Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation

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INTRODUCTION

In 1987 New Zealander Michael Fay shocked the yachting world by challenging the San Diego Yacht Club (SDYC) for the America's Cup with yachts not used in Cup races since the 1930s. Even more surprising was the New York Supreme Court's literal interpretation of the Deed of Gift, the document that established the charitable trust which defines and controls America's Cup competition. The court rejected the SDYC's petition for cy pres modification and upheld Michael Fay's challenge. This decision terminates the long-standing procedure for conducting Cup races, and interrupts the SDYC's plans for a 1991 multinational America's Cup regatta off San Diego's coast. The court's decision has created great uncertainty about the future of the Cup. Moreover, it is not at all clear that the court's decision was either sound as a matter of policy or compelled by law.

Using the Cup decision as a focal point, this Article evaluates the doctrine of cy pres modification in light of recent developments and suggests how the Deed of Gift should be interpreted to ensure that future Cup matches are open to all potential challengers. More importantly, this Article examines problems presented by "traditional" court interpretation of charitable trust instruments and proposes a significant expansion of the cy pres doctrine that should be modeled on the theory of dynamic statutory interpretation. The trust relationship is examined critically to establish the appropriate paradigm for resolving interpretive disputes that often arise long after the settlor's death. By characterizing the relationship of the beneficiary and the trustee of a charitable trust as an economic one founded in part on relational contracts, the appropriate standard of care—good faith and fair dealing—is established. Such a relational arrangement supports the application of dynamic interpretation. By looking to "public law" scholarship, insight is gained into the treatment of private agreements that have a public "flavor."

Part I presents the unique history and evolution of the America's Cup races and concludes with an examination of the New York Supreme Court's Mercury Bay decision. This Part sets the factual stage for an analysis of charitable trusts and the proper interpretation of trust terms in light of changed conditions or circumstances.

Part II focuses on the often maligned doctrine of cy pres modification. Part II demonstrates that the current underutilization of the equitable cy pres doctrine results in the suboptimal use of charitable resources. Instead, courts should expand cy pres modification to take into account the interests

of all parties in the transaction, including the community's interest in the efficient utilization of charitable trust assets. This Part presents arguments that courts should interpret charitable trusts liberally in light of changed conditions to promote the maximum and efficient use of resources.

Part III presents novel theories to be applied to interpretive problems of charitable trusts. An analysis of the relationships among settlor, beneficiary, and trustee reveals that courts should treat these specialized, potentially infinite arrangements as a species of relational contracts. As such, the parties should be subject to certain "good faith and fair dealing" requirements. Moreover, the examination of these arrangements as relational contracts yields insight into techniques taken to resolve interpretive problems. The lack of a principled basis for the application of cy pres that correctly balances the disparate interests of the settlor, the intended beneficiaries, and the community's interest in the efficacious utilization of charitable trust assets precipitates the cy pres and charitable trust interpretive dilemma. Dynamic interpretation, which thus far has been limited to statutes, provides a principled basis for an expansive and optimal use of cy pres. What at first appears to be an odd coupling reveals itself as an effective way to analyze certain private law problems.

I. AMERICA'S CUP LITIGATION

An historical analysis of America's Cup matches provides insight into the controversy between Michael Fay and the San Diego Yacht Club. America's Cup history is also important in analyzing the New York Supreme Court's decision and its implications for future races.

A. Historical Perspective

1. The Origin of the America's Cup

The America's Cup originated as a private race between yachtsmen for a one-time trophy. In 1851 the yacht America, owned by five members of the New York Yacht Club, sailed to England to seek races with any British yachts willing to wager. The American yacht, however, was believed to be so superior in design that no matches could be found. The sole race the America could enter was the Royal Yacht Squadron's All Nations Race around the Isle of Wight in the English Channel. The prize was a cup worth 100 guineas.2

The America won the race3 and thereby obtained what became known

2. G. HAMMOND, SHOWDOWN AT NEWPORT 16-17 (1974). The course was the usual one of the Royal Yacht Squadron, which also paid for the prize cup. W. STEPHENS, AMERICAN YACHTING 67 (1904). The course tended to favor local sailors who had experience with it. G. HAMMOND, supra, at 17.

3. The race was "little more than a drifting match, decided largely by chance." W. STEPHENS, supra note 2, at 68. The race was sailed without a time handicap. The America would have won under the British handicap system in effect at the time, but would have lost had the New York Yacht Club handicap system been used. G. HAMMOND, supra note 2, at 20.
as the America's Cup. The Cup became the private property of the owners of the America, not subject to any future challenges or conditions, and for a time was committed to the custody of one of the America's owners. In 1857 the owners of the Cup made a more permanent disposition of the trophy, dedicating it as a permanent challenge cup for international racing. The Cup was entrusted to the New York Yacht Club (NYYC) under terms and conditions that became known as the "Deed of Gift," reproduced in Appendix A.

2. Early Challenges for the America's Cup

Because American yachts were far superior to any that could be built in Britain, the NYYC held the Cup unchallenged for eleven years. The first defense of the Cup in 1868 was reminiscent of the race in which the America first won the Cup, with the challenger forced to sail a one-race match against the entire NYYC fleet over a course in New York Harbor.

4. See G. Hammond, supra note 2, at 18-20. The cup offered in the race was known variously as the Royal Squadron Cup (after the offering yacht club), the All Nations Cup (after the race), or, erroneously, as the Queen's Cup. See id., at 22; W. Stephens, supra note 2, at 67. The Cup has been known as the America's Cup (after the winning yacht) ever since. See R. Coffin, The America's Cup 21 (1885).

5. Indeed, unlike today's matches, each yacht in the 1851 race represented an individual owner and not a yacht club. W. Stephens, supra note 2, at 68.

6. By common consent, the Cup was assigned to John C. Stevens, Commodore of the New York Yacht Club, and "moving spirit" of the endeavor. Stevens displayed the Cup in his home until 1855. Id.

7. Id. at 106.

8. Id. at 106-07. This document was the first Deed of Gift and would be revised twice. See infra text accompanying notes 60-69. Because the Deed of Gift established a charitable trust in New York, the New York courts have jurisdiction over all disputes involving the America's Cup. See N.Y. Est. Powers & Trusts Law § 8-1.1(c) (McKinney Supp. 1989).

Whether the Deed of Gift properly qualifies as a charitable trust is beyond the scope of this Article and irrelevant to the issues herein. We note in passing, however, that among the charitable purposes enumerated by the Restatement (Second) of Trusts § 368(f) (1957) are "other purposes the accomplishment of which [are] beneficial to the community." Whether the Deed of Gift properly falls within the above-quoted terms illustrates the problems of properly classifying trusts as charitable. New York has a similarly vague provision which allows a charitable trust to be established for "benevolent purposes." See N.Y. Est. Powers & Trusts Law § 8-1.1(a) (McKinney Supp. 1989).


9. R. Coffin, supra note 4, at 22-23. Copies of the Deed of Gift had been sent to every yacht club in the world. Id. at 23; G. Hammond, supra note 2, at 25. At the time, only the British clubs had yachts with enough speed to challenge with any hope of a victory. R. Coffin, supra note 4, at 23.

10. The course, as in the 1851 race, strongly favored those with local knowledge of tides and currents. See G. Hammond, supra note 2, at 26-27.

11. Many thought this was the proper method for Cup matches, since this was the way the
The donors of the Cup subsequently expressed disapproval of the terms of the first match, prompting the NYYC to make three concessions for the second match in 1871. First, the match would consist of a series of races; second, the match would be sailed on as neutral and as fair a course as possible; and last, the challenger would be required to face only one yacht in each race. The NYYC retained a limited advantage under the third point, however, by selecting four yachts and designating which one would sail on the morning of each race.

Although neither the third nor the fourth Cup defense involved a strong challenger, both races contributed to the development of the America's Cup races. The practice of naming only one yacht as defender of the Cup, which resulted in fairer matches for the challenger, began with the third race. The fourth race was the first to use trial races to select the defending yacht, a practice that continues to this day, and was the first time the NYYC commissioned a new yacht specifically for the Cup defense.

The fourth match was also the catalyst for the second Deed of Gift. In 1881 the NYYC voted to return the Cup to the original donors, who redonated it upon new terms. The second Deed of Gift, reproduced in Appendix B, strengthened the NYYC's bargaining position against the mutual consent clause in match negotiations. Although mutual agreement between participants could still affect the logistics of a race, the NYYC could be far stricter about what it would allow in a match. The second Deed Cup had been won. Unlike that first race in which the America sailed on even terms with her competitors, each seeking the prize, the fleet in the first Cup defense was racing merely to prevent the challenger from winning. W. Stephens, supra note 2, at 114. Indeed, the British yacht Cambria was seriously impeded by the fleet. Id.

12. One of the donors, George Schuyler, opined that the NYYC position "renders the America's trophy useless as a "Challenge Cup," and that for all sporting purposes it might as well be laid aside as family plate." R. Coffin, supra note 4, at 60. Schuyler also stated that the term "match" clearly meant a contest between two parties. Id. at 61.

13. The position of the NYYC was to make no mutual agreement, but rather to compel a challenger to accept the limited rights stated in the Deed of Gift. See W. Stephens, supra note 2, at 111.

14. Despite this "concession," the NYYC refused to hold the match outside New York Harbor, as the challenger had suggested. See G. Hammond, supra note 2, at 28.

15. See W. Stephens, supra note 2, at 111.

16. This provision allowed the NYYC to select yachts based on their advantages in different types of weather. Thus, the NYYC could select the best yacht for each day's weather conditions. In fact, the NYYC used two yachts in the match. See G. Hammond, supra note 2, at 29.

17. See W. Stephens, supra note 2, at 112.

18. Both challenges came from Canada, and the yachts suffered from the limited funds of their syndicates. See id. at 117-19.

19. The NYYC, however, made it clear it did not believe this concession was required under the first Deed of Gift. See G. Hammond, supra note 2, at 31.

20. Id. at 32. This new yacht, however, was not used in the 1881 match. Id. at 33.

21. W. Stephens, supra note 2, at 119. The Cup was returned to Mr. George Schuyler, the sole survivor of the original five donors of the America's Cup. Id.

22. Id. at 121. In the first Deed, the mutual consent clause immediately followed the statement of qualifications for a challenger. In the second Deed, however, formal notice of six months was required to initiate a match, and only after that could there be mutual agreement on minor details of the match. Id. at 122. The first Deed of Gift "contemplated a mutual agreement as the natural and proper basis of a match, the minimum terms being inserted only as a last resort after a failure to agree." Id. at 121-22.
of Gift left a challenger "in the position of requesting as favors what should have been his by right of fair sport."  

Two other significant changes were made in the second Deed of Gift. The first was to require the challenger to have its regular course "on an arm of the sea."  
The second was to require the challenging yachts to "proceed under sail on their own bottoms to the port where the contest is to take place."  The second Deed of Gift, therefore, did little to promote friendly competition for the Cup. "Taken all together, the revision in no way improved the original deed or tended to perpetuate the spirit which inspired it."  

There was no other challenge for the Cup until 1885, when the Royal Yacht Squadron made a "double challenge." Because both challenging yachts were the most modern representatives of the principal racing class in Britain, the NYYC again commissioned a new yacht specifically for the defense of the America's Cup. Moreover, a syndicate from Boston built a yacht to compete with the NYYC entry for the right to defend the Cup, and in both the 1885 and 1886 matches the Boston entry was selected to defend.

### 3. The Third and Current Deed of Gift

A challenge by the Royal Clyde Yacht Club (the Royal Clyde) eventually led to the third Deed of Gift, reproduced in Appendix C. Despite the requirement under the second Deed of Gift that a challenger give no more than seven months notice of a challenge, the Royal Clyde sent a letter to the NYYC shortly after the 1886 match suggesting a September 1887 race. The letter also suggested that a smaller class of yacht be used in the

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23. Id. at 122.
24. This provision served to exclude all Canadian yacht clubs except the Royal Nova Scotia Yacht Club from challenging for the Cup. Id. at 123.
25. Id. at 121. This was another significant advantage for the NYYC. A challenger would be hindered in building a light weight yacht by having to sail it across the open sea. The NYYC, by contrast, could sail yachts which might not be capable of sailing on the open sea, but whose lighter design gave them an advantage in the races. See G. Hammond, supra note 2, at 32.
26. W. Stephens, supra note 2, at 123.
27. The challenge named the Genesta and the Galatea, with the request that if the former were defeated, the latter would be permitted to race in the same season. Id. at 165. The challenge of the Galatea, which was unbuilt at the time of the challenge, subsequently was postponed until 1886. Id. at 182.
28. Id. at 165.
29. Building a new yacht was imperative given that the challengers were from 11 to 16 feet longer on the load waterline than the NYYC's largest yachts. Id. at 166-67. Longer yachts generally have a speed advantage over shorter ones of comparable design. The NYYC formed a syndicate to finance the new yacht rather than pay for it out of club funds. G. Hammond, supra note 2, at 33. The use of rich investors to finance Cup yachts continues to be a feature of Cup competition.
30. See W. Stephens, supra note 2, at 169; G. Hammond, supra note 2, at 33. The Cup, of course, remained with the NYYC.
31. W. Stephens, supra note 2, at 188. The Royal Clyde wished to make the necessary arrangements in advance and then issue a formal challenge at the proper time. Id. Neither the challenger nor the defender gained any advantage from the seven month rule.
match. The NYYC, however, rejected the challenge until it came in the form required by the second Deed.

After the 1887 match, the NYYC again returned the Cup to George Schuyler, the lone survivor of the five original donors, who redonated it under the third Deed of Gift on behalf of the original donors. The most striking features of the third Deed of Gift are the requirements that a challenging club give ten months notice and provide all dimensions of the challenging yacht. The third Deed of Gift also provides that matches will be sailed on ocean courses.

