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Confusing Cy Près

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Cover Page Footnote

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CONFUSING CY PRÈS

Christopher J. Ryan, Jr.[*]

American courts have increasingly considered the possibility of prolonging the life of charitable trusts through cy près and the closely related doctrine of equitable deviation. This requires courts to interpret the material purposes of trusts and even the administrative terms on which settlors of charitable trusts condition gifts in trust made for public benefit. Yet, the implicit reasons why courts might invoke cy près to change a charitable trust's material purpose have not been explored in significant depth heretofore—and neither has a common but vexing trend of courts conflating cy près with deviation, which negatively impacts charitable trust-making.

I analyze the extent to which judges have struggled with applying these remedies via an empirical analysis of a universe of cases receiving a published opinion from an American court from the nation's founding through 2019. This study provides an original analysis of the cy près doctrine, including its use and misuse, along an extended timeline in American history. The study's novel contributions are twofold. First, it teases out the distinction between cy près and like equitable doctrines. In doing so, it elucidates how courts confuse cy près with other equitable remedies. Second, it discusses the sources of the confusion around the cy près and deviation doctrines by empirically testing the factors that bear on a court's decision to employ them accurately or inaccurately. These findings have implications not only for resolving the boundaries of the cy près

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doctrine, while encouraging charitable trust-making, but also for defining the critical role that judges play in shaping both the cy près doctrine and trust settlors' expectations in the past, in the present, and for the future.

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I. INTRODUCTION

It has been suggested that the cy près doctrine is esoteric.[1] It is, if only because of the fact that, relative to other forms of equitable relief, it remains a fairly obscure and recently underemployed legal doctrine by the courts.[2] Additionally, it has generated only modest academic interest, with treatment that considers the doctrine in passing or that centers, principally, on the need for its reform.[3] But why? Its history is as rich as it is fascinating, evolving alongside another equitable doctrine—deviation—to allow courts flexibility in permitting charitable trusts to continue, perhaps, in perpetuity.[4] More interestingly, at the root of the doctrine lies an essential tension that has significant bearing not only on the domain of

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[1] *See, e.g.*, Alberto B. Lopez, A Revaluation of Cy Pres Redux, 78 U. CIN. L. REV. 1307, 1308 (2010) ("Cy pres . . . has long been mired in confusion and controversy.") (footnote omitted).

[2] See *id.* ("[C]ourts have struggled to apply [cy près] consistently, which adds another piece to an already complicated puzzle.").

[3] Academic scholarship focusing on cy près is quite limited. There are a few seminal works on the matter, yet nearly all were published many decades ago. *See, e.g.*, Note, *A Revaluation of Cy Pres*, 49 YALE L.J. 303 (1939) (discussing the confusion surrounding and early use of cy près in the United States); Edith L. Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME L. REV. 219 (1953) [hereinafter Fisch, *American Acceptance*] (describing the history of charitable trust doctrines and impediments to their implementation in America); Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953) [hereinafter Fisch, *The Cy Pres Doctrine*] (explaining that courts in the mid-twentieth century believed the public good was served through liberal application of cy près); Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L.Q. 382 (1959) [hereinafter Fisch, *Changing Concepts*] (arguing for the elimination of cy près prerequisites); C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407, 425 (1979) (arguing that "[m]odern courts . . . will best serve the interests of society . . . by applying cy pres widely"). Renewed attention to the doctrine is lacking in volume. *But see* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111 (1993) (criticizing the limited scope of current efforts to reform cy près); Lopez, *supra* note 1, at 1357 (discussing how reforming cy près will discourage costly litigation while incentivizing charitable donors); Katie Magallanes, *Beyond Donor Intent: Leveraging Cy Pres to Remedy Unintended Burdens Caused by Charitable Gifts*, 40 ACTEC L.J. 407, 431 (2014) (arguing that a reasonableness standard would "increase the efficiency of charitable giving without creating any perverse disincentives"); Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663 (2015) (arguing that focusing on the concept of charitable gift economy will help courts reform cy près); Jeffery N. Pennell & Reid Kress Weisbord, *Trust Alteration and the Dead Hand Paradox*, 48 ACTEC L.J. 147, 176 (2023) (highlighting how different cases have approached settlor intent under the cy près doctrine).

[4] *See* Christopher J. Ryan, Jr., *An Historical and Empirical Analysis of the Cy-Près Doctrine*, 48 ACTEC L.J. 289, 336 (2023) ("For settlors, [cy près] offers longevity—perhaps in perpetuity—to their charitable wishes . . . .").

charitable trust law but also on both jurisprudence *and* charitable trust-making.[5]

For over 200 years, a conflict has brewed between courts in the United States and the "dead hand" control of decedents who leave sums of money or property, or both, in trust for charitable purposes. When a charitable trust is rendered stale—either by overly prescriptive conditions placed on the trust by the settlor of the trust or because changes in circumstances make the effectuation of the trust unlawful, uncertain, impracticable, or wasteful—the trust faces the possibility of extinguishment. But courts have the power to prevent this. That is, the cy près doctrine, as well as equitable deviation, afford another possibility: the possibility of extending the life of the trust, possibly in perpetuity.

