court agreed that the "right of the legislature to alter and amend the charter of the defendant corporation is not, and could not, be denied,"[147] but also noted that this power did not allow the legislature to, "under the guise of an amendment, substitute a new and different charter, with distinct and different purposes."[148]

The "nub of the controversy" was therefore to determine how to classify the statute at issue.[149] The Board of Regents argued that the "fundamental object of the Endowment Fund is to benefit the University," and further that "the administration of the Fund is secondary and of no real importance."[150] The court disagreed, noting

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[139] *Id.* at 62.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 64 ("[The *Cary* opinion] is clear, comprehensive and decisive; nothing can be added to its cogent logic, its forceful reasoning, or its irresistible conclusion.").
[143] *Id.*
[144] 112 A.2d 678 (Md. Ct. App. 1955).
[145] *Id.* at 682.
[146] *Id.*
[147] *Id.* at 683.
[148] *Id.*
[149] *Id.* at 684.
[150] *Id.*

that the proposed change in management altered the purpose, not just the administrative terms, of the trust. The court explained:

> Any donor was, of course, at perfect liberty to make gifts directly to the Board of Regents, and we can only infer that those who chose to channel their gifts through the appellee corporation instead, did so because they preferred it as the repository of their benefactions.
>
> . . . .
>
> In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable. It defeats the very purpose for which the corporation was formed, for there would have been no need whatever for a separate corporation to hold, invest, control and distribute the fund, unless for the purpose of limiting the control of the Board of Regents.[151]

The court implied that in a case of necessity (i.e., to prevent a failure of the trust), such a legislative act might be justified under the "police power" of the state.[152] But upon evaluating the facts of the case, the court found "this was no case of necessity…but simply a case where the Legislature has attempted to remove a private self-perpetuating board and replace it by a public one appointed. . . by the Governor without any necessity to effectuate the general purpose or to protect the public interest."[153] Therefore, the act was beyond the power of the legislature.

In each of the above three cases, *Cary Library*, *Adams*, and *Board of Regents*, the courts examined the donor's intent in great detail before determining whether a particular legislative modification of the trust was permissible. The care taken by Maria Cary and William Plunkett in delineating exactly why they wanted their trusts administered in a certain manner ultimately served as a powerful incentive to strike the legislative attempts to tinker with those carefully selected terms. Similarly, in *Board of Regents*, the representations made to the donors, including those proclaiming the permanence and independence of the endowment funds, became a very important fact when the constitutionality of legislation that would have destroyed that very independence was enacted. However, each of the cases left future courts the option of validating similar acts in cases of exigency or changed circumstances.

2. The Cases Allowing Legislative Alterations of Administrative Terms

The courts' are more willing to permit a legislative change in terms where the evidence indicates that the provisions to be modified were not of central

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[151] *Id.*
[152] *Id.* at 685-686.
[153] *Id*. at 684.

importance to the donor and the proposed changes would better effectuate or enhance the donor's purpose—and, by extension, promote the public interest. As noted above, there are several cases in which legislation modifying the terms of a charitable trust has been held constitutional. The first case, *Trustees of New Castle Common v. Gordy*, serves as a natural counterpoint to *Board of Regents*. Whereas the *Board of Regents* court construed legislation that was arguably an alteration of administrative terms as an alteration of trust purpose in striking the legislation, the *Gordy* court construed legislation that was arguably an alteration of purpose as an alteration of administrative terms in upholding the legislation. Unlike the strong donor intent shown in *Cary Library*, *Adams*, and *Board of Regents*, the donor intent in *Gordy* could not be readily made out, especially after the donor's heirs modified the trust "to eliminate entirely any requirement that the land should necessarily be used as a common, and to permit it to be rented and made productive."[154] Therefore, it was not unreasonable for the court to find that the legislation permitting the outright sale of the land was consistent with and even promoted the purpose of the trust.[155]

The second and third cases involve University reorganizations and therefore also serve as natural counterpoints to the *Board of Regents* case discussed above. In *Trustees of Rutgers College in New Jersey v. Richman*, the legislative act in question modified the University's charter "in a number of substantial respects" while retaining the University's core "objects and purposes."[156] Like *Board of Regents*, the Rutgers trustees administered a "very considerable body of assets, for the most part derived from private donations in the cause of higher education…."[157]

Despite this underlying factual similarity, there are several important distinctions between the *Board of Regents* opinion and the opinion in *Trustees of Rutgers*. First, in considering donor intent, the *Trustees of Rutgers* court noted—in stark contrast to *Board of Regents*—that "[i]t is not likely that persons making gifts to the University do so in special reliance upon the fact that no change will be made in the management of the corporation."[158] Next, as regards the exigency of the circumstances, the court noted that the University "is even now unable to meet the full measure of demand for its services, and the demand is certain to intensify in the predictable future far beyond its present capabilities."[159] Finally, the court noted that the trustees had consented to the new legislative scheme, and further

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[154] Trustees of New Castle Common v. Gordy, 93 A.2d 509, 515 (Del. 1952).