The third Deed of Gift effectively ended Cup challenges for five years. Once again, the terms of the Deed of Gift were viewed as providing a "well made" match for the defender. One observer described the reaction to the third Deed of Gift as follows: "Upon the publication of this document the Royal Clyde challenge was formally withdrawn and the leading British clubs joined with yachtsmen, both foreign and American, in denouncing the unfair conditions imposed on all future challengers." The British yacht clubs resolved not to challenge for the America's Cup as long as the new Deed was in effect.

In 1892, however, an agreement was worked out for a new match. The parties avoided the subject of the third Deed of Gift, and the Royal Yacht Squadron was allowed to challenge giving only the waterline measurement of the challenging yacht. The match was a three-out-of-five race series.

4. America's Cup at the Turn of the Century

Several important and enduring elements of America's Cup racing emerged by the early 1900s. Most importantly, the characteristics of the

32. Id. at 188-89. The Royal Clyde letter suggested yachts of 65 to 75 feet on the waterline. Id. at 189.

33. Id. at 189. After the rejection, the challenger decided to keep all particulars regarding its yacht secret until compelled to reveal them under the Deed. Id. at 190. The insistence on formal compliance with the Deed of Gift was the prevailing position of the NYYC at the time. See G. Hammond, supra note 2, at 36-37.

34. W. Stephens, supra note 2, at 195. A special committee of the NYYC drafted the new Deed. Id. This Deed of Gift has remained in effect ever since, although with some judicial modification. See infra text accompanying notes 60-62, 68-69.

35. W. Stephens, supra note 2, at 195. The practical effect of this requirement is to force any challenging club to have its yacht design completed nearly one year in advance of the match and then to be bound by the stated dimensions. Id. at 196. The defender thus has ten months to study the challenger's design and determine a way to outbuild it. Id. at 197.

36. See G. Hammond, supra note 2, at 38.

37. Id.

38. W. Stephens, supra note 2, at 196. The NYYC backed off the new Deed somewhat in 1888, offering a match based on the conditions governing the 1885 and 1886 matches, provided the new Deed was recognized as binding. No challenges were made. Id. at 197.

39. Id. at 226.

40. Id. at 227. The NYYC maintained that the third Deed was still in force and represented the sole legal statement of the Cup trust. Id. The Royal Yacht Squadron ignored the Deed, agreeing only to hold the Cup if won under the terms of the match. Id. A prior attempt to negotiate had failed because the Royal Yacht Squadron refused the NYYC condition that the Cup be held strictly under the Deed if won. Id. at 226.

41. Id. at 227.
challenging and defending yachts became quite similar. Although the NYYC continued to insist on using the largest yachts permissible under the third Deed of Gift,42 "[i]n a general way the dimensions, and even the model [of the challenging and defending yachts], show[ed] no radical differences . . . ."43 By the 1950s the use of a rating formula known as the Universal Rule standardized the yacht design of challenging and defending yachts.44 This standardization continues today through the use of the twelve-meter formula.45 Despite the similarities, however, both challengers and defenders were extremely secretive about the design and building of their yachts.46

The matches also continued to move away from literal, strict compliance with the Deed of Gift. The challenger's practice of naming only the waterline measurement of its yacht continued without protest from the NYYC.47 In 1899 the NYYC waived the requirement that the challenger sail to the match on its own bottom.48

The identity of the Cup challengers also changed over time. Rather than yachtsmen experienced in racing, the early challengers were wealthy men with little or no yachting experience "who [saw] in the publicity attending a Cup match a means of advertising themselves."49 They tended to know comparatively little about their yachts or the Cup. The challenging yachts were not selected from existing yachts,50 but were built specifically for Cup racing.51 By contrast, the defenders generally made it their business to study the Cup.52 Thus, the Cup races became an institution of their own outside the regular course of yachting.53

42. See G. Hammond, supra note 2, at 56.

43. W. Stephens, supra note 2, at 304. The exception to this was the Reliance, the 1903 defender. Id.; see infra note 50 and accompanying text.

44. G. Hammond, supra note 2, at 58. The Universal Rule is a formula that controls the yacht's dimensions within certain parameters. Id. at 71. This development also eliminated the need for time handicaps in races due to different yacht sizes. Id. at 58. Sir Thomas Lipton (of Lipton Tea fame) suggested this as early as 1907. Id. at 56.

45. See infra note 58.

46. W. Stephens, supra note 2, at 304. Both sides disclosed only what was necessary for prerace measurement, withholding from the public most of the details.

47. Despite requests for the dimensions of the challenging yacht, as required in the Deed of Gift, only the waterline length of the yacht was disclosed. No further request for other dimensions was made. See id. at 305; see also supra text accompanying notes 40-41.

48. W. Stephens, supra note 2, at 309. Sir Thomas Lipton was allowed to tow his yacht across the Atlantic. Id.

49. See id., at 299-300. Lord Dunraven, for example, showed little interest in yachting until a short time before his first challenge. See id. at 300. Sir Thomas Lipton, however, was the greatest illustration of this new type of challenger. Lipton's first challenge for the Cup marked the beginning of his yachting career. See id. at 301.

50. The 1903 defender Reliance illustrates this point. That yacht "represented a new and extreme step in the development of the racing machine, her whole form being confessedly bad for all purposes but Cup racing." Id. at 319.

51. Id. at 299. Indeed, apart from the America's Cup, the building of large racing yachts practically had ceased by 1900 both in Great Britain and America. Id.

52. Id. at 321.

53. Id. at 301.
5. The Rise of Twelve-meter Yachts and the Modern Era

In the mid-1950s interest in the America’s Cup was rekindled, and the NYYC began to consider what direction the Cup competition would take. The major issue was which type of ship would be used. Debate centered on two types: seventy-three foot ocean racers and the international twelve-meter class. The twelve-meter class prevailed. Because the twelve-meter class had a waterline shorter than the minimum specified in the Deed of Gift, the NYYC petitioned the New York Supreme Court for the first time seeking two changes to the Deed of Gift. In December 1956 the court made two modifications to the Deed: first, the minimum load waterline was reduced to forty-four feet; second, the requirement that the ships proceed on their own bottoms to the site of the match was eliminated. Six months later, the Royal Yacht Squadron challenged the NYYC for the Cup, and the match was set for 1958.

Because it is relatively inexpensive to build a twelve-meter yacht, the switch to the twelve-meter format greatly increased international interest in Cup competition. As new countries began challenging for the Cup, numerous syndicates began competing for the right to challenge on behalf of the challenging nation. A milestone was reached in 1970 when France and Australia both fielded yachts and competed in the first-ever challenger trials, with the winner earning the right to face the NYYC for the Cup. This was the genesis of the multinational regatta that catapulted the Cup.
into a new dimension of competition. Thus, there might be three levels of competition in a Cup match: trials between yachts of the same nation; trials between yachts of different nations to determine the challenger and select a defender for future challenger trials; and the Cup match itself. The first level largely has been incorporated into the second because two yachts from the same country can sail in the challenger trials for the right to challenge. In 1974 the NYYC accepted a formal challenge from the Royal Thames Yacht Club with the stipulation that challenger trials be held. Five nations competed for the right to challenge for the Cup.

Despite the increased interest in seeking the Cup, the NYYC remained undefeated in America's Cup matches for 132 years. This winning streak abruptly ended in 1983, when Alan Bond's the Australia II won the Cup. The victory by the Australia II increased further world interest in the Cup, both from potential participants and yacht-racing fans. This victory and the 1987 defense made further modification of the Deed of Gift necessary. The New York Supreme Court modified the third Deed of Gift to allow the 1987 match to be sailed between November first and May first in the southern hemisphere. Also, an order of interpretation of the third Deed of Gift was entered allowing the Chicago Yacht Club to participate in the 1987 match.

The 1987 match was the first in the history of the America's Cup in which the NYYC did not compete. The match was an international event in which a record thirteen syndicates vied for the right to challenge for the Cup. The finals of the challenger trials, and the match itself, were carried live on television. The SDYC's Stars and Stripes returned the Cup to the United States by defeating the Australian defender, the Kookaburra III, in four races.

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66. In 1987, for example, there were six yachts from the United States vying to meet the defender. See Safian, Rough Sailing, American Lawyer, Mar. 1988, at 92; see also infra note 72.

67. See G. Hammond, supra note 2, at 117. The five nations were England, France, Italy, Australia, and Canada. Id. Ultimately, however, the field narrowed to a sail-off between yachts of France and Australia. Id. The actual challenger for the Cup did not even field a yacht. The reduced importance of a formal challenge is discussed infra at text accompanying notes 88-90.

68. In re Royal Perth Yacht Club, Inc., No. 4615/85 (N.Y. Sup. Ct. Apr. 5, 1985). The Deed of Gift had provided that "no race shall be sailed in the days intervening between November 1st and May 1st." See infra Appendix C, p. 589. The court's order provided that the Deed was to be administered as if the following phrase were added after the above-quoted language: "if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere." In re Royal Perth, Yacht Club, No. 4615/85, at 2.

69. In re Royal Perth Yacht Club, No. 18,436/84. The petitioners asked the court to interpret the "arm of the sea" provision in the Deed of Gift. This ruling, while undoubtedly equitable, appears to run counter to the purpose of the arm of the sea provision. See supra note 24.

70. The NYYC had been one of the challenging syndicates, but failed to reach even the semifinals of the challenger trials. See Reed, Victory for "Plastic Fantastic", Time, Dec. 29, 1986, at 56. A loss to the New Zealand ended the NYYC's three-year, $15 million attempt to regain the Cup. See id.

71. See Ballard, Upset Time Down Under, Sports Illustrated, Nov. 11, 1986, at 40. Six challengers were American yacht clubs, and there were two yachts each from France and Italy, as well as representatives of Canada, Great Britain, and New Zealand. Id. There were also six yachts vying to defend the Cup. Id.

72. The Entertainment and Sports Network (ESPN) provided cable television coverage.
B. The Litigation

1. The Current Dispute

The dispute between the SDYC and New Zealand's Mercury Bay Boating Club (MBBC) has its roots in the 1987 Cup match. In the challenger finals, the SDYC's *Stars and Stripes*, skippered by Dennis Conner, routed Michael Fay's heavily-favored challenger, the *New Zealand*, in five races.\(^7\) There was more involved, however, than a sailing defeat. While the other yacht hulls were composed of aluminum, the *New Zealand*’s hull was constructed of fiberglass. This was the first time in Cup history fiberglass was used to construct the hull of a Cup yacht.\(^7\) Mr. Conner questioned the legality of using fiberglass, stating that "[i]there have been 78 aluminum 12-meters built, so why would you build one of fiberglass unless you wanted to cheat?"\(^7\) This statement did little to promote good will between the two syndicates.

Further problems arose following the 1987 match. Because of a dispute with the Sail America Foundation (Sail America), the organization that would manage the next defense of the Cup, the SDYC delayed\(^7\) announcing plans for the next Cup defense.\(^7\) By the time the SDYC was prepared to announce its plans for a 1990 or 1991 match off the coast of San Diego, a frustrated New Zealand syndicate already was preparing its challenge.\(^7\)

The challenge conveyed to the SDYC on July 15, 1987, was in strict, literal compliance with the third Deed of Gift.\(^7\) Most shocking was the proposed size of the ships: ninety feet on the waterline.\(^8\) Ships of that size

73. See Reed, supra note 70, at 56. The *New Zealand* had won 33 of 34 races in the challenger trials prior to the finals.  
74. See id.  
75. Id. at 57. Mr. Conner was not the only skipper to question the legality of the *New Zealand* hull. The rules required that all hulls be of equal weight and thickness across their entire surface. See id. The New Zealand syndicate defended against these charges by showing that Lloyd's of London had supervised construction of the *New Zealand* and could confirm that it complied with the rules. See id.  
76. It had become common practice for the NYYC to announce during a current match the site, date, and yacht size for the next match if it were to win. This approach was adopted by the Royal Perth Yacht Club, the *Australia II*'s sponsoring yacht club, after it won the Cup in 1983.  
77. The dispute centered primarily on the venue for the next Cup match.  
78. The delay in announcing the site of the next match and, therefore, the uncertainty about the prevailing weather conditions meant that the New Zealanders could not begin designing a new challenger. See Safian, supra note 66, at 92. Fay's attorney, Andrew Johns, also learned that the SDYC was attempting to get fiberglass yachts banned from future Cup matches by the International 12-Meter Association. Id.  
79. See Memorandum of Law of the Mercury Bay Boating Club, Exhibit C, Mercury Bay Boating Club v. San Diego Yacht Club, No. 21,299/87 (N.Y. Sup. Ct. Nov. 25, 1987) (reproducing copy of letter of challenge); see also Safian, supra note 66, at 93. The Deed of Gift requires that the challenger give ten months notice, name the owner of the challenging yacht, the name, rig, and certain dimensions of the challenger.  
80. Safian, supra note 66, at 93. This is the largest a single-mast yacht may be under the Deed of Gift. See infra Appendix C, p. 589.
had not been used in America's Cup competition since the 1930s.\textsuperscript{81}

The initial reaction of the SDYC was to ignore Fay's challenge and continue its plans for a multinational regatta off San Diego in 1991 using twelve-meter yachts.\textsuperscript{82} As a result, Fay filed suit in the New York Supreme Court to have his challenge declared valid under the third Deed of Gift. The SDYC also filed an application to amend the third Deed of Gift to conform with the recent practices governing Cup competition.\textsuperscript{83} The court consolidated the cases for disposition.