Perhaps because of this possibility, and the effect it can have at changing a charitable trust settlor's donative intent, courts have—in the past—been cautious in using the doctrine.[6] At an earlier time in history, the invocation of the cy près doctrine was all but forbidden,[7] but American courts have increasingly considered the possibility of prolonging the life of charitable trusts through cy près and the closely related doctrine of equitable deviation.[8] This requires courts to interpret the material purposes of trusts and even the administrative terms on which settlors of charitable trusts condition their gifts. As these equitable remedies caught on in the middle of the twentieth century, more and more trusts were put to different uses than originally intended by settlors when courts deemed their purposes or terms to be ineffective.[9]

Yet, because the use of these equitable doctrines requires at times the overriding of the intended purposes or terms of the trust

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[5] *See id.* at 335 (discussing the competing interests of the individual and the collective and how courts keep this in mind when applying cy près).

[6] *See id.* app. (noting many states that historically forbade adoption of the cy près doctrine).

[7] *See id.* (noting that historically many states' statutes and cases forbade adoption of the cy près doctrine).

[8] *See id.* (listing the current statutes and cases of many states accepting the cy près doctrine); *see also* Fisch, *The Cy Pres Doctrine*, *supra* note 3, at 388 ("Thus the courts of today, believing that the public good is served by a liberal enforcement of the purposes of the donor, apply the cy pres doctrine whenever possible . . . ."); Fisch, *Changing Concepts*, *supra* note 3, at 382–83 (describing the increased use of the cy près doctrine by courts after 1900).

[9] *See* Ryan, *supra* note 4, at 336 (discussing the "willingness on the part of courts to put charitable trusts to new uses").

created by the settlor, we have a paradox.[10] Judicial outcomes voiding the trust deny public benefit, but outcomes that allow trusts to prevail with permanency—albeit through a different effectuation than settlors may have intended—deny the fundamental certainty of private donors that their gifts will be used as planned.[11] The former is contrary to the bedrock of trust and estate law: the freedom of disposition.[12] The latter is the product of the way the law has shifted to privilege the rights of the collective over the individual.[13] This conflict is not new, but the implicit reasons that courts might invoke the cy près doctrine to change a charitable trust's material purpose have not been explored in significant depth before. And little, for that matter, has been written on a common but vexing trend of courts to conflate cy près with equitable deviation.[14]

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[10] *See* Pennell & Weisbord, *supra* note 3, at 149 (explaining how authorizing modification of a trust prolongs donative intent); *see also* Chester, *supra* note 3, at 417 (same).

[11] *See* Pennell & Weisbord, *supra* note 3, at 149 (arguing that elaborate restrictions imposed by the settlor may cause a stale trust and how modification prolongs a charitable purpose in light of unforeseen circumstances).

[12] *See id.* at 148 ("[T]he cardinal principle of American inheritance law . . . recognizes as 'sacred' . . . the right to control the disposition of property at death.")

[13] *See* Fisch, *Changing Concepts*, *supra* note 3, at 382 (stating that the common law stress on individualism "began to lessen and the tide of thinking flowed towards society as a whole" after 1900).

[14] This has provoked scholars to provide suggestions to rewrite the legal bounds of doctrine altogether, including removing the general intent requirement and broadening the interpretation of impracticability and impossibility. *See, e.g.*, *id.* at 393 (arguing that the elimination of the cy près requirements would better facilitate preservation of charitable gifts). Moreover, some scholars suggest that cy près and its close doctrinal cousin, equitable deviation, should merge, because courts consistently confuse the two doctrines, further perpetuating their inconsistent application. *See, e.g.*, John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 155 n.102 (2010) (noting "that the alleged distinction [between cy pres and equitable deviation] has been criticized by multiple commentators as specious and lacking any principled basis"); *see also, e.g.*, Rob Atkinson, *supra* note 3, at 99–101 (advocating for cy près reform on the grounds that dead hand control perpetuates waste for charities); Chester, *supra* note 3, at 414 (criticizing how a New York court could have applied equitable deviation or the cy près doctrine to effectuate the wishes of the testator). Others argue that cy près should remain narrow to preserve the original intent of the settlor and to encourage charitable donations, overlooking the issue of waste. *See, e.g.*, Lopez, *supra* note 1, at 1307–08 (proposing a presumption of specific charitable intent to benefit charity and protect settlor intent). While there are some arguments that cy près should remain narrow in order to preserve the original intent of the settlor and to encourage charitable donations, this view has been criticized on the grounds that it may overlook the issue of waste stemming from outdated, dead-hand control over the

To the extent that the cy près doctrine and deviation are confused with one another by the courts, the unfortunate result—for settlors, beneficiaries, and trustees alike—is the perpetuation of inconsistent case law concerning trust reform, which acts as a disincentive for charitable trust creation in the first place.[15] At times, the courts have taken a broad view of the cy près doctrine.[16]

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direction of charitable trusts once the trust's returns have outpaced their distribution. *See* discussion *infra* section III.A.