[155] *Id.*

[156] Trustees of Rutgers College in New Jersey v. Richman, 125 A.2d 10, 20 (N.J. 1956). In essence, the legislation authorized the management of the University to be transferred from the old Board of Trustees to a new Board of Governors dominated by state appointees. *Id.* at 26. The case lists exact terms of the reorganization in detail. *Id.* at 20-22.

[157] *Id.* at 22.

[158] *Id.* at 26. The court also noted the numerous past acts of the legislature respecting the governance of Rutgers, *id.* at 14-16, and supported the position that the College's donors had an understanding that their gifts might be subject to this type of legislative change, *id.* at 26.

[159] *Id.* at 19 (noting in detail the extent of the changed conditions encountered by the University).

held that this consent was valid, in part because the trustees retained the power to withhold the trust property from the new Board of Governers "in the event that its trust duties for the accomplishment of the trust purposes are not adequately discharged."[160]

This groundwork directly led to a number of the court's findings. First, the valid trustee consent operated to remove the case from the strict rule articulated in *Dartmouth College*.[161] Second, the court's broad view of the specific charitable purpose of the trust allowed it to hold that the legislation served, rather than detracted, from the intent of the donors.[162] Finally, in light of the University's intensifying needs, the court also added that "the contemplated step is a most reasonable advance in the successful development of the institution."[163] These findings led the *Trustees of Rutgers* court to ultimately hold that the legislation was not an unconstitutional impairment of contract.[164]

A combination of factors seemed to have led the courts in *Gordy* and *Trustees of Rutgers* to hold legislation altering the administrative terms of a trust constitutional. First and foremost among these factors is donor intent. Unlike the *Cary Library*, *Adams*, and *Board of Regents* cases discussed in Part II.C.1., the courts in *Gordy* and *Trustees of Rutgers* found no strong showing of contrary donor intent. For example, the *Gordy* found the legislation permissible in large part because the donor failed to designate anything other than that the commons be used (and leased) productively. Similarly, the *Trustees of Rutgers* court broadly interpreted the donors' intent, stating their intent to implement a specific administrative scheme was undoubtedly subordinate to their intent to further higher education in the state.

A second important factor in *Gordy* and *Trustees of Rutgers* may have also been the degree to which circumstances had changed. Indeed, both *Gordy* and *Trustees of Rutgers* featured a great passage of time between the establishment of the trust and the legislative action. For example, in *Gordy*, the grant was made in 1704 and the legislature acted in 1884, almost 200 years later. In *Trustees of Rutgers*, well over 150 years had elapsed between the chartering of the school and the legislative amendment.

A final factor at play is the extent to which the deviation better effectuates or enhances the donor's charitable purpose—which in turn furthers the public interest. In all three cases, the courts emphasized the public's benefit in allowing portions of the common to be sold (*Gordy*) and the University to be reorganized to better realize a return on the state's own investment in the school (*Trustees of*

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[160] *Id.* at 26.

[161] *Id.* at 27 ("The Board of Trustees, by appropriate resolution, has assented to the plan of reorganization and has accepted the amendments to the charter contained therein, so that the constitutional hurdles evoked by the Dartmouth College case are not applicable.").

[162] *Id.* at 28.

[163] *Id.* It is interesting to contrast this approach with the one taken in the *Adams* case, where the court focused on whether there was something unreasonable about the existing plan, rather than focusing on the reasonableness of the legislature's alternate plan. *Compare* Adams v. Plunkett, 175 N.E. 60, 64 (Mass. 1931), *with Trustees of Rutgers*, 125 A.2d at 28.

[164] *Trustees of Rutgers*, 125 A.2d at 33.

Rutgers). Notably, the courts in *Cary Library*, *Adams*, and *Board of Regents* failed to bring up the analogous (or identical) interests of the public in the library, hospital, and University, respectively, at issue in those cases. Thus, analysis of the public's concern in a particular trust purpose is unlikely to be an effective predictor of what a court will do in the future.

In sum, it appears clear for the cases discussed in Part II.C.1., legislation that alters the charitable purpose of a trust is likely to be unconstitutional. Changes in trust purpose inherently clash with the donor's intent, and therefore most courts have held that such changes are the proper province of the judicial, rather than legislative branch. But the situation regarding legislative alteration of the administrative terms of a trust is more complex. In cases where the provisions to be modified were not of central importance to the donor and the proposed changes would better effectuate or enhance the donor's purpose (and, thus, promote the public interest), court's are willing to permit the legislature to regulate the administration of the trusts. While the cases addressing these types of changes still focus on donor intent, other factors, such as the extent that conditions have changed and the extent of the public's interest in a particular alteration can become important. Further, the distinction between a change in charitable purpose case and an alteration of administrative terms is not always clear. As demonstrated by the *Gordy* case, in the absence of strong donor intent, a court may construe a change that appears to be directed at the purpose of a charitable trust as a mere alteration of its terms. But even in cases such as *Gordy*, the touchstone is still donor intent.