2. \textit{Mercury Bay Boating Club v. San Diego Yacht Club}

In briefs and arguments before the court, the MBBC sought declaratory relief validating its challenge and an injunction preventing the SDYC from entertaining any other challenges until the MBBC's challenge was decided.\textsuperscript{84} The MBBC argued for literal compliance with the third Deed of Gift.\textsuperscript{85} The SDYC countered by requesting that the court amend the third Deed of Gift to harmonize the Deed of Gift with post-1958 Cup practices.\textsuperscript{86} The SDYC contended that adhering to the literal conditions of the third Deed of Gift would destroy the multinational regatta that the Cup had become. The SDYC, therefore, requested cy pres relief to alter the Deed of Gift to empower the defender to set the conditions for the match.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{81} Safian, \textit{supra} note 66, at 93.
\item \textsuperscript{82} See \textit{America's Cup to Be in San Diego}, Wash. Post, Sept. 12, 1987, at C2, col. 2. Fay had sought a temporary restraining order to prevent the SDYC from proceeding with its plans, but the New York Supreme Court lifted the order, allowing the SDYC to proceed. See Phillips, \textit{Judge Leaves Sail America Free to Plan}, Wash. Post, Sept. 10, 1987, at B7, col. 1.
\item \textsuperscript{83} The SDYC sought cy pres relief pursuant to \textit{N.Y. Est. Powers \& Trusts Law} \S\ 8-1.1(c)(1) (McKinney Supp. 1989).
\item \textsuperscript{84} See \textit{Mercury Bay Boating Club v. San Diego Yacht Club}, No. 21,299/87, at 2 (N.Y. Sup. Ct. Nov. 25, 1987). The challenge of Michael Fay and the MBBC was concededly the first received by the SDYC. See \textit{id}.
\item \textsuperscript{85} See \textit{Mercury Bay}, No. 21,299/87, at 2. The third Deed of Gift provides that "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided." See \textit{infra} Appendix C, p. 589.
\item \textsuperscript{86} These practices included holding Cup matches every three or four years, using twelve-meter yachts, and holding a sail-off between multiple challengers to determine who may sail for the Cup.
\item \textsuperscript{87} Specifically, the SDYC requested that the court authorize the following amendments to the third Deed of Gift to allow the trustee of the Cup to:
\begin{enumerate}
\item Within a reasonable time after it wins or successfully defends the Cup, designate a particular class or design rule of yachts in which the challenging club or clubs and the defending club shall compete in the next match;
\item Within a reasonable time after it wins or successfully defends the Cup, set the site of, the dates [and times for, and the number of races in, the next match, with the next match to be held within a reasonable time after the preceding match, and the number of races to be not less than three;
\item Prescribe a reasonable period of time during which any qualified yacht club may submit a challenge for the next match; and
\item Make arrangements for a series of elimination races to select the challenger in the event more than one challenge is received.
\end{enumerate}
\end{itemize}
The court found that the practices which came to govern Cup races after World War II had evolved under the mutual consent clause in the Deed of Gift and that, when mutual consent could not be reached, the exact terms of the Deed of Gift would govern Cup challenges. The court noted that the past holders of the Cup had prevented unwanted challenges such as the MBBC's by announcing before the race the time, place, and type of yacht for the next match, should they be the winner. The holders also usually announced the period of time within which all challenges would be treated as being received simultaneously. The various competitors had complied with these arrangements under the mutual consent provision.

In effect, the court chastised the SDYC because its conflict with Sail America led to the SDYC's failure to issue a statement of intent "before it won or even shortly after." The court also reprimanded the SDYC for retroactively seeking to alter the Deed of Gift to "take away rights given to the challenger under the Deed, rather than relying on the mutual consent provisions as has been done in the past."
The SDYC argued that the donors of the Cup had not foreseen the changed nature of Cup competition and that literal adherence to the Deed would “thrust the Cup into a bygone age when only those of vast wealth could compete.” The SDYC put forth three specific objections to the MBBC challenge. First, literal adherence would be too expensive; second, ten months was not sufficient time to organize the event; and third, other potential challengers would be excluded.

The court rejected the first two arguments raised by the SDYC, finding that “racing ninety footers may turn out to be more economical given the shorter interval proposed between competitions.” The court further noted that ninety-foot yachts might be “ideal” for conditions off San Diego’s coast, while twelve-meter yachts would be “ill-suited.”

The court also found that outsiders still had the opportunity to compete for the right to challenge for the Cup. The court based this finding on the MBBC’s assertion that it was willing to participate in a multinational elimination series. Again the court chastised the SDYC, pointing out that it had declined to negotiate with the challenger.

Turning to the appropriate legal standard, the court found that although it had authority to employ cy pres to modify the trust, it could not properly exercise that power. The court stated that under the relevant standard, “the court may not resort to cy pres relief until it first determines that the donor’s specific charitable purpose is no longer capable of being carried out under the precise terms of the trust.”

The court found that the donors’ specific intent was the promotion of friendly competition among foreign nations through challenger-driven matches. The court found that there was no compelling justification for altering the third Deed of Gift to allow the defender to control most particulars of the event.

The key to the holding is the mutual consent clause. Although the Deed has strict requirements, the mutual consent clause allows the Cup to adapt to changed circumstances. The court interpreted the third Deed of Gift as first requiring the competitors to negotiate over the terms of the match, but providing fall-back or default terms should negotiation fail. Because of the mutual consent clause, the donors’ intent could be carried out without “radical and fundamental” changes in the Deed itself.

93. Id. at 15. The SDYC and the City of San Diego also had contended that organizing a proper defense of the Cup was similar to hosting the Olympics, requiring several years of lead time. See id. at 14.
94. Id. at 16. The court thus glossed over the time issue by combining the SDYC’s first two arguments.
95. Id. This point is entirely irrelevant to the cost or time problems argued by the SDYC.
96. See id.
97. Id. at 18.
98. See id. at 18-19.
99. The third Deed of Gift provides that the challenger and the defender “may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match.” See infra Appendix C, p. 589.
100. See Mercury Bay, No. 21,299/87, at 18. The court felt that making the changes desired by the SDYC would allow the holder of the Cup “unilaterally [to] dictate conditions for future
Having been denied the requested alterations in the Deed of Gift, the SDYC could accept MBBC’s challenge, forfeit the Cup, or negotiate agreeable terms with the challenger.\footnote{101} As a result of the court’s opinion, the next America’s Cup match was sailed in September 1988 off the San Diego coast pursuant to strict compliance with the terms of the Deed of Gift.\footnote{102} Literal compliance caused the MBBC to be the only Cup challenger.\footnote{103}

As anticipated, the SDYC’s Stars and Stripes successfully defended the Cup by easily outdistancing the MBBC’s New Zealand.\footnote{104} However, neither the controversy surrounding the race nor the legal challenges have subsided. When the MBBC discovered that the SDYC planned to defend the Cup by sailing a catamaran,\footnote{105} it filed a lawsuit asking the court to outlaw the SDYC’s entry. The judge ruled against the MBBC, stating that a boat cannot be disqualified pursuant to the Deed of Gift until it reaches the starting line.\footnote{106} Consequently, the race was sailed pending the court’s decision on the MBBC’s challenge to the SDYC’s entry.\footnote{107}

On November 30, 1988, following the race, the MBBC returned to court requesting disqualification of the SDYC’s entry on the grounds that the use of a catamaran violated the terms of the Deed of Gift and the MBBC’s notice of challenge because the America’s Cup required a match between comparable vessels.\footnote{108} On March 28, 1989, Judge Ciparik, in an unexpected ruling,\footnote{109} disqualified the SDYC and ordered it to forfeit the Cup.\footnote{110} Judge Ciparik ruled that the use of the catamaran was illegal because it “violated the spirit of friendly competition”\footnote{111} inherent in Cup competition and that the defender of the Cup “is bound to a higher obligation [of fairness] than the victor of the Stanley Cup or the Super Bowl.”\footnote{112} More importantly, Judge Ciparik justified her decision by stating, “[T]here is no doubt San Diego’s defense . . . in a catamaran clearly deviated

\footnote{101.} \textit{Id.} It is unclear what the court means by “forfeit.” The Deed of Gift contains no forfeiture provision for failing to accept a challenge.\footnote{102.} See White, \textit{Sport Takes Unusual Tack in Mismatch}, USA Today, Aug. 31, 1988, at C1, col. 2.
\footnote{103.} See \textit{id.} at C2, col. 1. Likewise, no other American team will be able to enter a sail-off with the SDYC to select a challenger. The SDYC maintained that there was not sufficient time for defender trials. \textit{See} Lloyd, \textit{San Diego Club to Weigh ’89 Cup Race}, \textit{N.Y. Times}, Mar. 10, 1988, at B10, col. 2.
\footnote{104.} The margin of victory was 18 minutes, 15 seconds, in the first race, and 21 minutes, 10 seconds, in the second. Ballard, \textit{Game of Cat and Mouse}, \textit{SPORTS ILLUSTRATED}, Sept. 19, 1988, at 24.
\footnote{105.} A catamaran is a light-weight, twin-hulled vessel. White, \textit{supra} note 102, at C2, col. 1. For an in-depth discussion of the dispute over whether the SDYC may use a catamaran to defend the Cup, see Ballard, \textit{Cup Outlook: No, Sail}, \textit{SPORTS ILLUSTRATED}, June 13, 1988, at 44.
\footnote{106.} Mercury Bay Boating Club v. San Diego Yacht Club, No. 21,299/87, at 2 (N.Y. Sup. Ct. Mar. 28, 1989) (Judge Ciparik’s opinion disqualifying the SDYC’s entry, and order forfeiting the SDYC’s September 1988 entry, and order forfeiting the SDYC’s September 1988 defense to the MBBC).
\footnote{107.} \textit{Id.}
\footnote{108.} \textit{Id.}
\footnote{110.} \textit{Mercury Bay}, No. 21,299/87, Mar. 28, 1989, at 12-14.
\footnote{111.} \textit{Id.} at 13.
\footnote{112.} \textit{Id.}
from the intent of the donor . . . .”

Judge Ciparik’s disqualification of the SDYC’s entry can be criticized on many levels. The most facile criticism is of the way the court handled the catamaran qualification issue. The court easily could have ruled on stipulated facts prior to the 1988 Cup race that the use of a catamaran violated the Deed of Gift; thus, the court could have averted what was at best a farce, and at worst a nullity engendering a wave of litigation that threatens the viability and reputation of the Cup.

On a more fundamental level, the court’s ruling voiding the 1988 Cup race and awarding the Cup to the MBBC is inconsistent with its prior rulings in the case. In the earlier rulings that forced the 1988 America’s Cup mismatch, Judge Ciparik refused to employ cy pres to modify the trust because “the precise terms of the trust” were still capable of being carried out. Nowhere in her disqualification ruling, however, did Judge Ciparik contend that the race was not carried out pursuant to the precise terms of the Deed of Gift. Instead of a literal interpretation to determine whether cy pres should be employed, Judge Ciparik took an interpretive approach and deemed that the settlor’s overriding intent was to foster and promote races based on fairness.

This ruling is incongruous with the court’s criticism of the SDYC’s use of a catamaran. New Zealand used a ship design which, although admittedly legal at ninety feet on the waterline, had not been used in Cup competition since the 1930s. Nevertheless, the court criticized the SDYC for violating the intent of the Deed of Gift “when it chose to follow the unprecedented course of defending in a catamaran . . . .” The only certainty created by Judge Ciparik’s ruling disqualifying the SDYC is another wave of litigation with the potential to further tarnish the Cup’s reputation and standing as the preeminent yachting trophy.

II. CY PRES AND DEVIATION

Although the court’s decision to reject cy pres modification in Mercury Bay was greeted with astonishment and surprise by those unfamiliar with

113. Id. at 12.
114. See infra note 119 and accompanying text.
116. We have no objection to the interpretive approach taken by the court in this latter stage of litigation. Indeed, judges should take into account—interpret, if you will—the settlor’s intent in light of the textual, historical and evolutive perspectives discussed infra at text accompanying notes 222-84. That is the basis for dynamic interpretation. Our objection to the Judge’s use of the interpretive approach is based on what we perceive to be her change in analysis during the litigation from a literal interpretation of the Deed of Gift to an interpretive one based on the settlor’s overarching intent.
117. See supra text accompanying notes 79-81.
119. As this Article goes to press, the SDYC has appealed the court’s ruling. See Mercury Bay Boating Club v. San Diego Yacht Club, Nos. M-1882, M-1973 (N.Y. App. Div. May 5, 1989) (LEXIS 6642, States library, NY file). The ultimate resolution of this litigation is beyond the purview of this Article.
charitable trusts and the doctrine of cy pres, the decision was predictable to those familiar with the history of American courts' interpretation and use (or lack thereof) of cy pres and its companion doctrine, deviation. The seeming inequity of the Mercury Bay decision demonstrates the judicial hostility to the doctrine of cy pres, hostility that has resulted in the narrow treatment and use of a theoretically flexible, equitable doctrine to be used at the court's discretion.

The doctrine of cy pres, which is recognized and employed in almost all jurisdictions, developed to modify charitable trusts whose purpose had become obsolete as a result of changed conditions not taken into account by the original settlor or donor. Cy pres developed as a necessary corollary to charitable trusts, which are exempt from the Rule Against Perpetuities and are potentially infinite in duration. The trust that controls the America's Cup—established by the original Deed of Gift in 1857 and superseded by two later Deeds of Gift—is an illustration of a superannuated charitable trust established by a long-dead settlor whose intent, in light of changed circumstances, can only be guessed.

The doctrine of cy pres allows the court to exercise its equitable powers to modify the trust's administrative and substantive provisions to avoid the obsolescence of the trust, while conforming as strictly as possible to the settlor's original intent. The doctrine seems ideally suited for the America's Cup dispute. Unfortunately, the court in Mercury Bay hewed to the narrow interpretive framework that has caused the doctrine to be underutilized as a vehicle for reforming inefficient trusts.