[15] *See* Lopez, *supra* note 1, at 1308–09 (noting that the "hazy distinction" between cy près and equitable deviation "adds another piece to an already complicated puzzle"); *see also, e.g*, Chester, *supra* note 3, at 421 & n.100 (describing how courts reach different results in similar circumstances depending on whether they use cy près or deviation).

[16] *See, e.g.*, Starr v. Morningside Coll., 173 N.W. 231, 231 (Iowa 1919) (holding that a bequest was not conditional on the college remaining in the city where the testator resided and upholding the bequest even after the college merged with another college); Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 616 (N.Y. 1921) (stating that courts can apply cy près on information from the state or on their own regardless of whether the trustee or another person applies for cy près); Hicks v. City of Providence, 113 A. 791, 793 (R.I. 1921) (denying petitioners claim to title through adverse possession and concluding that, where the property left in a fund is condemned, it belongs to the public and is to be administered by the cy près doctrine); Bruce v. Maxwell, 143 N.E. 82, 84–86 (Ill. 1924) (holding that, where the terms of a deed required the property be used for "build[ing] an old man's home," the donor had a general charitable intent and cy près allowed the land to be sold and the proceeds given to an existing old man's home since construction on the land was impossible); Drury v. Sleeper, 146 A. 645, 647 (N.H. 1929) ("When, by reason of changed conditions, a charitable gift cannot be carried out in the precise mode prescribed by the donor, effect will be given to his general purpose . . . ."); *In re* Mears' Estate, 149 A. 157, 158 (Pa. 1930) (holding that a trust is not void for uncertainty when the testator's general intent is ascertainable); Thatcher v. Lewis, 76 S.W.2d 677, 682 (Mo. 1934) (finding that the court is allowed to substitute "another object of the same general charitable nature where the original object fails"); Citizens & Mfrs. Nat'l Bank v. Guilbert, 186 A. 564, 566 (Conn. 1936) ("The effect of [the doctrine of approximation] is to carry out the real or dominant intention of the testator, though the particular method prescribed for accomplishing that purpose proves impossible or impracticable."); *In re* Peterson's Estate, 277 N.W. 529, 533 (Minn. 1938) ("[T]he court is authorized to approximate the intention of the donor when his exact intention cannot be carried out for some reason."); Gifford v. First Nat'l Bank of Menominee, 280 N.W. 108, 112 (Mich. 1938) ("If a fund decreases in value, so that the original purposes of the charity cannot be accomplished, the scheme of the charity may be changed cy pres."); Town of Milton v. Att'y Gen., 49 N.E.2d 909, 912 (Mass. 1943) (stating that a charitable gift will be carried into effect in alignment with the intent of the donor when a literal execution is impracticable); Fairbanks v. City of Appleton, 24 N.W.2d 893, 896 (Wis. 1946) (explaining that the cy près doctrine applies even when the will states that a property shall be devoted for no other purpose than that of the testator); Wilber v. Owens, 65 A.2d 843, 848 (N.J. 1949) (stating that "[t]he special intent" of a settlor "was but a means to an end" and that "[t]he particular purpose was subordinate to the general charitable intention"); *In re* Stouffer's Trust, 215 P.2d

In others, they have considerably narrowed the doctrine.[17] Still, at other times, courts have misapplied the use of cy près when deviation would have been the appropriate course of action,[18] and vice versa.[19] There is no question that the drafters of the Uniform

374, 379 (Or. 1950) ("[W]here a charitable beneficiary has ceased to exist . . . a court of equity may direct the vesting of such legacy in a similar organization . . . .").

[17] *See, e.g.*, Heuser v. Harris, 42 Ill. 425, 437 (1867) (refusing to apply cy pres because, though a bequest to "the poor" is not valid, the county court can manage the funds for the poor rather than use cy près to fund some other charitable goal); Lackland v. Walker, 52 S.W. 414, 432 (Mo. 1899) (finding that "there is no just principle which confers a permission to [use cy près] at the mere discretion of the court or upon the sole ground that it appears to be advantageous to the charity"); John Robinson Hosp. v. Cross, 272 N.W. 724, 728 (Mich. 1937) (stating that, when a bequeathment is "left specifically for one purpose, the doctrine of cy pres is not involved"); Heustess v. Huntingdon Coll., 5 So. 2d 777, 779 (Ala. 1942) (declining to apply cy près).