D. The Validity of Legislation Modifying or Terminating a Specific Conservation Easement

The constitutionality of a legislative act purporting to alter a specific conservation easement would likely turn on the intent of the particular donor of that conservation easement, as well as the representations made to that donor by the land trust or other entity that procured the easement. Bills seeking to terminate a particular easement, like the Virginia bill mentioned above,[165] would likely be found unconstitutional because such easements are generally intended, by the donor, the holder, and the federal tax system, to be held in perpetuity. Specifically, strong intent that the land is to be encumbered by a specific conservation easement for conservation purposes in perpetuity is likely to be found in: (1) the conservation easement deed, (2) the representations made by the holder to the landowner, and (3) the parties' compliance with the provisions of § 170(h) of the Internal Revenue Code and the Treasury Regulations interpreting that provision.

First, the language of the conservation easement deed itself is likely to display a strong showing that the donor intended the land to be protected for conservation purposes in perpetuity. A typical easement would likely expressly state:

[165] Va. S.B. 898 (2003).

> This Preservation Agreement assures that the Property will be perpetually preserved in its predominately natural, scenic, forested, wetland, and open space condition. The Purposes of this Preservation Agreement are to protect the Property's natural resource and watershed values; to maintain and enhance biodiversity; to retain quality habitat for native plants and animals, and to maintain and enhance the natural features of the Property. Any uses of the Property which may impair or interfere with the above stated Conservation Values are expressly prohibited.[166]

Less generic easements, put in place for the protection of agricultural land or clean water, would nevertheless likely feature similarly broad language. For example, an easement put in place to preserve clean water, might state that the parties agree, "for the purpose of creating a Conservation Easement to preserve, enhance, restore, and maintain the natural features and resources of the Easement Area, to provide habitat for native plants and animals, to improve and maintain water quality, and to control runoff of sediment."[167] Similarly, an agricultural conservation easement might read, "The Grantors intend to make a charitable gift of the property interest conveyed by this Deed to the Grantee for the exclusive purpose of assuring that, under the Grantee's perpetual stewardship, the open space character and agricultural productivity of the Property will be maintained forever, and that uses of the land that are inconsistent with these conservation purposes will be prevented or corrected."[168] The detailed statements found in these easement agreements are a primary source of donor intent in the conservation easement context.

Second, most land trusts make detailed representations to landowners regarding the perpetual nature of the conservation easement. For example, the Vermont Land Trust assures landowners that "[a] donation of a conservation easement protects your land from development for *all* future generations. The land . . . carries with it protective restrictions . . . . [that] are *forever* upheld by the Vermont Land Trust through its stewardship staff."[169] The Nature Conservancy states that its conservation easements "reach beyond a landowner's lifetime to

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[166] Saginaw Basin Land Conservancy, Sample Preservation Agreement, http://sblc-mi.org/sample.html.

[167] North Carolina Clean Water Management Trust Fund, Conservation Easement Example, May 2007, http://www.cwmtf.net/easement.htm.

[168] Pennsylvania Farm Link, Sample Conservation Easement, http://www.pafarmlink.org/resources/sample%20conservation%20easement.pdf. Other conservation easements for specific purposes may have even more detailed expressions of donor intent. *See* West Amwell Township, Sample Woodlands Conservation Easement, http://www.westamwell twp.org/Ordinance/West%20 Amwell%20Woordlands%20Appendix%20B.htm (providing detailed guidelines for when trees and understory plant materials may be removed, when new plantings are allowed, and where fences may be installed, and further listing in detail activities that are prohibited).

[169] Vermont Land Trust, VLT Landowner Information Series: Conservation Easement Donations, http://www.vlt.org/Conservation_Easement_Donations.pdf (emphasis added).

ensure the conservation purposes are met *forever*."[170] Similarly, Utah Open Lands (UOL) represents to landowners that UOL "assures that the terms of the agreement are followed in perpetuity."[171] These and similar representations made to the donors of conservation easements help strengthen the case for strong donor intent in the conservation easement context.

Third, landowners seeking a tax deduction in return for donating a conservation easement, must comply with the requirements of § 170(h) of the Internal Revenue Code (§170(h)) and the Treasury Regulations interpreting that provision. Section 170(h) explicitly provides that to qualify for a federal charitable income tax deduction, a conservation easement must be "granted in perpetuity" and "exclusively for conservation purposes."[172] The section specifies that this latter condition is not satisfied unless "the conservation purpose is protected in perpetuity."[173] The Treasury Regulations additionally require that a conservation easement may only be extinguished in the context of a judicial proceeding when changed conditions render conservation use impossible or impracticable.[174] These requirements, and the donor's intent to meet them, further facilitate a strong showing of donor intent in the conservation easement context.