A. Cy Pres Modification: A Traditional Approach

Most courts employ a three-part test to determine if cy pres modification is proper. To be successful, an applicant must show: first, there is a

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120. See supra text accompanying notes 73-119.
121. See infra text accompanying notes 151-56 for a discussion of the doctrine of deviation.
122. See infra note 133 and accompanying text; see also 4A A. Scott, THE LAW OF TRUSTS § 399.4, at 533-36 (4th ed. 1989). For a discussion of the antecedents of historical judicial hostility to cy pres, see E. Fisch, CY PRES DOCTRINE IN THE UNITED STATES ch. 2 (1950); Chester, CY PRES: A Promise Unfulfilled, 54 IND. L.J. 407 (1979).
123. See 4A A. Scott, supra note 122, § 399.2, at 470 n.2; Comment, Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres, 74 Va. L. Rev. 635, 635 n.6 (1988).
124. See DiClerico, CY PRES: A Proposal for Change, 47 B.U.L. Rev. 153, 154 (1967). When the settlor's intent becomes "impossible, impracticable, or illegal to perform, the court ... will change the terms of a trust in a way which will both approximate the general intent of the testator or donor and make it possible for the trust to continue to benefit the community." Id.
126. See supra text accompanying notes 7-8.
127. See supra text accompanying notes 21-22, 34-36.
128. See E. Fisch, supra note 122, § 1.00, at 1-2. The search for the settlor's individual intent through the use of cy pres may be doomed to fail either because the settlor's original intent cannot be found and judges must rely on the "categorization" of the testator or because community-minded judges will employ cy pres to benefit the public good. See Note, supra note 125, at 977-84.
129. See supra text accompanying notes 84-100.
valid charitable trust; second, the settlor's specific charitable objective is frustrated, necessitating cy pres modification to carry out the settlor's wishes; and third, the settlor's "general charitable intent" is not restricted to the precise purpose identified in the trust instrument. The second element—whether changed circumstances sufficiently impede the execution of the settlor's specific charitable objective—is the requirement that creates most problems for petitioners seeking cy pres modification.

Using the Restatement approach, most courts apply cy pres modification only when it becomes impossible, impracticable, or illegal to comply with the settlor's expressed intent given changed conditions. Although the degree of impossibility or impracticability required varies significantly and the apparent trend in the courts has been to construe the terms broadly, a significant number of courts continue to demand either present nonfulfillment of purpose or literal impossibility of execution before allowing a modification of a trust's provisions. Although the raison d'être for this traditional, restrained approach to cy pres modification is beyond the purview of this Article, the limited use of the cy pres doctrine frustrates the settlor's intent in many situations and results in a net loss to the settlor, the intended beneficiaries, and to society.

Mercury Bay exemplifies this phenomenon. The New York Supreme Court rejected the SDYC's proposed modifications to the Deed of Gift because the SDYC failed to show that the settlor's specific objective could not be carried out under the exact terms and conditions of the trust. The court thus took a limited view of its cy pres powers, a position that relevant "traditional" law and scholarship by no means compel. For example, New

130. Restatement (Second) of Trusts § 399 (1957); E. Fish, supra note 122, ch. 5. For a novel criticism of the search for a general charitable intent, see Note, supra note 125, at 977-78 (arguing that search for a general charitable intent is indeterminate because it relies on "the counterfactual").

131. See Restatement (Second) of Trusts § 399 comment c (1957); see also id. § 381 comment a.

132. See In re Klinkner, 85 Cal. App. 3d 942, 951, 151 Cal. Rptr. 20, 26 (1978) ("Although we note that the doctrine of cy pres is enjoying a liberalization in many states, . . . we also note that this trend is largely influenced by the efforts of courts to save charitable bequests from noncharitable claimants."); see also 4A A. Scott, supra note 122, § 399.4, at 537-40; Comment, supra note 123, at 642-43.

133. See, e.g., City and County of Denver v. Curigaran, 147 Colo. 125, 132, 362 P.2d 1060, 1064 (1961) (refusing to apply cy pres to allow city to use trust funds for public improvements in a way court admitted would be more efficient); Manufacturers Nat'l Bank v. Woodward, 140 Me. 117, 120, 34 A.2d 471, 472 (1943) (refusing to apply cy pres to allow trust funds to cover expenses of equipping and operating library when trust terms stated that income was to be used for "keeping the buildings in repair and purchasing suitable books"); Crow v. Clay County, 196 Mo. 234, 279, 95 S.W. 369, 381 (1906) (refusing to raise maximum age of eligibility for scholarship paid from trust income for orphans and poor children to include college age students, even though trust was established before state had free public schools and there had been no recent demand for scholarships); In re Oshkosh Foundation, 61 Wis. 2d 432, 438, 215 N.W.2d 54, 57 (1973) (refusing to apply cy pres to scholarship trust to include students and committee members residing within school district but outside city limits, when trust named residents of Oshkosh as eligible candidates).

134. See, e.g., Chester, supra note 122, at 416-25; DiClerico, supra note 124, at 165; see also Comment, supra note 123, at 641-46.

York Estate Powers and Trust Law section 8-1.1(c) specifically provides for changes in a charitable trust through cy pres:

[W]henever it appears to [the supreme court] that circumstances have so changed since the execution of an instrument making a disposition for . . . charitable . . . purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may . . . make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein . . . .

The requirement that strict compliance with the literal terms of the trust be “impracticable or impossible” limits the court's power to alter a trust. Several New York decisions interpreting this directive, however, indicate that courts may construe the terms “impracticable” and “impossible” broadly to optimize the use of charitable trust assets in light of changed conditions.\(^{137}\)

Accordingly, prior New York decisions make a persuasive case for the application of traditional cy pres doctrine to the third Deed of Gift. As the recent America’s Cup litigation has demonstrated, application of the default rules of the third Deed of Trust, which take effect when mutual consent fails, make impossible the first and most significant term of the trust—that the Cup “be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.”\(^ {138}\) The SDYC's requested modifications\(^ {139}\) are fully compatible with the intent of George Schuyler and the other donors.

The post-World War II developments in America’s Cup competition created an explosion of interest in the Cup and a level of competition between yachts of foreign nations that transcends anything the donors might have contemplated. Modifying the Deed of Gift to conform to recent practice would allow the trustee to “vitalize” the donors’ intent in establish-

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137. See In re Nellis Athletic Fund, 42 Misc. 2d 121 (N.Y. Surr. Ct. 1964). In Nellis Athletic Fund, the court authorized cy pres relief where the trustee was able “to enlarge to a considerable degree” the donor's original plan due to an appreciation in the amount of the bequest. Id. at 124. By adapting the gift to the changed circumstances, the trustee was able to “formulate plans to implement the hopes and aspirations of the decedent by not only carrying out his desires, but by vitalizing the same . . . .” Id. In In re Neher, 279 N.Y. 370, 18 N.E.2d 625 (1939), the court altered the specific directions of the trust through cy pres to carry out the settlor's paramount intention to give the property for a general charitable purpose and “to graft on to the general gift a direction as to the desires or intention of the testator as to the manner in which the general gift is to be carried into effect.” Id. at 374, 18 N.E.2d at 626. In In re Stuart, 183 Misc. 20 (N.Y. Surr. Ct. 1944), the court applied cy pres to allow a transfer of an art collection to a different location than that specified and allowed it to be viewed on Sundays despite the donor's express direction to the contrary. Id. at 25. The court held that the donor's general purpose was to make the collection available for general public viewing. Id. at 25. See also In Re Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983) (equal protection clause not violated when court permitted charitable trust to be administered only to males).
138. See infra Appendix C, at p.589.
139. See supra text accompanying notes 86-87.
ing the Cup competition. The changed circumstances of recent years, while making compliance with the specific directions of the Deed of Gift impracticable, enhance the general charitable purpose that drives the Cup: “friendly competition between foreign countries” that is challenger-driven. While the conditions for carrying out this intent were modified two times, the donors’ goal in creating the Cup competition did not change.

The New York Supreme Court, however, opted for the restrictive interpretation of the doctrine, frustrating the desires of all involved. The parties participated in a match that neither wanted. Because there was no “mutual consent” on any major point for the September 1988 match, the parties were forced to return to the New York Supreme Court to litigate the legality of using a catamaran to defend the Cup. The ongoing litigation threatens to eclipse Cup competition. The 1988 match may have destroyed much of the prestige the competition has built up over the years. Moreover, now that the established protocol has been broken, there is no guarantee that future challengers will not engage in similar opportunistic behavior.

The court ignored the fact that prior modifications and interpretations of the Deed of Gift had been made even though the donors’ purpose technically could have been carried out without these revisions. The trust would not have failed had the Chicago Yacht Club not been allowed to compete or if the restriction on sailing dates had applied when the Royal Perth Yacht Club held the Cup. Further, it is not clear that the modification reducing the minimum waterline to allow twelve-meter yachts was done to prevent the failure of the trust. Thus, prior modifications of the Deed of Gift would not have met the strict standard applied in the current proceeding. Each change, however, helped effectuate the general goal of friendly, fair competition. This is the standard by which the SDYC’s original cy pres motion should have been judged. The events of recent Cup matches show that the amendments to the Deed of Gift sought by the SDYC are fully compatible with the donors’ general purpose and that the donors’ specific purpose could no longer be carried out.

The court also ignored the history of the Cup, a history showing a clear trend away from literal compliance with the notoriously prodefender

140. See In re Nellis Athletic Fund, 42 Misc. 2d 121, 124 (N.Y. Surr. Ct. 1964); see also supra note 137 (discussing Nellis Athletic Fund).
141. See supra text accompanying notes 66, 98.
142. See supra text accompanying notes 60-62, 68-69.
143. See supra text accompanying notes 105-19.
144. See Ballard, supra note 104, at 24.
145. It appears, however, that most of “yachting’s hierarchy reached a landmark agreement designed to arbitrate disputes between challenger and defender” in hopes of avoiding future conflicts and lawsuits. America’s Cup Victory Hollow, The Sporting News, Sept. 19, 1988, at 58, col. 3. “The agreement also is intended to ensure that in future regattas, defender and challenger race in similar boats.” Id.; see also Ballard, supra note 104, at 25.
146. Indeed, it can be argued that this modification violates an express desire on the part of the donor to bar yacht clubs not on the arm of the sea from participating. See supra note 69 and accompanying text.
147. See supra note 68 and accompanying text.
Deed of Gift, to a system promoting fair and challenging contests for the Cup. Recent Cup practice is the product of this evolution and is clearly a workable means of fulfilling the donors' intent in light of the increased interest in challenging for the Cup. The court failed to recognize that the Cup competition itself has undergone fundamental change since 1887. By limiting its focus to the parties before it, the court may have cast Cup competition back to its pre-World War II status. This is a case in which cy pres relief is warranted, and the New York Supreme Court erred in not granting the changes sought by the SDYC.

B. The Applicability of the Doctrine of Deviation

No party to the *Mercury Bay* dispute mentioned the applicability of the doctrine of deviation as a vehicle to modify the trust's administrative provisions to reflect changed circumstances. The doctrine of deviation may be utilized when "it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." Deviation applies only to administrative provisions of the trust, in contrast to cy pres modification which affects substantive provisions of the trust.

Although distinguishing between substantive and administrative provisions is extremely difficult, if not impossible, the SDYC and the Attorney General in *Mercury Bay* could have argued that the relief the SDYC had requested was a deviation compelled by a change of circumstances and a desire for economic efficiency. In other words, limiting the Cup to the challenge provisions established by the third Deed of Gift "substantially impairs" the fulfillment of trust purposes in light of the donors' intent. Hence, the administrative provisions of the trust, which detail how challenges must operate, should be modified to conform with more liberal and efficient current practices. In contrast to cy pres modification, deviation is favored by courts.

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148. See supra text accompanying notes 57-59.
149. One commentator noted: "Assuming they had the right by custom, if not by law, to name the time, the place and the boat size, Sail America and the SDYC ignored Fay's challenge." Ballard, supra note 105, at 44-46.
150. See id. at 51. The settlor probably thought the [mutual consent] clause "provided all the leeway civilized sailors would ever need to reach an understanding. The America's Cup has proved him wrong time and again." Id.
151. *Restatement (Second) of Trusts* § 381 (1957) (emphasis added).
152. See id. § 381 comment a.
153. See DiClerico, supra note 124, at 154-55. "The terms 'substantive' and 'administrative' are obviously conclusionary and give rise to confused and vague court decisions, particularly when an administrative provision is of such central importance in the trust instrument as to take on a substantive nature." Id.
154. Courts apply the deviation doctrine in situations short of impossibility, particularly when "effective philanthropy" or the public interest is paramount.

Courts are less solicitous toward the cy pres doctrine because its application "reaches the central purpose of the trust, and is therefore appropriately subject to greater restraint" than deviation which modifies the manner in which the trust is administered. Comment, supra note 123, at 648.
Although the distinction between cy pres and deviation could have been manipulated by the parties and the court to achieve an "efficient" result in *Mercury Bay*, that distinction is not a principled one and should be discarded by the courts. The distinction between administrative and substantive provisions of a trust is indeterminate, and leads to insurmountable problems in the proper application of the two doctrines. Instead of allowing skilled advocates to manipulate a chimerical and unprincipled distinction between cy pres and deviation, the courts should reexamine the doctrine of cy pres.

**C. A Traditional Argument for the Liberalization of Cy Pres**

Although arguments are made above that *Mercury Bay* was decided incorrectly, even accepting the traditional interpretation of the doctrine's scope, a credible case has been made for expansion of cy pres modification. More liberal application of the doctrine would benefit society and achieve efficient results. By comparing the benefits achieved by accommodating the settlor's intent through strict adherence to trust terms, and the benefits to society that flow from freely applying cy pres modification and the resulting charitable efficiency, one can argue that the courts should err on the side of flexibility and limit the "Dead Hand's" grip on trust assets.