[18] *See, e.g.*, Worcester Cnty. Tr. Co. v. Grand Knight of Knights of Columbus, 92 N.E.2d 579, 583 (Mass. 1950) (applying the cy près doctrine to determine the method of payment distribution); Slade v. Gammill, 289 S.W.2d 176, 182 (Ark. 1956) (applying the cy près doctrine to validate the trustees' sale of land); Knights of Equity Mem'l Scholarships Comm'n v. Univ. of Detroit, 102 N.W.2d 463, 467–68 (Mich. 1960) (applying the cy près doctrine to find that financial hardship imposed by changed circumstances justified deviation from terms of the charitable trust); Portsmouth Hosp. v. Att'y Gen., 178 A.2d 516, 522–23 (N.H. 1962) (using the cy près doctrine to modify the terms of a trust); New Eng. Hosp. v. Att'y Gen., 286 N.E.2d 474, 475–77 (Mass. 1972) (using the cy près doctrine where it was "impractical and needless to comply literally with the terms" of the trust to achieve its intended purpose); Est. of Grove v. McGinness, 138 Cal. Rptr. 684, 690 (Cal. Ct. App. 1977) (using cy près to modify a trust instrument to avoid violating the rule against perpetuities); Est. of Vallery v. Saint Luke's Cmty. Found., 883 P.2d 24, 29 (Colo. App. 1993) ("The exercise of the *cy pres* doctrine involves a large measure of discretion. The trial court did not abuse that discretion in holding that the restriction . . . has become an impracticable limitation . . . ."); *In re* Fisk Univ., 392 S.W.3d 582, 588, 597 (Tenn. Ct. App. 2011) (holding that where it would be financially impracticable to comply with the conditions of the gift "the court did not err in holding that cy pres relief was available").

[19] *See, e.g.*, Ministers & Missionaries Benefit Bd. v. Meriden Tr. & Safe Deposit Co. (*In re* Ives' Will), 94 A.2d 917, 920–21 (Conn. 1953) (holding that, where circumstances have made the trust's purpose impracticable, "the gift . . . must be held to have lapsed unless it can be saved by applying the doctrine of approximation"); *In re* Succession of Mizell, 468 So. 2d 1371, 1377 (La. Ct. App. 1985), *rev'd*, 475 So. 2d 765 (La. 1985) (noting that the trial judge applied cy près without ever using the term, instead relying on the doctrine of approximation); Tinnin v. First United Bank of Miss., 502 So. 2d 659, 663 (Miss. 1987) (stating that the judicial power to reform the terms of a trust exists "under the doctrines of cy près, equitable approximation or whatever" without stating which doctrine applied to the modification in the case); *In re* Treen Estate, 13 Pa. D. & C.3d 115, 121–22 (Ct. Com. Pl. 1979) (using the doctrine of deviation to remove racially discriminatory language from the trust while recognizing that doing so "subvert[s] the clearly expressed intent of the testatrix"); *In re* Est. of Wilson, 452 N.E.2d 1228, 1233–35 (N.Y. 1983) (using the deviation doctrine to remove discriminatory

Laws have added to courts' confusion over the two distinct doctrines,[20] which this Article explores in much greater depth in the pages that follow. Nevertheless, courts play a critical role in shaping the cy près doctrine. This role often depends on which view judges take with respect to narrowing or broadening the interpretation of the cy près doctrine—or simply conflating it with deviation. Moreover, judicial interpretations of the doctrines bear on the incentives of settlors in charitable trust-making.

Thus, I analyze the extent to which judges have struggled with applying these equitable remedies. I do this via an econometric analysis of a universe of cases receiving a published opinion from an American court that consider an invocation of the cy près doctrine to resolve a dispute concerning a charitable trust. These cases span the nation's founding through 2019. This study provides a novel analysis of the cy près doctrine and the use and misuse of the doctrine along an extended timeline in American history. Additionally, this study endeavors to test empirically whether the classification of a trust, the change in the monetary value of the trust, and the difference in time from the creation of the trust to the court's decision have a bearing on whether a court employs cy près or equitable deviation to diverge from the trust's original purposes and terms.

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language from the testatrix's trust awarding gender restrictive scholarships despite finding that the restriction was "central to the testator's . . . charitable purpose"); Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 679 N.E.2d 1084, 1092 (Ohio 1997) ("[W]e believe that a deviation from the express terms of the trust instruments is appropriate to carry out the settlors' charitable wishes."); Colin McK. Grant Home v. Medlock, 349 S.E.2d 655, 660 (S.C. Ct. App. 1986) ("The expansion of a trust's class of beneficiaries is neither novel nor beyond the scope of equitable deviation."); Niemann v. Vaughn Cmty. Church, 113 P.3d 463, 473 (Wash. 2005) (en banc) ("[D]eviation is permissible when, due to circumstances unanticipated by the settlor, modification of an administrative requirement would advance the trust's purpose.").

[20] *See, e.g.*, Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 709 (2001) (claiming that the Uniform Trust Code drafters perpetuated confusion between the doctrines of cy près and equitable deviation by blurring distinctions between the two); *see also, e.g.*, Tait, *supra* note 3, at 1716 ("[C]y pres reform has slowly but steadily chipped away at the primacy of donor intent and made it easier for institutions to reform restricted gifts through judicial intervention. Changes adopted by the Uniform Trust Code . . . have modernized cy pres procedure by shifting the presumption in favor of general charitable intent, . . . blurring the line between cy pres and deviation.").