1. Legislative Attempts to Alter the Purpose of the Easement

Armed with these three sources of donor intent, it is likely that a court considering legislation seeking to impair the purpose of a conservation easement—such as the Virginia bill discussed above—would hold the legislative act unconstitutional. Like the legislative acts involved in the *Dunphy*, *Kapiolani Park*, *Salem*, and *Cohen* cases discussed in Part II.B., such an act would serve to defeat the very purpose that the donor sought to fulfill in making her charitable donation. Though a court may engage in some weighing of the suitability of the particular land for conservation, it is likely that even a marginal conservation purpose would suffice to allow the donor's intent to prevail over the legislature's. For instance, in the *Salem* case, showing the park, though small and inaccessible, would facilitate ocean views and breezes sufficed to prevent the legislature from overriding those marginal park values with its own plan of allowing the sale of the trust land into development.

The result would likely be the same even in a somewhat more permissive jurisdiction like Delaware. The result reached in *Delaware Land* and *Gordy* was in part due to the lack of strong intent shown by the donors involved in those cases. Particularly in *Gordy*, the court relied heavily upon the fact that the donor's main requirement was that the commons be used productively. This broad articulation of

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[170] The Nature Conservancy, Conservation Easements: All About Conservation Easements, http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html.

[171] Utah Open Lands, Fact Sheet, http://www.utahopenlands.org/faq.html (last visited 6/20/09).

[172] I.R.C. § 170(h)(5)(A) (2006).

[173] *Id.*

[174] Treas. Reg. § 1.170A-14(g)(6).

donor intent led the court to find the legislative act authorizing the sale of the commons permissible, so long as the funds generated continued to be used productively. Conservation easement cases are unlikely to generate similarly lax showings of donor intent. As described above, the easement documents, representations of the holder, and requirements of the IRC are likely to result in strong evidence that the parties to the easement intended the particular land encumbered by the easement to be used for the conservation purposes specified in the easement deed in perpetuity. Faced with such a strong showing, it is unlikely that any court, including a Delaware court, would allow a legislative act to interfere with the donor's explicit intentions.

2. Legislative Attempts to Alter the Administrative Terms of the Easement

At the outset, it is somewhat difficult to imagine a scenario in which the legislature would find it worthwhile to meddle with the administrative terms of a particular conservation easement (such as to authorize the moving of a building envelope or the relocation of a fence line). The most likely scenario is that a court would attempt to construe an act such as the Virginia act as a mere alteration of terms as the first step in finding a particular legislative act permissible. The court in *Gordy,* evaluated a legislative act which allowed land held in charitable trust to sold and construed this relatively invasive modification as a mere alteration of terms. Similarly, a court could conceivably find that a conservation land swap engineered by the legislature did not fundamentally alter the easement's charitable purpose—to preserve land in perpetuity.

It is hard to imagine such an argument actually working, especially given the strong intent likely to be shown by donors of conservation easements. The *Gordy* case, after all, dealt with a fairly boundless grant of power to administer common land productively. As shown by the language of the sample easements discussed above, conservation easements stand in stark contract to trusts established in the eighteenth century to oversee the use of the town commons. In the conservation easement context, the donating landowner, the receiving land trust, and the subsidizing federal government all have expressed the intention to protect particular land in perpetuity for the conservation purposes specified in the deed of conveyance, not just any land that the legislature, through an orchestrated swap, might deem equally fit.

IV. GENERAL LEGISLATION LESSSENING THE PROCEDURAL AND SUBSTANTIVE BURDENS ASSOCIATED WITH THE MODIFICATION OR TERMINATION OF CONSERVATION EASEMENTS IN GENERAL

Recently, a few members of the land trust community suggested altering, through state legislation, the mechanism by which decisions to modify or terminate existing conservation easements are made. Such proposals usually seek to both lower the standards pursuant to which conservation easements can be modified or

terminated[175] and vest state boards (rather than the judiciary) with the authority to make modification and termination determinations.[176] The legislature's residual *parens patriae* power to make laws respecting the regulation of charitable trusts in general is discussed in Part II.D. This residual power allows the legislature to enact certain general laws respecting the regulation of charitable trusts without running afoul of the prohibition on legislative use of the cy pres power. The New Hampshire Supreme Court, for example, opined in *Opinion of the Justices* that "the legislature . . . may enact general rules as to use of judicial cy pres power by the courts."[177] But what power does the legislature have to enact rules that regulate the administration (including modification or termination) of all charitable trusts or a category of charitable trusts? I will briefly address the problems with applying these types of general laws prospectively to future conservation easements. I will then more thoroughly address whether such laws could be applied retroactively to conservation easements in existence at the time of passage.

A. The Limits of Prospective Application

Prospective application of legislation that alters the cy pres standard and vests the judiciary's power to make cy pres determinations in a state board would be problematic for three reasons. First and foremost, both lowering the cy pres standard and vesting an extra-judicial board with authority to modify and terminate conservation easements would directly conflict with requirements in the Treasury Regulations that tax-deductible easements be extinguishable by their holders only in a judicial proceeding and upon a finding of impossibility of impracticality. Non-compliance with the tax scheme would prevent individuals in a state enacting such legislation from obtaining the charitable income tax deductions and other federal tax benefits that make donating conservation easements so attractive. Further, individuals interested in protecting their land "in perpetuity" (or for as long as such protection remains "possible or practicable," as under existing law) may be less inclined to donate under a regime that would allow their conservation easements to be terminated by a state board (possibly consisting of political appointees) when the board's members believe a particular conservation easement no longer serves "the public interest."