The argument for efficiency is that courts, under the guise of protecting the settlor's intent, have construed the cy pres doctrine narrowly and have limited its utility in correcting inefficiencies in the operation of charitable trusts. The argument persuasively suggests that courts should presume that most right-thinking settlors would not object to changes in charitable trusts if the result is a more efficient use of trust assets. This

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155. See id.
156. See DiClerico, supra note 124, at 170.
157. The concepts of "impracticability" and "impossibility" expand and contract from case to case in spite of a similarity in facts. . . . The labels and categories used by the courts in their analyses and determinations of the applicability of cy pres are meaningless and conclusionary formalities which tend to prevent the courts from deciding these cases by resolving the conflicting interests and policies, and obscure the fact that this balancing process is the actual method of decision.

Id. at 170 (emphasis added) (footnotes omitted).
158. See supra text accompanying notes 141-50.
159. See, e.g., DiClerico, supra note 124; Comment, supra note 123, at 648-53.
160. See supra note 123, at 648-50. More importantly, the author of the Comment demonstrates the contours of the doctrine of cy pres modification by examining its English and American historical development. The Comment examines *In re Estate of Beryl H. Buck*, No. 23,259 (Cal. Super. Ct. filed Jan. 30, 1984), to demonstrate the courts' narrow construction of the doctrine. For additional discussion of the *Buck* case see also Note, supra note 125, at 980-84.
161. Professor Macey argues that the utilization of cy pres and other equitable "reformation" doctrines may be inefficient due to certain error costs that may be created by court interpretation of trust instruments. Macey, supra note 159, at 301. In addition, he argues that judicial interference with trusts is inefficient because it may lead to increased transaction costs. Id. at 302. Although his arguments seem persuasive, they consider only one aspect of the issue.
argument, coupled with the notion that the public's interest in the administration of the trust has been given short-shrift, ought to cause a long-overdue reexamination of the cy pres modification doctrine and result in its liberal use and interpretation.

*Mercury Bay* calls for liberal and expansive interpretations of the cy pres doctrine to achieve efficient outcomes. Cup matches have developed into one of the truly international competitions of the twentieth century. What was originally perceived to be a “blue-blood” sport of the elite now transcends the narrow confines of the yachting set and has taken on national significance which is inextricably tied to patriotism and, what some might argue, xenophobia. The Cup has developed into the yachting competition as a result of minimal judicial interference and interpretation. It is difficult to make a sensible argument that the settlors' intent is advanced only by the development of Cup matches that comply literally with the terms of the third Deed of Gift. To require literal compliance and to refuse to apply cy pres is to exalt form over substance and to ignore the settlor's overarching intent to foster first-class yacht racing. Instead, the court's decision "thrusts the Cup into a bygone age when only those of vast wealth could compete."  

III. REVOLUTIONIZING INTERPRETATION OF CHARITABLE TRUSTS

Although commentators often have attacked the conservative approach to cy pres—pointing out its suboptimal use of trust assets—and have called for its expansion, courts have resisted relaxing the doctrine. Courts are hesitant to employ cy pres for fear of sacrificing individual property rights by exalting the use of property for the "community" over its use and control by the donor. Further, as a matter of policy, courts the effect or costs of judicial interpretation on the settlor. His critique of trust law fails to address and balance adequately the societal benefits gained by the optimal use of trust assets. Conversely, one commentator focuses on the optimization of trust assets to the detriment of the settlor's intent, which may increase the inefficiencies complained of by Macey. See Comment, supra note 123, at 648. The doctrine of statutory dynamic interpretation, by employing the evolutive as well as the textual and historical perspectives, properly balances society's interest and the settlor's intent and results in the efficient and proper use of trust assets. See infra text accompanying notes 222-51.

162. John Kolins, the skipper of the *America II* at Perth in 1987, remarked: "This is like taking a giant step to [the Cup's] old form. It used to be just an event in the 1940s. It slowly evolved into a major regatta. . . . The America's Cup has a choice of becoming a major sailing competition between countries or it can be surpassed by other events. If it's not going to be the major competition [top racers] will find another forum . . . ."

White, supra note 102, at C2, col. 1.

163. See *supra* text accompanying note 93; see also *supra* note 12. According to media and sports mogul Ted Turner, who skippered the winner *Courageous* in 1977, the main problem is they're playing by rules that are 130 years old. That's why they're a mismatch." White, *Supra* note 102, at C1, col. 2.


165. See Chester, supra note 122, at 417-18.
understandably are concerned that any relaxation of the cy pres doctrine will "open the flood gates" to litigation over the use of all funds in charitable trusts and result in impermissible error costs of adjudication.\textsuperscript{166} The courts' concern in this regard is justified. Advocates of the liberal approach assert that courts should apply cy pres whenever it would allocate more efficiently the proceeds of a charitable trust to maximize societal gain. This approach, however, would risk swallowing the rule whole. Any charitable trust would be susceptible to thinly-veiled judicial reformation with concomitant error costs and increased transaction costs.\textsuperscript{167} Previous proposals for the relaxation of the traditional doctrine, and the liberal use of cy pres, thus typically fail to articulate a principled, workable theory for its appropriate use.\textsuperscript{168}

What is needed is a reasoned doctrine for the application of cy pres which takes into account not only the settlor's intent, but society's interest in the efficacious utilization of resources in light of changed conditions that occur following the donor's death. The doctrine of dynamic statutory interpretation, with a few minor modifications, appears to be such a doctrine. However, before we can discuss rationally the applicability of statutory dynamic interpretation to charitable trusts, charitable trusts need to be analyzed and characterized in light of recent scholarship addressing the unique status of long-term consensual arrangements. The problem with the traditional application of cy pres goes beyond the question of whether the settlor's intent should or should not be given effect in specific situations. Charitable trusts need to be analyzed to establish a heuristic for an analysis of problems that arise as a result of their use and operation. It is only when the unique relationship that is a charitable trust is properly analyzed and defined that the proper scope and use of cy pres can be articulated.

\textsuperscript{166} See \textit{id.} at 422; see also Macey, \textit{supra} note 159, at 314.

\textsuperscript{167} Professor Macey states:

The final reason why the common law of trusts does not appear to tend towards efficiency stems from the basic observation that preferences vary. A judicial decision in one case to uphold a trust may accord with the preferences of the settlor in that case, while the same decision in an identical case would not be in accord with the preferences of another settlor. Rules such as those described above that tinker with the settlor's intentions are likely to thwart the wishes of at least some testators.

Macey, \textit{supra} note 159, at 314.

\textsuperscript{168} Professor DiClerico argues that courts should recognize "that they are and should be involved in the difficult task of balancing the competing values and interests in this area, instead of merely applying labels in a forced fashion." DiClerico, \textit{supra} note 124, at 170-71. Such recognition "would result in the open presentation and litigation of all interests and issues which would serve as the basis for a reasoned choice." \textit{Id.}; see also \textit{supra} text accompanying notes 160-63.
A. A Relational Approach

1. The Relational Heuristic

Relational contracts are defined as those contracts in which "the parties are incapable of reducing important terms of the arrangement to well-defined obligations." To summarize a complex theory, relational contracts arise when the parties cannot adequately allocate ex ante the risk that uncertain future contingencies may have on the parties' contract. These uncertainties can be considered the "cost" of a long-term contract. Alternatively, the parties may be involved in such a complex relationship that even if they foresee all the contingencies that may affect their relationship, they are unable to address adequately these foreseen contingencies in the contract. These contingencies are left for resolution at the time the dispute arises.

One example of a relational contract is a commercial lease entered into for a thirty-year term. Both the lessor and the lessee may be incapable of reducing an important term in the lease to well-defined obligations. For example, the lessor and the lessee may agree that the lessee may assign his interest in the premises to another only with the consent of the lessor and that the lessor's consent may not be withheld unreasonably. Ex ante, the parties to the agreement are unable to identify future conditions that would cause the lessee to request the lessor's consent to a transfer.
Moreover, they are unable to identify the proposed assignee or the way in which the proposed assignee would use the premises. Similarly, even if the parties could identify the proposed assignee specifically, including the way in which the assignee would use the premises, the lessor may not be able to grant consent ex ante because of an inability to predict the composition of the other tenants at the time the assignment is requested.

Thus, the parties in a long-term lease may resort to a relational contract, an incomplete contingent contract that is the best relationship and agreement the parties can make ex ante. By utilizing a vague term like "reasonable" to define the lessor's obligation, the parties have made an incomplete agreement. It is impossible to determine when the lessor must "reasonably" consent to an assignment of the premises. Only future conditions will determine whether the lessor must give that consent.

Relational contracts differ from standard or classical complete contracts, which assume that performance standards can be reduced to specific obligations. In complete contracts, parties are assumed to be able to allocate all the risks ex ante because the parties are presumed to have access to complete information about all the future contingencies and the relevant legal rules that could affect their relationship. Parties by themselves are unable to form complete contracts in a strict sense—to allocate all the risks—solely because of the cost of negotiating and actually writing the terms. Yet, although "the contract is incomplete, the contract as supplemented with the underlying contract rules represents a complete allocation made by the parties." Thus, although the parties in the complete contract may assume a risk, that risk is foreseeable and allocated by the parties pursuant to the agreement. In a complete contract all contingencies are anticipated and addressed either by the parties or by legal rules.

179. See Goetz & Scott, supra note 170, at 1092.
180. See Johnson, supra note 175, at 758-61 (suggesting lessor's consent to an assignment may not be withheld unreasonably).
182. For a discussion of whether the lessor should be allowed arbitrarily to withhold his consent to transfer in certain situations, see Johnson, supra note 175, at 756-57.
183. For a discussion of classical, neoclassical, and relational contracts, see MacNeil, supra note 169, at 854.
184. Goetz & Scott, supra note 170, at 1092.
186. Id. (noting law provides standardized "risk allocations in advance" eliminating negotiation costs while allowing parties to "bargain for customized provisions"); see also infra notes 212-13.
187. Narasimhan, Of Expectations, Incomplete Contracting, and the Bargain Principle, 74 CAL. L. REV. 1123, 1129 n.24 (1986); see also Gillette, Commercial Rationality and the Duty to Adjust Long-Term Contracts, 69 Minn. L. REV. 521 (1985). By analyzing the bargaining theory of contracts, Professor Narasimhan concludes that all contracts are incomplete, hence relational, and should be viewed as such by the court at the time damages are assessed.
188. See Goetz & Scott, supra note 181, at 276 (arguing contract rules cause parties to address in contract terms "unforeseen contingencies that will excuse further obligation").
189. See Goetz & Scott, supra note 170, at 908 n.27 (defining complete contingent contract as paradigm in which parties explicitly allocate risks "that future contingencies may cause one
2. Charitable Trusts as Relational Contracts

At first glance, treating charitable trusts as relational contracts appears to be an odd way to characterize these unique arrangements. Under traditional trust law, the establishment of a charitable trust has been characterized as a property transfer rather than a contractual agreement. Denominating charitable trusts as a species of relational contracts, however, makes perfectly good sense. In fact, the charitable trust is in some respects the prototypical relational contract: it is a long-term, inherently flexible arrangement that employs fiduciary standards as a bonding mechanism to monitor the activities of one of the parties to the agreement (the trustee), and in which the precise terms of the agreement (trust) are incapable of resolution ex ante.

The putative donor (settlor) of the charitable trust is faced with a number of options regarding property disposition. While alive, the donor can consume the property, or dispose of it inter vivos by gift or other voluntary transfer. Failing consumption or inter vivos transfer, the donor can dispose of the property in a one-shot, noncharitable transaction by transferring it to heirs or other natural objects of his bounty by a will. On the other hand, if the donor's charitable intent predominates, the donor can make an outright gift to a charity of choice. If the putative donor makes no choice or dies suddenly without expressing a choice as to the disposition of his property (intestate), legal default rules operate in the form of intestacy statutes to determine the takers of the donor's property. Finally, if the donor dies intestate and without relatives, his property will escheat to the state.

The donor's use of the charitable trust as a vehicle for disposing of his wealth represents a conscious choice to enter into and establish a long-term relationship which properly can be characterized as a species of relational contracts. If the donor wished to enter into a classic complete contingent contract, the "one-shot" contract, the donor easily could have disposed of his property by giving it outright to a suitable charity or by establishing a charity whose primary purpose would be to accomplish the donor's goals.

The donor's choice of the charitable trust, however, establishes a unique relationship. Charitable trusts are different from private trusts in that charitable trusts generally are immune from the Rule Against Perpetuities, and therefore, may endure forever. As such, unlike most agreements, the donor is faced with a momentous task when establishing a charitable trust: how to establish a trust that will be responsive to societal and other potential changes that may occur centuries after the donor's

or the other to regret having entered into the executory agreement").

191. See J. Dukeminier & S. Johanson, supra note 190, at 98.
192. For a discussion of the applicability of the Rule Against Perpetuities to private trusts, see W. McGovern, S. Kurtz & J. Rein, supra note 8, § 13.2, at 506-07; Macey, supra note 159, at 306-10.
death. The task is well nigh impossible. As with other relational agreements, the parties to the charitable trust agreement, the settlor, the trustee, the beneficiaries, and society, are incapable of drafting a complete contingent contract that properly allocates the risk of regret contingency among the parties. Implicit in the settlor's establishment of the charitable trust is the recognition that the dead hand control exercised by the settlor is unique and idiopathic to this relationship because the purpose of the trust is charitable. In other words, the agreement made between the settlor and society appears to be as follows: The settlor achieves a level of immortality which is otherwise unobtainable, and society achieves a benefit in the sense that the trust assets are used for previously defined and approved charitable goals. It is assumed, moreover, that the settlor achieved a level of tax savings that may have motivated, in part or in whole, his charitable gift.