My results indicate that trusts created for certain purposes (i.e., public purpose, educational purpose, and medical purpose trusts) are more likely to benefit from a court employing the cy près doctrine to effect as nearly as possible the settlor's intent.[21] Additionally, I find that the presence of reversionary or gift-over provisions in a trust instrument makes a court far less likely to employ the cy près doctrine. [22] Also, I find that a greater difference in time between the creation of the trust and the court's decision redounds to a greater likelihood of a court using cy près.[23] Yet, monetary value—that is, the value of the trust from its creation to the court's decision—has little to do with a court's use of the doctrine, suggesting that judges are somewhat impervious to economic considerations in the domain of charitable trust law.[24] Most importantly, however, I find that judges have begun to misapply cy près and deviation at an alarming rate since the uptake of the Uniform Trust Code, which portends greater confusion over the equitable doctrines and their applications.[25]

This Article proceeds in three parts. Part II explores the sources that may be causing judicial confusion over the use of the cy près doctrine in the past and present day. It discusses the interpretations of the doctrine and its close cousin—equitable deviation—which confound judges in the application of these doctrines in modern times.[26] Part III examines the role of the courts in getting cy près right. It also unpacks the unique empirical dataset I have created, with the help of my able research assistants.[27] It details my investigation of the types of cases that have come before probate and appellate courts involving the invocation of cy près.[28] Finally, it delivers an explanation of my empirical findings.[29] Part IV concludes with a discussion of the future of the cy près doctrine and the paths that could lead to the doctrine's demise or its continued salience, either of which would impact charitable trust-making.

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[21] *See infra* section II.D.*1*.
[22] *See infra* section II.D.*1*.
[23] *See infra* section II.D.*1*.
[24] *See infra* section II.D.*1*.
[25] See *infra* Part III.
[26] *See infra* section II.B.
[27] *See infra* section III.A.
[28] *See infra* section III.B.
[29] *See infra* section III.D.

This Article provides two novel contributions to the limited literature on the cy près doctrine *qua* law. First, it teases out the distinction between cy près and like equitable doctrines.[30] In doing so, it elucidates how courts confuse the cy près doctrine with other equitable doctrines. Second, it discusses the sources of the confusion around the cy près doctrine by empirically testing the factors that bear on a court's decision to employ the doctrine accurately or inaccurately. I ultimately find that courts do not have much of a problem interpreting the cy près doctrine, but they do struggle applying the doctrine of equitable deviation or approximation. That difficulty leads to greater judicial uncertainty and negatively impacts charitable trust-making.[31] These findings have implications not only for resolving the boundaries of the cy près doctrine and promoting charitable trust-making but also for defining the critical role that judges play in shaping the cy près doctrine—as well as trust settlors' expectations—in the past, in the present, and for the future.

II. THE PRESENT MORASS OF CY PRÈS AND RELATED LEGAL DOCTRINES

While cy près was once seldom used to modify a trust instrument, its application in the modern context has precipitously increased since the early- to mid-twentieth century.[32] Of course, so has the use of alternatives to cy près where courts did not explicitly recognize the cy près doctrine as a valid legal mechanism for modifying a charitable trust's purpose. These alternatives include approximation and deviation, among others.[33] The emergence of these alternatives to the cy près doctrine, as well as new guidance from statutory and uniform laws, have created confusion and uncertainty about whether courts have applied the proper legal reasoning in electing—or not electing—to modify a trust's purpose. This Part offers a deeper dive into the understanding of the

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[30] *See infra* Part II.

[31] *See infra* Part III.

[32] *See* Ryan, *supra* note 4, at 303 (noting the "shift . . . brought on by a changing attitude towards charitable trusts more generally" that precipitated an increase in use of the cy près doctrine).

[33] *See* Lopez, *supra* note 1, at 1309 (noting the existence of equitable deviation and the definitional challenges posed by approximation doctrines).

doctrine, and what it is not, as well as explicating the roots of the confusion in judge-made and statutory law.

A. CY PRÈS AND EQUITABLE APPROXIMATION

Until the late nineteenth century, neither cy près nor approximation were palatable to American courts.[34] This was because courts tended to view the use of either doctrine as doing violence to a trust settlor's intent.[35] But for the most part, American courts could distinguish between the two—even if they chose not to use them.[36] In the past, a handful of courts used approximation as a sleight-of-hand alternative to cy près where application of the latter doctrine might have been appropriate.[37] Although most jurisdictions would eventually adopt cy près by statute, judicial precedent, or both, the application of "equitable approximation" was a way for courts to sidestep a formal endorsement of cy près where it was not yet in vogue.[38]

By 1939, at least eight jurisdictions still expressly rejected cy près: Alabama, Delaware, District of Columbia, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia.[39] However, of those jurisdictions, a few implicitly authorized cy près, but did so "under the guise of approximation."[40] Because of their jurisdiction's statutory or past precedent's rejection of cy près, several of these

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[34] *See id.* at 1312–13 (describing longstanding judicial disapproval of cy près doctrine applications).

[35] *See* Ryan, *supra* note 4, at 300 (noting that cy près doctrine has been long disapproved "[b]ecause American courts held and hold testamentary freedom as sacrosanct").