The public interest standard would eliminate the requirement that some level of deference be accorded to the intent of the donor (as memorialized in the

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[175] For example, such proposals have called for the ability to terminate conservation easements (or modify them in manners inconsistent with their purposes) when it is deemed to be "in the public interest," rather than when the purpose of the conservation easement has been shown to have become "impossible or impracticable" due to changed conditions as required under the doctrine of cy pres.

[176] Many conservation easements contain an amendment provision that grants the government or nonprofit holder the right to simply agree to amendments that are consistent with the purpose of the easement (i.e., without court approval). In such cases, only those modifications to an easement that are inconsistent with its purpose (such as to permit the subdivision and development of the land) or the termination of an easement (which would clearly be inconsistent with its purpose) would require court approval.

[177] 133 A.2d 792, 795 (N.H. 1957). For more detail, see notes 55-62 and accompanying text.

easement deed) when making modification or termination decisions. Moreover, the public interest standard may accord more weight to the public's economic interests than to the less quantifiable interests of the public in conservation and historic preservation. Indeed, the whole point of protecting land in perpetuity with a conservation easement is to ensure that the conservation and historic value of that land is not subject to market control.

These alterations could therefore significantly chill future conservation easement donations and greatly reduce the efficacy of conservation easements. Potential donors of conservation easements would certainly think twice if they knew that their donations might later be subject to a fairly malleable public interest standard. Finally, vesting a politically appointed board with one of the judiciary branch's key powers—the cy pres power—may also implicate other separation of powers concerns.

B. The Limits of Retroactive Application

1. Retroactivity in General

Statutes that operate retroactively raise constitutional concerns under both the federal and state constitutions. Generally, the Due Process Clause of the Fourteenth Amendment does not prohibit retrospective civil legislation, unless the consequences are particularly "harsh and oppressive."[178] In addition, many state constitutions also prohibit retrospective laws that "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past."[179] Determining exactly when a right has become "vested" is no easy task. A Missouri court interpreting this provision of its state constitution defined a vested right as,

> Something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.[180]

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[178] Welch v. Henry, 305 U.S. 134, 147 (1938).

[179] MO. CONST. art. I, § 13. *See also* Colo. Const. art II, § 11; GA. CONST. art. I, § 1; IDAHO CONST. art. XI, § 12; MD. CONST. DECL. OF RIGHTS art. XVII; N.H. CONST. art I. § 23; OHIO CONST. art. II, § 28; TENN. CONST. art. I, § 20; TEX CONST. art. I, § 16.

[180] Fisher v. Reorganized Sch. Dist. R-V, 567 S.W.2d 647, 649 (Mo. 1978). For other standards of retroactivity that have also been articulated by the courts, see, for example, Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) (defining a retroactive law as one that "attaches new legal consequences to events completed before its enactment"); Miller v. Florida, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'"); Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (noting a retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767

This judicially crafted definition, however, is not easily applied. The underlying problem lies in the "vested right" test, which one observer has described as the "most hackneyed example" of a standard "which purport[s] to govern decisions concerning the legality of retroactive application . . . . [but] [o]n close examination . . . turn[s] out to be little more than [a] way[] to restate the problem."[181] The Singer treatise continues, in its harsh critique of the standard:

> A most natural definition of the term "vested" is "accrued" or, as dictionaries put it, "completed and consummated." But in that sense, any claim or interest which has come into being and been perfected as a "right" would have to be said to be vested. This makes it clear that the formulation which uses "vested" as the basis for deciding the legality of retroactivity has to be using that concept in a more specialized sense than its ordinary and usual one. . . . The superficiality and inconclusive nature of most of these formulations make it necessary, or at least desirable, to search for more meaningful guidelines with which to make judgments about the fairness or unfairness of applying a new law to alter legal interests from what they had previously been.[182]

To make matters worse, the "vested" rights standard is particularly difficult to apply in trust law. First, charitable trusts, like conservation easements, are enjoyed by a relatively indeterminate pool of beneficiaries, making it difficult to ascertain exactly in whom rights have become vested. This difficulty arises because "[t]he relationships among the settlor, trustee, and beneficiaries are not contractual in an ordinary sense."[183] Gradwohl and Lyons continue by noting that "[t]he difficulty in applying a 'vested rights' analysis in [the trust law] context becomes clear when we realize that, in one sense, the sum of the beneficial interests in a trust is 'vested in the group of beneficiaries.'"[184] Given this somewhat disheveled doctrinal backdrop, it may be most helpful to simply look at several past legislative acts to determine where the line between a permissible regulation respecting existing charitable trusts and an impermissible interference with "vested" rights is properly drawn.