More importantly, the complex nature of an inter vivos or testamentary charitable trust supports categorizing it as a relational contract. The settlor establishes a contractual relationship between two sets of parties. First, the trustee is in what best can be described as a quasi-contractual relationship with the intended beneficiaries of the charitable trust, and owes fiduciary duties to them. Even in the absence of a known beneficiary or beneficiaries who may sue to enforce the trustee's duties, the attorney general may represent the intended beneficiaries and enforce their collective rights against the trustee.

Similarly, the trustee is in what can be described as an implied agreement or quasi-contractual arrangement with the settlor to carry out the settlor's intent as expressed to the trustee in the trust instrument. Because the court assesses the trustee's performance by steadfast execution of and adherence to the terms of the trust, the trustee's actions must by necessity be guided by the not-so-invisible hand of the settlor. Consequently, even though the settlor may not sue to enforce the trust agree-


194. See supra notes 124-25 and accompanying text. Whether a confiscatory tax on assets passing on death and resulting government distribution of that wealth better serves societal goals is beyond the scope of this Article. For a discussion of that issue, see generally L. Thurow, The Impact of Taxes on the American Economy (1971); R. Wagner, Death and Taxes: Some Perspectives on Inheritance, Inequality, and Progressive Taxation (1973); R. Wagner, Inheritance and the State (1977); Chester, Inheritance and Wealth Taxation in a Just Society, 30 Rutgers L. Rev. 62 (1976). It is presumed that the disposition of private assets for charitable purposes is socially beneficial.


197. See supra note 193 and accompanying text.

ment, the settlor's wishes must be construed and taken into account by the trustee in order to effectuate the settlor's intent and preclude action by the trust beneficiaries and others with standing to allege trustee misfeasance.\footnote{199}{I find it extremely odd, even counterintuitive, that the settlor of the trust is not allowed to sue to enforce the trust. Whether this oddity is an anachronism reflecting outmoded "property" rules qua property rather than modern contract rules is beyond the scope of this Article. It is sufficient to note that pursuant to modern contract law, the settlor should be able to sue to enforce the provisions of the trust under a third-party beneficiary theory. For a discussion of third-party beneficiary theory, see Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 Harv. L. Rev. 1109 (1985). Whether contract rules, including third-party beneficiary rules, should be applied to trusts generally is the subject of yet another article.}

Finally, although the creation of a trust is not treated as a contract, apparently to avoid the hurdles that would be created by the requirement of consideration necessary to support an enforceable contract,\footnote{200}{See 3 A. Scott, supra note 122, § 197.2, at 191-92.} a completed trust is analogous to a long-term contractual relationship because of the way it is designed. Consequently, although the creation of a trust is regarded as a conveyance or an executed equitable transaction, as opposed to a contractual executory transaction,\footnote{201}{Id.} the problems presented by the enforceability of this long-term transaction resemble those problems presented by the enforceability of analogous long-term relational contracts.

Thus, the trustee of a charitable trust serves as the focal point of a complicated arrangement. The faithful execution and performance of the terms and conditions of the trust cause the trust to take on relational characteristics, particularly in long-term charitable trusts.\footnote{202}{Professors Goetz and Scott note: For a variety of cooperative arrangements . . . the performance obligation of the parties is described in terms of a general fiduciary responsibility. Although these relationships may or may not be long-term, they nonetheless are properly analyzed as relational contracts because they tend to be characterized by uncertainty about factual conditions during performance and an extraordinary degree of difficulty in describing specifically the desired adaptations to contingencies. In such relationships, where the obligor occupies a position of special confidence, superiority, or influence, a "special duty" exists to protect the interest of the other . . . . Fiduciaries are required, inter alia, to act "primarily for the benefit of another on matters relating to the undertaking." Goetz & Scott, supra note 170, at 1126-27 (footnotes omitted).} The trustee's fiduciary duties to the beneficiaries are furthered by "substitute bonding provisions serving functions similar to the termination authorizations in more commercial settings."\footnote{203}{Id. at 1130.} These bonding or monitoring provisions are designed so that the parties efficiently may achieve the desired result in a complex and flexible relationship.

By analyzing the charitable trust as a relational contract, courts achieve interpretive flexibility by using standards such as "good faith" and "fair dealing." Such an approach provides courts with the degree of flexibility needed to operate and interpret long-term agreements such as charitable trusts. More importantly, only with such interpretive flexibility can the trustee use trust assets optimally. Thus, a close examination of charitable trusts reveals that the relational contract analogy is appropriate.
3. Applying Appropriate Economic Principles to Charitable Trusts

Some claim that the expansive use of cy pres represents an inefficient attempt to explicate the settlor's intent because it creates increased error and transaction costs. Professor Macey makes a convincing argument that cy pres may lead to certain error costs because a court can never be sure that it is achieving the correct or efficient result when it applies cy pres since the settlor typically is long dead when these interpretive disputes arise. Consequently, Professor Macey argues that cy pres should be abolished or severely limited. This, he contends, would reduce error costs because it "would encourage settlors to specify how they wish their funds to be allocated in case it becomes impossible to fulfill their initial request."

There are, however, three potential problems with Professor Macey's approach, all of which are rooted in his view of charitable trusts as complete, rather than relational contracts. First, he assumes that the settlor can anticipate and define when the settlor's intent will have become "impossible to fulfill" or significantly "thwarted" by changes that will or may occur in the future. Professor Macey ignores the myriad of fact situations that may arise following the settlor's death which might have affected her choice on how the funds should be utilized. The major advantage of the charitable trust is its inherent adaptability to these fact situations. Perhaps the costs of that adaptability are the error and transaction costs that Professor Macey criticizes.

Second, Professor Macey assumes that the settlor's choices are finite and alternative and, as a result, the settlor can specify ex ante with certainty and clarity how his assets should be utilized in light of changed conditions that make the settlor's original intent impossible to fulfill. Professor Macey's evaluation of charitable trusts are viable if flexibility is not an important and desirable element of the charitable trust relationship and if it is assumed that a settlor considers only three options: first, the trust will be performed pursuant to the exact terms and conditions of the trust; or second, if the trust cannot be performed according to the settlor's expressed intent and the settlor provides a workable alternative disposition, the courts must follow the supplanting disposition; or third, if an alternative disposition is lacking, courts must apply a state-supplied default rule by which the assets will revert to the settlor or the settlor's heirs determined at the time of reversion. This view of charitable trusts as a quasi-complete contract supports Professor Macey's assertion that trust assets should revert to the settlor's estate if the settlor's specific intent cannot be performed and the

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204. Applying economic principles to charitable trusts might seem odd at first glance; however, for a discussion of the benefits gained by applying economic principles to a variety of legal issues see Johnson, An Appeal for the "Liberal" Use of Law and Economics: The Liberals Fight Back (Book Review), 67 Tex. L. Rev. 569 (1989).
205. See Macey, supra note 159, at 313. Others have criticized the cy pres doctrine because it is premised on the alleged erroneous assumption that the courts can explicate the original settlor's intent in light of changed conditions. See Note, supra note 125, at 584-86.
206. Macey, supra note 159, at 314.
207. See id.
208. See id. at 306.
settlor has not made an alternative disposition of trust assets.\textsuperscript{209}

As discussed above, however, a charitable trust instrument is better viewed as a relational contract in which the related concepts of good faith and fair dealing should be utilized to balance and maximize—through flexibility—settlor and societal interests. It is unrealistic to assume that the settlor did not expect conditions to change in ways the parties could not anticipate and regulate ex ante. After all, that is why a trust is utilized and a trustee is charged with fiduciary duties to the beneficiaries. The trustee is responsible for dealing with changed conditions and maximizing, in the safest and most conservative manner possible, the wealth generated by the trust to be enjoyed by the beneficiaries.\textsuperscript{210} To view the relationship as the equivalent of a complete contract is counterintuitive and contrary to the very purpose of the relationship.

Last, and most important, Professor Macey's restrictive solution to the cy pres problem is more detrimental to society than the more expansive solution we propose. Contrary to Professor Macey's solution to allow trust assets to revert to the settlor's heirs if the specific intent of the settlor cannot be carried out and no express instructions allow the court to apply cy pres,\textsuperscript{211} we believe the trust should be subject to the liberal use of cy pres, guided by dynamic interpretation. We propose that unless the trust expressly states that cy pres should not be applied in any form, trust assets should never revert to the settlor's heirs, but instead, should be put to some other socially productive use that as nearly as possible (which is, after all, the literal translation of cy pres) comports with the settlor's intent given changed or unanticipated conditions.

Our suggested default rule, promoting the liberal use of cy pres in the absence of contradictory language in the trust, makes sense for three practical, efficient reasons. First and foremost, if the property must benefit either society or the heirs of some long-dead settlor, who are in every sense "laughing heirs," society should benefit by a rule that maximizes the optimal use of assets previously designated for charitable purposes. Both the short-term and the long-term effects of an expansive use of cy pres should be beneficial. The short-term effects are obvious, allowing for the efficient, optimal use of trust assets given changed conditions.

We believe the supposed detrimental long-term effect—that settlors will not establish charitable trusts \textit{in futuro} due to the threat of courts applying cy pres loosely—has been overstated. This long-term effect of the expansive use of cy pres should be mitigated by settlors and their attorneys who will know the rule and act accordingly. Thus, unless expressly negated by the use of appropriate language, each trust will contain an implied, off-the-rack provision authorizing the court to employ cy pres in light of

\textsuperscript{209} See \textit{id.} Professor Macey states "the argument that the cy pres doctrine unambiguously serves the interests of economic efficiency by reconciling the goals of settlors with unanticipated future events seems doubtful when examined closely." \textit{id.}

\textsuperscript{210} See supra text accompanying notes 196-97.

\textsuperscript{211} Professor Macey argues:

An alternative rule which stipulates that the settlor's assets always revert back to his heirs whenever any significant aspect of the settlor's intentions are thwarted, unless the settlor provides for a contrary result, would serve the interests of efficiency . . . . Such a rule would provide a better guide to courts on the value to the settlor of his second choice asset allocation.

Macey, \textit{supra} note 159, at 306 (emphasis added).
Once the rule is settled that courts will employ cy pres expansively, it should encourage settlors to be more specific about the disposition of charitable assets in light of changed conditions that are foreseeable and in light of changed conditions that are unanticipated. Settlors who do not wish courts to apply cy pres to their trust should design "customized provisions to replace the state-supplied terms." While Professor Macey correctly points out the higher transaction costs caused by an expansive cy pres doctrine, it is possible that his solution may burden society with even higher transaction costs. Settlors cannot anticipate every change in condition or circumstance that may affect the operation of the trust, and so courts and society are faced with difficult choices regarding the use and operation of a trust. The approach advocating restrictive application of cy pres assumes that whenever changed conditions render the trust less efficient, the settlor prefers the termination of the trust to any judicial intervention. Although this approach has the advantage of reducing error costs by providing certainty, it puts the onus on the settlor to place appropriate language in the trust to terminate it upon such changed conditions. In particular, it presents the settlor with the difficult burden of identifying those conditions that may affect the trust and then proposing how the trust should be interpreted or operated in light of those changed conditions. The events or changes that the settlor foresees will be addressed in the well-drafted trust; it is the conditions that cannot be foreseen that create the interpretive problems that call for cy pres resolution by the courts. It is inefficient to require the settlor to anticipate ex ante all the changes that could occur in the future and to deal with them accordingly. The error costs associated with that requirement would be astronomical.

On the other hand, it is very easy for the settlor to identify ex ante when his charitable intent is so specific that any changes resulting in deviation from that intent should cause the trust to terminate or revert to the settlor's heirs. Similarly, it makes sense to establish a default rule that requires the settlor to establish, if he can, certain situations in which cy pres should not be applied in light of his intent. Ex ante, the settlor is better able to know and express the circumstances in which he does not want courts to apply cy pres. The ease with which the settlor can express his intent in this

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212. Professors Goetz and Scott explain the purpose of off the-rack rules as the legal system provid[ing] ready-made rules based on common assumptions about typical contracting behavior .... These "off-the-rack" contract rules reduce the costs of exchange by specifying the legal consequences of typical bargains where the expected cost of explicit negotiation exceeds the utility derived from individualized exchange. It is only where idiosyncratic value exceeds negotiating costs, therefore, that contractual flexibility induces privately concocted alternative arrangements.


213. Goetz & Scott, supra note 181, at 262. "The [Expanded Choice] postulate maintains that implied terms expand contractor's choices by providing standardized and widely suitable 'preformulations,' thus eliminating the cost of negotiating every detail of the proposed arrangement." Id. at 262 (footnotes omitted).

214. This is the approach taken by Professor Macey. See Macey, supra note 159, at 306.
regard makes an expansive approach more efficient. As long as flexibility is a desideratum in charitable trusts (as we assume it must be in any agreement that has the potential to endure forever), a default rule requiring the settlor to negate expressly the use of cy pres as applied to his trust makes better sense than one requiring the settlor to identify those situations in which cy pres should be applied.215

Second, courts should employ an expansive cy pres power as the preferred default rule because the available empirical and historical evidence strengthens the view that it has a salutary effect on charitable giving. “There are sufficient incentives for making charitable gifts in this country to assure that under the expanded doctrine of cy pres charity will not be deprived of its benefactors.”216 Third, the unique tax treatment Congress has afforded the charitable trust corroborates the approach that, unless the settlor expressly negates the use of cy pres, courts should treat charitable trusts as long-term, flexible arrangements and should apply cy pres liberally.217 Charitable trusts provide the settlor or the settlor’s estate with a tax advantage.218 By granting this tax advantage, the community purchases an interest in the trust. Thus, limiting the interpretation of charitable trusts to an approach that allows the trust assets to revert to the settlor or to the settlor’s heirs unless the settlor specifically authorizes the use of cy pres is unfair and counterintuitive. The settlor should not be allowed to gain a tax benefit inter vivos or upon death and then shirk the responsibility that the charitable trust imposes. By requiring the settlor to state expressly in the trust instrument that the trust terminates or reverts upon the happening or nonhappening of some event, the tax authorities can decide at the time that the tax benefit is conferred upon the settlor whether to challenge the tax advantage gained by the settlor’s establishment of the charitable trust.