[36] *See* Lopez, *supra* note 1, at 308 n.43 ("Although not usually called cy pres, there is a similar equitable principle whereby deviation from the terms of a private trust is permitted . . . . This doctrine . . . has not been hampered by historical distinctions.").

[37] *See infra* note 41 (providing examples of courts indirectly utilizing cy près powers through approximation).

[38] *See* Ryan, *supra* note 4, app. (listing the laws of states on cy près and finding most have adopted the doctrine by statute).

[39] *See A Revaluation of Cy Pres*, *supra* note 3, at 308, n.41 (listing Alabama, Delaware, the District of Columbia, Kentucky, North Carolina, South Carolina, and Tennessee as jurisdictions that did not follow cy près at the time of publication in 1939) (citing GEORGE GLEASON BOGET, THE LAW OF TRUSTS AND TRUSTEES § 433 (1935)); *see also* Ryan, *supra* note 4, app. at 358 (noting that Virginia did not have a cy près doctrine until it was enacted by statute in 1946).

[40] *A Revaluation of Cy Pres, supra* note 3, at 308 & n.42 (first citing Mars v. Gilbert, 77 S.E. 131 (S.C. 1913); then citing Noble v. First Nat'l Bank, 183 So. 393 (Ala. 1938); and then citing Dunn v. Ellisor, 141 So. 700 (Ala. 1932)).

courts applied the doctrine of equitable approximation to effect cy près results.[41] In other words, courts' acceptance of approximation was their gateway to acceptance of cy près. In this way, the remedies are linked while distinct.

But equitable approximation is not the same thing as cy près, and using approximation in place of cy près yields inconsistent results.[42] Often, courts' historical use of equitable approximation was based on the flawed rationale that "the intent of the settlor in a private or charitable trust should be saved from frustration of purpose."[43] However, it is not always the case that a settlor's purpose needs saving, nor is it the case that approximation should be used interchangeably with cy près. Either creates disincentives to trust-making in the first place and bad law in the second instance. Yet, approximation's past misuse could also explain courts' current confusion between cy près and approximation. Professor Rudko compares cy près with approximation as such:

> Properly understood, however, the doctrine of equitable approximation . . . is *not* an alternative to cy pres. Under [approximation], a court may vary the administrative directives of a trust when changed circumstances

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[41] *See* Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 482 (1998) (explaining how courts rejecting the cy près doctrine used equitable approximation to reach similar results). Professor Rudko focuses on the ways in which cy près has been used to effectuate the promises of the Equal Protection Clause by attacking discriminatory charitable trusts. *See id.* at 471–72, 472 n.5 (noting that the Supreme Court reversed a state court decision that upheld a trust which allowed a college to refuse to admit black students in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957)). For more on this idea, see generally, for example, Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957) (discussing the effect of the anti-racial covenant decisions on equitable trust doctrines); Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272 (1967) (discussing the applicability of Fourteenth Amendment protections to the cy près doctrine).

[42] *See* Rudko, *supra* note 41, at 483 (explaining the inconsistencies between processes and results pertaining to cy près and equitable approximation).

[43] *Id.* at 482.

> require. Cy pres deals only with ultimate purpose, not with procedural efficiency.[44]

This distinction is important and highlights the difference between cy près and approximation, which are discrete doctrines and apply to different components of a charitable trust.[45] When they are confused with one another, case law becomes unpredictable and often reaches puzzling, if not unjust, results.

An example of a court having conflated the two doctrines can be found in *Smith v. Moore*.[46] In that case, a federal appellate court was asked to construe a testamentary trust made for the erection and maintenance of a new, free hospital under Virginia charitable trust law. One stipulation of the settlor was that not more than one-fifth of the settlor's estate be used in acquiring the physical plant for the hospital.[47] But the funds held in trust were insufficient to effectuate the settlor's stated purpose.[48] Yet, the court held under the doctrine of approximation that: (1) the funds would be used to build a wing of a larger hospital complex rather than an independent hospital; (2) said wing would be a clinic rather than a hospital; and (3) the record of title to the clinic would be vested in the hospital corporation, rather than the corporation the settlor directed to be formed.[49] This result changed the trustee, the material purpose, and the administrative terms of the trust while closely hewing to one administrative provision of the trust instrument in particular—the term regarding the percentage of the settlor's estate that could be used for the effectuation of the trust.

Clearly, the settlor's medical purpose trust was effectuated by this decision on grounds that are traditionally reserved for cy près. Thus, *Smith v. Moore* represents a misapplication of the doctrine of approximation which indeed saved the trust. On the other hand, the result is far afield from the settlor's stated purpose, with improper reasoning. Therein lies the rub. The settlor's stated purpose of

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[44] *Id.* at 483 (first citing *In re* Est. of Wilson, 452 N.E.2d 1228 (N.Y. 1983); then citing Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665 (1997)).

[45] *See id.* (noting the distinctions between cy près and approximation).

[46] Smith v. Moore, 343 F.2d 594 (4th Cir. 1965).

[47] *See id.* at 596 (stipulating the portion of the estate designated for the physical plant).