(C.C.D.N.H. 1814) (stating a law is retroactive if "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past").

[181] 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.5, at 414-15 (6th ed. 2002).

[182] *Id.*

[183] John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312 (2003).

[184] *Id.*

2. Retroactivity of Past Legislation Respecting the Regulation of Trusts

The Uniform Trust Code (UTC), Uniform Management of Institutional Funds Act (UMIFA), Uniform Prudent Management of Institutional Funds Act (UPMIFA), and several state revocation on divorce statutes have dealt with the retroactivity problem in the past. For example, the drafters of the UTC recognized the underlying problem but decided to apply the code to preexisting trusts, to the extent such application was constitutional.[185]

To remedy the potential problems that might arise through retroactive application, the drafters included a section entitled "Application to Existing Relationships" to specifically address the issue.[186] Section 1106 explicitly states that the rules of construction and presumptions found in the UTC apply to preexisting trusts only in the absence of "a clear indication of a contrary intent in the terms of the trust."[187] The comment to § 1106 explains that "[c]onstitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."[188]

As an example, § 412 of the UTC makes some liberalizing changes to the doctrine of administrative (or equitable) deviation as traditionally applied by the courts. In assessing the constitutionality of applying this provision retroactively in Nebraska, Gradwohl and Lyons note that "[t]o the extent that [the section] authorize[s] application of the doctrine of equitable deviation to dispositive provisions of a trust, the section changes Nebraska law and should not be applied [retroactively]."[189] Similarly, § 413 "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."[190] Again, Gradwohl and Lyons state that this new rule "should not be applied retroactively to establish different beneficial interests in the trust than existed prior to enactment of the UTC."[191]

UMIFA sought to rationalize certain problems in the management of institutional funds; among other things, the act sought to set out standards for the "prudent use of appreciation in invested funds."[192] In addressing the retroactivity problem, the drafters of UMIFA first noted that donors of institutional funds "seldom give any indication of how they want the growth in their gifts to be treated."[193] In the prefatory note, the drafters wrote that an "overwhelming" majority of commentators agreed that:

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[185] *See* Uniform Trust Code (UTC) § 1106, cmt (explaining that "[b]y applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.").

[186] *Id.* § 1106.

[187] *Id.*

[188] *Id.* § 1106, cmt.

[189] Gradwohl & Lyons, *supra* note 195, at 354.

[190] UTC § 412, cmt.

[191] Gradwohl & Lyons, *supra* note 195, at 356.

[192] Uniform Management of Institutional Funds Act (UMIFA), prefatory note (1972).

[193] *Id.* The paragraph continued by stating that "[i]f, however, a donor does indicate that he wishes to limit expenditures to ordinary yield, under the Act his wishes will be respected," indicating that UMIFA, like the UTC, comprises default, as opposed to mandatory rules. *Id.*

> [T]here should be no constitutional objection to making the Act retroactive. The rules of allocation should not be treated as absolute rules of property law, but rather as rules as to the administration of the trust. The purpose is to make allocations which are fair and impartial as between the successive beneficiaries.[194]

The drafters focused on the lack of strong donor intent to the contrary in justifying retroactivity of UMIFA, citing several cases[195] and emphasizing that the UMIFA only operates "in the absence of a clear statement of the donor's intention."[196]

The New Hampshire Supreme Court addressed the constitutionality of retroactive application of UMIFA under the New Hampshire Constitution in *Opinion of the Justices*.[197] In its opinion, the court agreed with the drafters of UMIFA, concluding that the statute did not violate the state constitution's provision against retrospective laws.[198] In addition, though the court acknowledged that "[m]atters relating to trusts are usually within the jurisdiction of the judiciary," it held that passage of the act "would not constitute an improper encroachment upon the functions of the judicial branch" because rules respected "the expressed intentions of the donor."[199]

UPMIFA was drafted as a replacement of UMIFA to provide "modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending."[200] UPMIFA § 8 expressly states that UPMIFA applies to future funds as well as existing institutional funds. Like UMIFA, however, the act was careful to bolster, rather than impair, donor intent.[201] In the comment to § 4 of the act, the drafters again noted that "UPMIFA is a rule of construction, so it does not violate either donor intent or the Constitution."[202]

Notably, the drafters cited to both the New Hampshire *Opinion of the Justices* decision and *In re DeWitt*, a case involving a revocation on divorce statute. *DeWitt* held that retroactive application of the statute at issue in that case similarly did not

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[194] *Id.* (quoting Austin Scott, *Principal or Income?*, 100 TRUSTS & EST. 180, 251 (1961) and citing Bogert on Trusts, § 847, at 505-06 (2d ed. 1962)).

[195] *See, e.g.*, *In re* Gardner's Trust, 123 N.W.2d 69, 73 (1963) ("[I]t is doubtful whether testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends go where the law required them to go at the time they were received by the trustee.").