To support a default rule that causes the trust assets to revert to private hands in the event of changed conditions is to support the anomalous position that the settlor, ex ante, should gain full credit for the donation of these assets for the community’s good even though a few years later changed conditions may cause these assets to revert to the settlor’s

215. There may be increased transaction costs associated with this view, but fewer error costs. In other words, in certain types of charitable trusts, settlors will attempt to design customized terms that will address changed conditions. Thus, transaction costs may rise as settlors grapple with the possibility of change. However, these increased costs represent an expedient exchange for the error costs that are avoided once it is acknowledged that charitable trusts cannot be drafted simplistically and cheaply through the use of “form” trusts like form contracts. These are unique arrangements requiring flexibility. If settlors are desirous of restricting that flexibility, the burden should be placed on them.

216. DiClerico, supra note 124, at 200 (footnotes omitted).

217. “After having developed mainly as an intent-enforcing device in this country, the cy pres doctrine . . . must begin to emphasize the interest of the community, but not to the point of totally disregarding the interest of the testator.” DiClerico, supra note 124, at 174 (footnotes omitted); see also Comment, supra note 123, at 650 (noting philanthropic donors encouraged to give by likelihood gift efficiently used; questioning wisdom of system that affords tax benefits and costly public mechanisms to inefficient charitable institutions).

218. Congress has granted a tax exemption for income earned in a trust that is “operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.” I.R.C. § 501(c)(3) (1988).
heirs. Putting the burden on the settlor to state expressly when cy pres should not apply, or when the assets should revert to private hands upon the happening of specified identifiable conditions, however, allows all concerned to assess the “true” charitable nature of the trust at the time society grants the pecuniary benefits to the settlor or the settlor’s estate.

4. The Appropriate Termination of “Relational” Charitable Trusts

Treating charitable trusts as relational contracts provides a multifunctional benefit. First and foremost, it provides a theoretical framework for analyzing legal problems that arise with respect to the formation, operation, and termination of charitable trusts. All too often these trusts have been viewed as a species apart from other consensual transfers of assets, real or personal. In some ways, of course, charitable trusts are unique. The exemption from the Rule Against Perpetuities represents a conscious societal choice that disposition of assets to “charitable” purposes is worthy of the exemption from a beneficial rule designed to promote the alienability of assets. Yet a charitable trust, or for that matter a purely private trust, should be viewed as one alternative for the disposition of the donor’s assets. As such, in the absence of compelling policy, it should be treated like other consensual transfers and subject to similar rules.

Thus, termination of a charitable trust as a result of changed conditions is analogous to termination of a traditional relational contract. By applying the flexible standards of good faith and fair dealing, courts should endeavor to police any opportunistic behavior (i.e., cheating) that might occur as a result of this highly interactive relationship.

The court has three choices when deciding whether to apply cy pres. First, the court may refuse to apply cy pres, which will result in the suboptimal use of trust assets. Second, the court can terminate the trust and cause the trust assets to revert to the settlor or the settlor’s heirs. Finally, the court can apply cy pres and promote the optimal use of trust assets.

We contend that the termination option should not be available to the courts unless the settlor has stated expressly when the court should apply that option. To do otherwise is to allow the settlor to engage in a form of opportunistic behavior to the detriment of societal interests. Having taken the tax and other advantages (the trust’s perpetual life and the good will and enhanced reputation that accrues to the settlor as a result of his gift), the settlor, or the settlor’s representative, should not be allowed to “renege on the deal” when conditions change and cause those assets to revert to private uses.

Treating charitable trusts as a species of relational contracts provides an appropriate paradigm for the resolution of disputes that arise in these long-term consensual arrangements. The court should avoid approving opportunistic behavior and treat these unique relationships as flexible devices that are adaptable to a variety of situations. A doctrine has been

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220. Goetz & Scott, supra note 170, at 1139; see also supra text accompanying notes 211-13.
221. See supra notes 194-95 and accompanying text.
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developed in an analogous area that is applicable to the interpretive problems presented by charitable trusts. Using the relational standards of "good faith and fair dealing," dynamic interpretation should be used to determine when courts should employ cy pres. It is to this inquiry that we now turn.

B. Dynamic Interpretation

1. Defining Dynamic Statutory Interpretation

Professor William Eskridge recently proposed a theory of "dynamic statutory interpretation" that is applicable to the interpretive problems courts face when they address certain private-law issues, including the appropriate scope of cy pres modification to relational trusts. In addressing a slightly different problem, Professor Eskridge persuasively argues that statutes "should—like the Constitution and common law—be interpreted 'dynamically' that is, in light of their present societal, political, and legal context." In brief, Professor Eskridge argues that three perspectives, the textual, historical, and evolutive, must be taken into account and reconciled by the arbiter of interpretive disputes involving statutes.

The applicability of this doctrine to the judicial interpretation of terms in private charitable trusts is readily apparent. The interpreter (judge) starts with the textual perspective—a review and examination of the express terms and conditions of the charitable trust in light of the relief requested. Similarly, the interpreter is concerned with the historical perspective, what courts traditionally have described as the settlor's intent, including the settlor's expectations when creating the trust. Finally, the interpreter must, at least when called upon to justify the use of cy pres modification, examine the trust in light of its evolutive perspective. Can the settlor's original expectations be carried out in light of changed conditions?

Unfortunately, courts have viewed cy pres too narrowly as a vehicle for efficient utilization of trust resources. This narrow interpretation results from a framework that relies too heavily on the settlor's intent and purpose (the textual and historical perspectives) and ignores the evolutive perspective and the advantages to be gained through the appropriate use of dynamic interpretation. The traditional tests established to determine

223. Id. at 1479.
224. Professor Eskridge writes:

[Statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control. These three perspectives relate to (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretative options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time (evolutive perspective).]

Id. at 1483.
225. See Id. at 1482. "Interpretation is not static, but dynamic. Interpretation is not an
whether cy pres is warranted—impossibility or impracticability—represent
overriding concern with the settlor's intent and purpose and promote dead
hand control. The tests do not show enough concern for societal benefits to
be gained by the liberal application of cy pres to charitable trusts.

2. The Application of Dynamic Interpretation to Trusts

When properly applied to the issue of cy pres, dynamic interpretation
balances the settlor's intent and environment against the claim of obsoles-
ence. As in statutory interpretation, the textual perspective is critical and
predominant in most situations. The terms of the trust should control its
interpretation if the trust is a recent one that specifically addresses the issue
before the court. More importantly, the terms of the trust will control even
in light of "decisive shifts in public values." Borrowing the language from
the trust in In re Buck, if the settlor, for whatever reason, has specified
that the trust income is to be "held and used for exclusively non profit
charitable, religious or educational purposes in providing care for the
needy in Marin County, California, and for other non profit charitable,
religious or education purposes in that county," the terms of the trust
should be given effect if the trust was recently settled. In the absence of
overwhelming evidence that the settlor was acting pursuant to a mistaken
impression, a delusion, or undue influence, it is presumed that the settlor
was aware of the needs of the Marin County residents and established the
trust accordingly.

On the other hand, older trusts that explicitly address the issue to be
resolved should be examined to ascertain whether the evolutive perspective
should be considered. Once again, the starting point should be the text or
the terms of the trust. But the court should not stop with a textual
interpretation. The court also should analyze the relevant historical context
to determine if it supports the textual perspective. The Buck trust was
established fairly recently in 1975. However, had the trust been estab-
archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to
pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and
circumstances." Id. (footnotes omitted).

226. "Under dynamic statutory interpretation, the textual perspective is critical in many
cases. The traditional understanding of the 'rule of law' requires that statutes enacted by the
majoritarian legislature be given effect . . . . When the statutory text clearly answers the
interpretive question, therefore, it normally will be the most important consideration." Id. at
1483 (footnotes omitted).


228. See Brief of the San Francisco Foundation, at 3, In re Buck, No. 23,259 (Cal. Super. Ct.

229. According to Professor Eskridge:
The historical perspective is the next most important interpretive consideration;
given the traditional assumptions that the legislature is the supreme lawmaking body
in a democracy, the historical expectations of the enacting legislature are entitled to
difficulty. Hence, when a clear text and supportive legislative history suggest the
same answer, they typically will control.

Eskridge, supra note 222, at 1483-84.

230. Because the Buck trust was a recent one that specifically addressed the issue before the
court, it is our opinion that if the matter had not been settled, the court should have relied on
the textual perspective and strictly construed that trust, which would have validated the
lished in 1875 with the same restrictive use provision, dynamic interpretation would call for an examination of the historical perspective to determine if it corroborates the text. Thus, if Marin County in 1875 were as affluent when compared to its Bay Area neighbors as it is today, strict interpretation of the trust terms and a rejection of cy pres would be warranted.

Conversely, as is the case with the America's Cup's third Deed of Gift, if the historical context militates against strict application of the text, the evolutive perspective should be considered. As noted above, the donors of the Deed of Gift for the America's Cup were not wedded to a competition that complied with the literal terms and conditions of the trust. Through the successive deeds, the donors expressly attempted to provide for the most efficient competition for the Cup. At the time the third Deed of Gift was adopted, the donors set forth a framework that was effective given the historical development of Cup competition and the level of technology at the time. The overriding concern was to promote effective and efficient competition and to establish the Cup as the ultimate yachting prize. Analyzing the evolutive as well as the historical and textual perspectives could lead a court to conclude that the trust is better served by applying cy pres and modifying its terms and conditions to take into account changed circumstances.

When Professor Eskridge's dynamic interpretive model is applied to recent trusts that do not specifically address the issue before the court, the evolutive and historical perspectives both become relevant to the decision-maker, with the former controlling if the historical evidence is ambiguous. Finally, if an older trust is involved and does not address the issue specifically, the evolutive perspective should control in interpreting its provisions. Although this interpretive framework is by no means the definitive answer to when courts should apply the doctrine of cy pres, courts should use it as a guide to focus attention on the questions and issues that need to be addressed when a claim is made that cy pres is warranted. The facts of each trust, like the interpretation of each statute, will frequently be dispositive of the issue. Knowing which questions to ask would establish a framework that allows the court to apply the cy pres doctrine properly and to reject the narrow interpretive doctrine that has stifled the optimal use of charitable trust assets.

3. Public Policy, the Difficulty of Interpretation, and the Application of Dynamic Interpretation to Charitable Trusts

Courts have exercised restraint with respect to cy pres modification even when the evolutive perspective favors application of the doctrine. This suggests that courts defer to some stronger policy that limits cy pres application. We believe that implicit in the objection to the application of geographical limitation on the scope of intended beneficiaries to those residing in Marin County, California. See In re Buck, No. 23,259.

231. See supra text accompanying notes 146-50.
232. See supra text accompanying notes 146-47.
233. See Eskridge, supra note 222, at 1497.
234. See id.
the dynamic interpretation doctrine to charitable trusts is the notion that charitable trusts are contracts between the settlor and the state that the judiciary must enforce without variance in all but the most exceptional circumstances. In other words, cy pres is inappropriate in situations involving charitable trusts because it somehow violates the contract between the settlor and the state. The state allows charitable trusts and accepts the burden of enforcing them in the absence of the settlor, typically by the actions of the Attorney General.235

Professor Eskridge has rejected this “contracting” argument in the context of statutory dynamic interpretation for reasons that are applicable to charitable trusts.236 Implicit in the arguments for the application of dynamic interpretation to charitable trusts is the notion that their unique nature and their exemption from the Rule Against Perpetuities imbue them with a “public character.”237 They are comparable to statutes, and, in some respects, should be treated like statutes and not like private contracts.

Professor Eskridge demonstrates that statutes should be interpreted dynamically by examining the courts’ treatment and modification of consent decrees. Given that charitable trusts are even more strongly imbued with a public character and more easily revisable than consent decrees, the language Professor Eskridge uses in describing the analogous use of dynamic interpretation to consent decrees supports the application of dynamic interpretation to “private” charitable trusts.238

[T]he consent decree is negotiated between one or more private actors and one or more public actors. Like a statute, the consent decree endures for a long or indeterminate period of time, until it is withdrawn or amended, and must normally be accompanied by a public justification and object. Also, like a statute under my model of dynamic interpretation, the consent decree can be changed by the court, over the objections of a party, to reflect changed circumstances. Consent decrees exemplify dynamic interpretation because they often result in an ongoing process of revision to address new problems.239

Arguments can and will be made that the doctrine of dynamic interpretation should not be applied to charitable trusts. Those arguments

235. See 4A A. Scott, supra note 122, § 391, at 357-63.
236. Professor Eskridge argues that courts weigh current policy and practice in resolving contract interpretation disputes through several “rules”:

(1) The contract might be updated by looking to current “usages of trade” generally, or “courses of dealing” specifically adopted by the parties. (2) The general obligations of “good faith” and “unconscionability” would protect against hundred-year-old terms that are no longer considered reasonable. (3) The contract might be cancelled or reformulated if performance has been rendered “impracticable” by the existence of contingencies not contemplated in the original contract. (4) Terms might be added to or subtracted from the original contract according to new policies embodied in modern contract law. (5) The court might treat the contract as a “relational contract,” in which the parties are only expected to expend their “best efforts” under the ongoing circumstances of the contract.
Eskridge, supra note 222, at 1521-22 (footnotes omitted).
237. See supra notes 192-221 and accompanying text.
238. See Eskridge, supra note 222, at 1522.
239. Id.
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will be two-fold. First, the doctrine is ill-suited to interpretive problems of a private contractual nature like charitable trusts, which are admittedly quite different in origin, implementation, and scope than statutes. Second, adherents to the traditional interpretation of charitable trusts will make “second order” arguments that the expansive application of dynamic interpretation inevitably will violate the settlor’s intent, leading to certain error costs and higher transaction costs.²⁴⁰

Taking the latter argument first, applying dynamic statutory interpretation to charitable trusts will have far reaching ramifications. There is a serious concern that future settlors will refuse to establish socially beneficial charitable trusts for fear their intent will be disregarded after they have died. Thus, the short-term effect of an expansive use of cy pres, recast as dynamic interpretation, is the short-term optimization of charitable trust assets. The alleged long-term effect is the detrimental evaporation of charitable trust assets,²⁴¹ or increased transaction costs as settlors endeavor to establish “ironclad” charitable trusts that will never be the subject of cy pres or dynamic modification.