[48] *See id.* at 597 (establishing the insufficiency of the funds held in trust for the settler's purpose).

[49] *See id.* at 604 (describing the court's holding).

creating a new, independent hospital was overridden by the court, but the result allowed the trust to continue under cy près principles.[50] Yet, had the court used approximation accurately, it is possible that the hospital could have been formed according to the settlor's wishes by deviating from the administrative provision regarding the percentage of the estate that should be used to create the hospital. This is but one instance of the danger of conflating approximation with cy près and highlights the tension between courts and deceased settlors' influence over their charitable designs.

B. CY PRÈS AND EQUITABLE DEVIATION

Deviation is a separate and distinct doctrine from cy près. Unlike cy près, which is only available for charitable trusts, deviation is applicable to both charitable and private trusts.[51] But to underscore the fundamental difference between the doctrines, it is worth noting that cy près allows for modification of the settlor's stated purpose, while deviation allows for departure from purely administrative terms.[52] This is a critical distinction between cy près and equitable deviation, and it can be summarized as follows: "[T]he deviation doctrine is applicable to make changes in the manner in which a charitable trust is administered while cy pres is used in cases where a change of the settlor's specific charitable purpose is involved."[53] In

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[50] *See id.* (overriding the settlor's explicit purpose of establishing a new hospital while permitting the trust structure to continue under equitable approximation).

[51] *See* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. a. (AM. L. INST. 2003) (stating that, while cy près is not applicable to private trusts, equitable deviation is applicable).

[52] *See* RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 3.02 cmt. d. (AM. L. INST. 2021) ("It is sometimes unclear whether a restriction: (1) relates to the purpose to which a charitable asset must be devoted and, therefore, the doctrine of cy pres applies or (2) relates to the manner by which the charitable purpose must be carried out and, therefore, the doctrine of deviation applies."); *see also* Lopez, *supra* note 1, at 1308 (distinguishing the alterations made to trusts under cy près and deviation doctrines). Equitable deviation is "[a]nother doctrine employed by the courts to modify failed trusts . . . . Under equitable deviation a court may modify the administrative provisions of the trust without reference to testator's intent. The rationale is that the court is not interfering with the *purpose* of the trust, only with the mechanics of carrying out that purpose. Consequently, the court can authorize deviation from the administrative provisions of a charitable trust even though the settlor's intent is narrow." Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK UNIV. L. REV. 41, 45 n.13 (1989) (citing G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 394 (2d rev. ed. 1977)).

[53] Comm. on Charitable Trs. and Founds., *Cy Pres and Deviation: Current Trends in Application*, 8 REAL PROP. PROB. & TR. J. 391, 398–99 (1973).

other words, deviation applies to changes in the administrative terms (i.e., the management of a trust, the little details of how it is run and controlled), while cy près applies to changes in the dispositive and material terms of the trust (i.e., the purpose of the trust, the charitable cause the trust addresses, and the delivery of trust assets to the intended beneficiaries).[54]

Beginning in the twentieth century, equitable deviation emerged alongside the courts' newfound preference for cy près, and unsurprisingly—given their similarities—several courts have since confused the doctrine of cy près with the doctrine of equitable deviation.[55] Some courts cite cy près as the doctrine on which their decision to modify a trust rests, while actually only deviating from the administrative terms,[56] while others cite deviation when actually applying cy près because the jurisdiction in which the court sits did not formally recognize cy près as a mechanism for modifying a trust's purpose.[57] The 1973 article, *Cy Près and Deviation: Current Trends in Application*, provides a useful list of circumstances under which twentieth-century courts in the U.S. have applied equitable deviation to modify a trust:

- "Authorization to sell property in spite of restrictions in the governing instrument to the contrary"[58]
- "Authorization to mortgage property where such is prohibited or not expressly permitted by the terms of the instrument"[59]
- "Modification of investment restrictions contained in

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[54] *See id.* at 398–400 (noting differences in the proper application of the two doctrines).

[55] *See supra* notes 17–18 (providing examples of cases where courts have confused the doctrines of cy près and equitable deviation).

[56] *See* Comm. on Charitable Trs. and Founds., *supra* note 53, at 399 (citing Worcester Cnty. Tr. Co. v. Grand Knight of the Knights of Columbus, 92 N.E.2d 579 (Mass. 1950)) (applying deviation by mistake while calling it cy près).

[57] *See id.* at 399 (noting that "courts . . . have had considerable difficulty in distinguishing between the two doctrines and often a change is made in the name of cy près when . . . only a deviation of the terms of administration is at issue") (first citing Worcester Cnty. Tr. Co. v. Grand Knight of the Knights of Columbus, 92 N.E.2d 579 (Mass. 1950) (exemplifying an application deviation while calling it cy pres); and then citing Furman Univ. v. McLeod, 120 S.E.2d 865 (S.C. 1961) (another example of applying cy près while calling it deviation)); *see also* Chester, *supra* note 52, at 43 (characterizing courts' misapplication of the equitable doctrines as "intellectually dishonest" and "destroy[ing] predictability of result[s]").