[196] UMIFA, prefatory note.

[197] 306 A.2d 55 (N.H. 1973).

[198] *Id.* at 55.

[199] *Id.*

[200] Uniform Prudent Management of Investment Funds Act (UPMIFA), prefatory note (2006).

[201] *Id.* ("UPMIFA improves the protection of donor intent with respect to expenditures from endowments. When a donor expresses intent clearly in a written gift instrument, the Act requires that the charity follow the donor's instructions. When a donor's intent is not so expressed, UPMIFA directs the charity to spend an amount that is prudent, consistent with . . . the donor's intent that the fund continue in perpetuity.").

[202] *Id.* § 4, cmt.

violate the Contracts Clause.[203] Essentially, the UPMIFA drafters noted that "the purpose of the anti-retroactivity norm is to protect a transferor who relies on existing rules of law"[204] and further that UPMIFA's rules of construction therefore cannot rule afoul of this norm because such rules, by definition, "apply only in situations in which a transferor did not spell out his or her intent and hence did not rely on the then-current rule of construction."[205]

A final area where the retroactivity of trust legislation has been considered is in the implementation of so-called "revocation-on-divorce" statutes. Most revocation-on-divorce statutes are based upon § 2-508 of the Uniform Probate Code, which "revokes any disposition or appointment of property made to the former spouse, any grant of general or special power of appointment to the former spouse, and any nomination of the former spouse as a fiduciary."[206] Courts are split on whether statutes incorporating the language of the UPC can be applied retroactively.[207]

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[203] *Id.* For a discussion of *DeWitt*, see *infra* note 224 and accompanying text.

[204] *Id.* (citing Joint Editorial Board for Uniform Trusts and Estates Acts, *Statement Regarding the Constitutionality of Changes in Default Rules as Applied to PreExisting Documents*, 17 AM. COLL. TR. & EST. COUNS. NOTES 184, app. II (1991)).

[205] *Id.*

[206] Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 85 (2004) (citing Uniform Probate Code (UPC) § 2-508 (1969)). The current provision is at § 2-804 of the UPC. That section now states:

> (b) Except as provided by the express terms of a governing instrument, a Court Order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:
>
> (1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomiation in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent or guardian; and
>
> (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common.

UPC § 2-804 (2004).

[207] For cases finding retroactive application of revocation-on-divorce statutes permissible, see, for example, Allstate Life Insurance Co. v. Hanson, 200 F. Supp. 2d 1012 (E.D.Wis. 2002); Estate of Dobert v. Dobert-Koerner, 963 P.2d 327 (Ariz. Ct. App. 1998); Estate of Becker v. Becker, 32 P.3d 557 (Colo. Ct. App. 2001); and Mearns v. Scharbach, 12 P.3d 1048 (Wash. Ct. App. 2000). For cases finding retroactive application of these statutes unconstitutional, see, for example, Whirlpool Corp. v. Ritter, 929 F.2d 1318 (8th Cir. 1991); *In re* Estate of DeWitt, 32 P.3d 550 (Colo. Ct. App. 2001); Aetna Life Insurance Co. v. Schilling, 616 N.E.2d 893 (Ohio 1993); First Nat'l Bank & Trust v.

In *Allstate Life Insurance Co. v. Hanson*, for example, a federal district court found retroactive application of Wisconsin's revocation-on-divorce statute constitutional for three reasons: first, the statute did not interfere with either the settlor's or the insurance company's rights under the contract;[208] second, the change was foreseeable insofar as Wisconsin already "heavily regulates the transfer of assets at death"; finally, the statute only represented a change in a default rule and therefore did not "impose the sort of severe restriction that has been found to be substantial."[209]

Similarly, in *Estate of Dobert v. Dobert-Koerner*, the court found the legislation permissible because the plaintiff ex-wife could not show that her rights under the insurance contract were vested because Dobert "retained the right to change the beneficiary designation at any time."[210] The court reasoned, in the alternative, that even if her rights had vested, her interest in "remaining the designated beneficiary was not substantially impaired" by the statute because she lacked "any reasonable basis for expecting that her beneficiary status would continue."[211] Courts, like *Hansen* and *Dobert*, generally find the retroactive application of revocation-on-divorce statutes permissible because (i) they do not significantly alter "vested rights," (ii) they merely represent default rules, and (iii) use of the default rules effectuates, rather than undermines, donor intent.

Notwithstanding the foregoing, many courts have held that retroactive application of a revocation-on-divorce statute is unconstitutional. For example, in *Estate of DeWitt v. USAA*, the court held that the ex-wife's expectancy interest in the insurance policy was sufficiently vested and any substantial legislative interference with it was impermissible under the Colorado state constitution.[212] The Eight Circuit, in *Whirlpool Corp. v. Ritter*, reached the same result by analyzing the role donor intent played in the revocation-on-divorce scenario.[213] Specifically, the court questioned whether all individuals would necessarily intend that their ex-spouses be removed as beneficiaries of their existing insurance policies.[214] The court noted that "it is equally possible that the [policyholder] made a conscious choice to leave [his ex-wife] as the named beneficiary."[215] The court further stated that such individuals "are entitled to rely on the law governing insurance contracts

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Coppin, 827 P.2d 180 (Okla. Ct. App. 1992); and Parsonese v. Midland Nat'l Ins. Co., 706 A.2d 814 (Pa. 1998).