In short, however, unless the settlor drafts the instrument to state the contrary, the settlor will approve of the efficient use of trust assets in light of changed, unanticipated conditions. More importantly, the doctrine of dynamic statutory interpretation holds that the textual perspective is consulted first to ascertain if it provides a definitive resolution to the dispute before the court.²⁴² Failing that, the historical perspective is consulted to ascertain the settlor’s intent. Thus, it is only when the text and the “legislative history” fail to provide an answer that the court turns to the evolutive perspective for guidance on interpretive problems.²⁴³ Consequently, any objection to dynamic interpretation based on its alleged violation of the settlor’s intent misstates the issues and fails to conceive properly of its appropriate use.

Finally, recent scholarship demonstrates that the process of statutory interpretation is not static or nondynamic as it was once thought to be. In brief, some of this scholarship attempts to prove that the meaning of any legal document, including the text of charitable trusts, is unstable or contingent on any number of variables.²⁴⁴ Thus, like a statute, the text of a charitable trust may never have a single, correct, or true meaning. Instead, the interpreter’s context, life experiences, and class position will influence the interpretation.²⁴⁵ Dynamic interpretation recognizes this insight by interpreting the settlor’s intent in light of the parties and interests affected,

²⁴⁰. See Macey, supra note 159, at 301-02.
²⁴¹. For an historical, empirical refutation of this argument see supra text accompanying note 216.
²⁴². See supra note 226 and accompanying text.
²⁴³. See supra note 229 and accompanying text.
²⁴⁴. For a discussion of the indeterminacy of language in charitable trusts in the absence of the settlor at the time the interpretive issue arises, see Note, supra note 125, at 979-81.
including the settlor's, the intended beneficiaries', and the public's, and in light of the textual, historical, and evolutive perspectives presented by charitable trusts.

Accordingly, dynamic interpretation should be applied to charitable trusts primarily in two very different, easily identifiable situations. First, when ambiguity is present in the text, courts should consider the evolutive perspective for the resolution of the ambiguity. Since the settlor is typically long dead when the court exposes and addresses the ambiguity, any objection based on the settlor's intent is meritless. The court is unable to discern the settlor's intent from a reading of the trust and must consider other factors to make its decision. It is here that the dynamic interpretation model is strongest. Given ambiguity and the evolutive perspective, why should the court attempt to slavishly adhere to some long-dead settlor's intent? Society, and presumably the settlor, is better served by the resolution of the ambiguity in a manner that optimizes the use of the trust assets.

As pointed out by Professor Eskridge, the second and most difficult case for dynamic interpretation is when the settlor's intent, clearly expressed in the text and supported by historical evidence, is "inconsistent with compelling current values and policies." Cy pres is designed and should be used to resolve these situations. Cases abound in which traditional cy pres doctrine is employed to transcend the settlor's express intent due to a change in societal values and policies. For example, when the settlor has placed an explicit racially or sexually restrictive covenant or condition in the trust, courts should properly overrule the settlor's specific intent, as expressed textually and historically, to effectuate the ideals and mores of modern society.

By employing dynamic interpretation, courts...
will be able to distinguish adequately those cases in which the evolutive perspective outweighs either or both the textual or historical perspective and thus calls for the proper application of cy pres.\textsuperscript{251}

\textbf{CONCLUSIONS}

Charitable trusts are unique legal mechanisms by which settlors dispose of their wealth for the public's and their own benefit. In interpreting charitable trusts, however, all too often courts have lost sight of the fact that trusts are complicated relationships involving many disparate interests. As the America's Cup litigation demonstrates, when courts are called upon to resolve interpretive disputes involving charitable trusts, they must balance the intent of the settlor, the interests of the intended beneficiaries, and the public's interest in resolving the dispute. The fact that the charitable trust may endure forever raises unique problems that are infrequently encountered in private trusts and other consensual arrangements. The problem of dead hand control over significant assets in perpetuity is quite real.

Theoretically, courts have developed and used cy pres to resolve problems that arise because of changed conditions or circumstances that the settlor did not anticipate when establishing the trust. The mere existence of this sensible doctrine, however, should not obscure the fact that courts do not apply the doctrine correctly, which results in a concomitant suboptimal use of charitable assets.

The misapplication of the cy pres doctrine results from a systemic mischaracterization of the nature of charitable trusts. Instead of treating these unique arrangements as complete contingent contracts, these arrangements are better categorized and analyzed as a species of relational contracts. As such, they are flexible arrangements in which parties attempt to adjust their respective positions to take advantage of changes that occur over time. Change, however, may lead a party to act opportunistically by taking unfair advantage of the situation. Cy pres is a doctrine that courts should employ expansively to prohibit the opportunistic behavior that may occur when changes in conditions prevent charitable trust assets from being used optimally. Allowing trust assets to revert to the settlor or her heirs, or allowing those assets to be used suboptimally, is a type of opportunistic behavior or wealth transfer that should be avoided through the use of appropriate societal default rules.

By utilizing the analogous theory of statutory dynamic interpretation when applying cy pres, courts can avoid the interpretive problems that have produced the underutilization of a doctrine devised for the efficient, optimal use of trust assets. Dynamic interpretation provides a principled basis for the application of cy pres that goes beyond an examination of the


\textsuperscript{251} See supra notes 224-26 and accompanying text.
facts of each case. By analyzing charitable trusts under the tripartite scheme established by statutory interpretation—the textual, the historical, and the evolutive perspectives—courts can determine rationally when cy pres is warranted in light of the interests of all relevant parties. By expanding cy pres to incorporate dynamic interpretation, the intent of the settlor, the beneficiaries, and society is properly taken into account in light of the context within which the trust is established.

The America's Cup litigation illustrates the bankruptcy of the contemporary cy pres doctrine. By placing too much emphasis on the settlor's intent, courts are abdicating their responsibility to effectively interpret and enforce trusts that have been dedicated to public benefit and use. Although the concern for the slippery slope and the ill effects that could result from the expansive use of cy pres are well-considered, negating the effective use of the doctrine is more costly for society. By using dynamic interpretation to establish the interpretive framework for when cy pres should be applied, proper symmetry is achieved with respect to the rights of settlors to control, in a limited fashion, the disposition of property, and conversely, the rights of current and future generations to use charitable trust assets in an optimal and efficient fashion.252

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252. For a critical legal studies discussion of this battle between the dead and the living and the issues raised thereby, see Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 Stan. L. Rev. 1189 (1985).
Appendix A

Deed of Gift of 1857 (First Deed of Gift)

TO THE SECRETARY OF THE NEW YORK YACHT CLUB: —

Sir: The undersigned, members of the New York Yacht Club, and late owners of the schooner yacht America, beg leave through you to present to the Club the Cup won by the America at the Regatta of the Royal Yacht Squadron at Cowes, England, August 22, 1851.

This cup was offered as a prize to be sailed for by Yachts of all nations without regard to difference of tonnage, going round the Isle of Wight, the usual course for the Annual Regatta of the Royal Yacht Squadron, and was won by the America, beating eight cutters and seven schooner Yachts which started in the race.

The Cup is offered to the New York Yacht Club, subject to the following conditions:

Any organized Yacht Club of any foreign country shall always be entitled, through any one or more of its members, to claim the right of sailing a match for this Cup with any yacht or other vessel of not less than 30 or more than 300 tons, measured by the Custom House rule of the country to which the vessel belongs.

The parties desiring to sail for the Cup may make any match with the Yacht Club in possession of the same that may be determined upon by mutual consent; but in case of disagreement as to terms, the match shall be sailed over the usual course for the Annual Regatta of the Yacht Club in possession of the Cup, and subject to the Rules and Sailing Regulations the challenging party being bound to give six months' notice in writing, fixing the day on which they wish to start. This notice to embrace the length, Custom House measurement, rig, and name of the vessel.

It is to be distinctly understood that the Cup is to be the property of the Club, and not of the members thereof, or owners of the vessels winning it in a match; and that the condition of keeping it open to be sailed for by Yacht Clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it a perpetual Challenge Cup for friendly competition between foreign countries.

J.C. Stevens.
Edwin A. Stevens.
Hamilton Wilkes.
J. Beekman Finley.
George L. Schuyler.
Deed of Gift of 1881 (Second Deed of Gift)

The America's Cup is again offered to the New York Yacht Club, subject to the following conditions:

Any organized Yacht Club of a foreign country, incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course on the sea or on an arm of the sea (or one which combines both), practicable for vessels of 300 tons, shall always be entitled, through one or more of its members, to the right of sailing a match for this Cup, with a yacht or other vessel propelled by sails only, and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel as aforesaid, constructed in the country of the club holding the Cup.

The yacht or vessel to be of not less than 30 nor more than 300 tons, measured by the Custom House rule in use by the country of the challenging party.

The challenging party shall give six months' notice in writing, naming the day for the proposed race, which day shall not be less than seven months from the date of the notice.

The parties intending to sail for the Cup may, by mutual consent, make any arrangement satisfactory to both as to the date, course, time allowance, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the six months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then the challenging party shall have the right to contest for the Cup in one trial, sailed over the usual course of the Annual Regatta of the club holding the Cup, subject to its rules and sailing regulations, the challenged party not being required to name its representative until the time agreed upon for the start.

Accompanying the six months' notice, there must be a Custom-house certificate of the measurement, and a statement of the dimensions, rig and name of the vessel.

No vessel which has been defeated in a match for this Cup can be again selected by any club for its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time such contest has taken place.

Vessels intending to compete for this Cup must proceed under sail on their own bottoms to the port where the contest is to take place.

Should the club holding the Cup be for any cause dissolved, the Cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.

253. R. Coffin, supra note 4, at 132-34.
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It is to be distinctly understood that the Cup is to be the property of the club and not of the owners of the vessel winning it in a match, and that the condition of keeping it open to be sailed for by organized Yacht Clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it perpetually a Challenge Cup for friendly competition between foreign countries.

George L. Schuyler.

APPENDIX C

Deed of Gift of 1887 (Third Deed of Gift)

This Deed of Gift, made the twenty-fourth day of October, one thousand eight hundred and eighty-seven, between George L. Schuyler as sole surviving owner of the Cup won by the yacht AMERICA at Cowes, England, on the twenty-second day of August, one thousand eight hundred and fifty-one, of the first part, and the New York Yacht Club, of the second part, as amended by orders of the Supreme Court of the State of New York dated December 17, 1956, and April 5, 1985. WITNESSETH -

That the said party of the first part, for and in consideration of the premises and of the performance of the conditions and agreements hereinafter set forth by the party of the second part, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto said party of the second part, its successors and assigns, the Cup won by the schooner yacht AMERICA, at Cowes, England, upon the twenty-second day of August, 1851. To have and to hold the same to the said party of the second part, its successors and assigns, IN TRUST, NEVERTHELESS, for the following uses and purposes:

This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line, beam at load water-line and extreme beam and draught of water which dimensions shall not be exceeded and a custom house registry of the vessel must also be sent as soon as possible. Centre-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel, nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement.

The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match in which case also the ten months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return, and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Should the Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality, eligible to challenge under this deed of gift, in trust and subject to its provisions. In the event of the failure of such transfer within three months after such dissolution, said Cup shall revert to the preceding Club holding the same, and under the terms of this deed of gift. It is distinctly understood that the Cup is to be the property of the Club subject to the provisions of this deed and not the property of the owner or owners of any vessel winning a match.

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And when a challenge from a Club fulfilling all the...
conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.

AND the said party of the second part hereby accepts the said Cup subject to the said trust, terms, and conditions, and hereby covenants and agrees to and with said party of the first part that it will faithfully and fully see that the foregoing conditions are fully observed and complied with by any contestant for the said Cup during the holding thereof by it and that it will assign, transfer, and deliver the said Cup to the foreign Yacht Club whose representative yacht shall have won the same in accordance with the foregoing terms and conditions, provided the said foreign Club shall, by instrument in writing lawfully executed, enter with said party of the second part into the like covenants as are herein entered into by it such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective assignors, and to be executed in duplicate, one to be retained by each Club, and a copy thereof to be forwarded to the said party of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal and the said party of the second part has caused its corporate seal to be affixed to these presents and the same to be signed by its Commodore and attested by its Secretary, the day and year first above written.

George L. Schuyler (L.S.)

The New York Yacht Club
by Elbridge T. Gerry, Commodore
John H. Bird, Secretary

In the presence of H.D. Hamilton
(Seal of the New York Yacht Club)