[208] 200 F. Supp. 2d at 1020 (stating that the revocation-on-divorce statute "changed the identity of the presumptive beneficiary, but did not alter either party's obligations under the contract.").

[209] *Id.* (also characterizing the statutory change as a plausible "shift in the presumption governing disposition of nonprobate assets"). The court noted that the donor could have easily rebutted this presumption by "merely . . . perform[ing] some small affirmative act indicating his intent." *Id.* For example, the court states that the donor could have "altered the life insurance contract, executed some separate document, or even performed some informal act . . . to show a court that [his ex-wife] was still his intended beneficiary." *Id.*

[210] 963 P.2d at 332.

[211] *Id.*

[212] 32 P.3d 550, 555 (Colo. Ct. App. 2001).

[213] 929 F.2d 1318, 1323 (8th Cir. 1991).

[214] *Id.*

[215] *Id.*

as it existed when the contracts were made, and by radically altering the meaning of these contracts, the statute is unconstitutional."[216] Courts holding retrospective application of revocation-on-divorce statutes unconstitutional do so because they do not believe the default rule under those statutes necessarily comports with donor intent.

In sum, retroactive application of general legislation respecting the regulation of trusts can be problematic. All of the sources concerning the UTC, UMIFA, UPMIFA, and the revocation-on-divorce statutes are in agreement that, at the very least, such statutes must only provide default rules of construction in order to be consistent with donor intent. The sources also agree that any legislative provisions that substantially interfere with a contract or alter a "vested" contractual right are suspect.

C. The Validity of General Legislation Modifying or Terminating Conservation Easements

Based upon the above discussion, it is unlikely that either of the proposed legislative changes to the regulation of conservation easements could be retroactively applied to existing easements. Both the proposal to allow conservation easements to be modified or terminated when it is deemed to be in the public interest, and the proposal to vest an extra-judicial board with the power to make such decisions are likely impermissible on a number of grounds.

First, unlike the UTC, UMIFA, and UPMIFA, and the revocation-on-divorce statutes discussed above, the proposed conservation easement legislation would be binding on all conservation easements, regardless of any showing of contrary donor intent. Rather than providing default rules of construction around which conservation easement donors could contract, the proposals would impose new standards and procedures on all existing and future conservation easements, regardless of their actual terms.

Second, as discussed above, the UTC's more relaxed cy pres standard (which includes "wasteful" along with impossible and impracticable) is unlikely to be valid if applied retroactively. The proposed conservation easement legislation, which would allow a conservation easement to be terminated when it is deemed to be in the public interest and by an extra-judicial board, represents an even more dramatic departure from the traditional cy pres standard and, thus, is even more unlikely to be valid if applied retroactively.

Third, unlike the UTC, UMIFA, UPMIFA, and the revocation-on-divorce statutes, allowing a conservation easement to be modified or terminated when it is deemed to be in the public interest would be contrary to the intent of most (if not all) conservation easement donors. As noted above, the typical donor of a conservation easement, whether out of a desire to ensure the most permanent protection of her land possible under existing law, or to obtain federal tax benefits, or both, manifests a strong intention that the land in question be used for

[216] *Id.*

conservation purposes "in perpetuity"—and perpetuity is defined in this context under both Federal tax law and state charitable trust law to mean unless and until a court determines that the charitable purpose of the easement has become impossible or impractical due to changed conditions. Indeed, many conservation easement deeds expressly state that they can be terminated only under such conditions.

Finally, as noted by the New Hampshire Supreme Court, such general legislation may also at some point run afoul of the impairment of contract and separation of powers doctrine. The *Opinion of the Justices* opinion holding that UMIFA did not encroach on the powers of the judiciary highlighted the fact that the provisions of UMIFA in question served to further donor intent. For these reasons, it is unlikely that such proposed legislation could be applied to retroactively to pre-existing conservation easements.

V. CONCLUSION

Whether conservation easements represent an effective equation to circumnavigate the whims of politics remains to be seen. Based on the establish trust law principles discussed in this Article, it does appear likely that the legislature's power to modify or terminate established conservation easements is limited. However, while the doctrines of cy pres and equitable deviation rightfully belong in the hands of the judiciary, there nevertheless may be certain occasions in which legislative action modifying or even terminating a conservation easement may be permissible. It is possible that a court might permit legislative interference when the conditions and public interests are so drastically changed that adherence to the conservation easement's strict terms would be manifestly unreasonable. This result is undesirable. Only the judicial branch of government is properly situated to weigh the conservation easement donor's intent against the present society's interest in a particular modification.