[58] *Id.* at 398 (citing Grace Church v. Ange, 77 S.E. 239 (N.C. 1913)).

[59] *Id.* (citing Bond v. Town of Tarboro, 7 S.E.2d 617 (N.C. 1940)).

a governing instrument"[60]
- "Transfer of trust property to a new trustee"[61]
- "Modification of age"[62]
- "Elimination of racial or religious restrictions"[63]
- "Deviation from terms specifying buildings to be improved or erected"[64]
- "Modification of governing instruments to include provisions required by federal tax law"[65]

Noticeably, these circumstances resemble situations in which a court might apply the cy près doctrine but are distinct in the sense that none are purporting to alter the donor's material purpose in creating the trust. Instead, these changes impact the substantive administrative terms of the trust—such as how the property is managed, or other procedural requirements of the trustee, to eliminate hinderances in the administration of the trust—which, if uncorrected, would prevent the trust from continuing to serve its charitable purpose. While these administrative terms may affect the application of the trust's purpose, such as where and how the trust property is used, they do not go so far as to change the material purpose of the trust that would alter or conflict with the donor's intentions for the use and distribution of the trust property. Thus, in the above instances, it can be said that equitable deviation was correctly used by courts.

There are several explanations for why courts confuse equitable deviation and cy près. First, historical shifts in social, economic, and political attitudes moved courts toward applying less "invasive" doctrines to modify charitable trusts. Second, equitable deviation was a solution to two problems: a jurisdiction's refusal to accept cy près and the gift-over rule.[66] Finally, it is possible that Uniform

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[60] *Id.* (citing Long Asylum Trs.' Petition, 63 Pa. D. & C. 284 (Orphans' Ct. 1948)).

[61] *Id.* (first citing Moses H. Cone Mem'l Hosp. v. Cone, 56 S.E.2d 709 (N.C. 1949); and then citing Gordon v. Mayor of Balt., 267 A.2d 98 (Md. 1970)).

[62] *Id.* (citing Petition of Hershey Tr. Co., No. 712 of 1963, (Pa. Orphans' Ct. Dauphin Cnty. (1970) (unreported)).

[63] *Id.* (first citing Weaver Tr., 43 Pa. D. & C.2d 245 (Orphans' Ct. 1967); and then citing Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966)).

[64] *Id.* (citing *In re* Sinclair's Will, N.Y.L.J., June 14, 1967, 19 (Sur. Ct. 1967)).

[65] *Id.* (citing *In re* Est. of Barkey, 318 N.Y.S.2d 843 (Sur. Ct. 1971)).

[66] *See id.* at 399 ("Occasionally, a court has employed the deviation doctrine rather than the cy pres doctrine to avoid a gift over limited to take effect in the event the original

Laws, which changed the doctrines, have also caused some confusion.[67] At any rate, a court's confusing cy près and deviation as operatives of the same doctrine often produces a result that contravenes a settlor's original intent in creating a charitable trust.

C. CY PRÈS AND THE GIFT-OVER RULE

In many ways, the antithesis of cy près is the "gift over." That is, understanding the gift-over rule leads to a greater understanding of what cy près is not and where it ought not be used. A gift over occurs where a provision in the trust instrument specifies what should happen if a trust's purpose becomes impossible or impracticable and which would take effect in the event that the original trust purpose fails.[68] The existence of a gift over should prevent application of the cy près doctrine in order to save that gift, because its possible failure is already taken into account.[69] In other words, gifts over adhere to the general rule that "seems most to betray the inherent confusion over general charitable intent: upon failure of the initial charitable gift, the existence of a gift over precludes application of the cy pres doctrine to save that gift."[70]

While this rule would seem to provide certainty, it has failed to do so. An example of this comes from Kentucky in *Orphan Society of Lexington v. Board of Education*.[71] Here, the settlor created an *inter vivos* trust to erect and benefit the Lincoln School, a model school serving the Irishtown community in Lexington.[72] The settlor provided that the trust would terminate when the school "ceased to

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charitable beneficiary fails."); *see also* Ryan, *supra* note 4, at 306 ("[C]ourts began to use the equitable doctrine of deviation, rather than cy près . . . to achieve the purposes which were normally achieved via the cy-près doctrine.").

[67] See discussion *infra* section II.D.

[68] Comm. on Charitable Trs. and Founds., *supra* note 53, at 399 (providing an example of a "will [that] provided for a gift over" to a different beneficiary in the event that the trust was used improperly).

[69] *See* Chester, *supra* note 52, at 45 (arguing that "existence of a gift over precludes application of the cy près doctrine to save that gift"). Professor Chester recommends that the general intent requirement should be abandoned completely, thus "killing" the mandatory gift-over rule and making it instead a rule "of construction, one factor among a number bearing upon whether cy pres should be applied." *Id.* at 46.

[70] *Id.* at 45.

[71] Orphan Soc'y of Lexington v. Bd. of Educ., 437 S.W.2d 194 (Ky. 1969).

[72] *See id.* at 194–95 (providing background on the charitable trust's purpose).

exist," with a gift-over provision to two charitable organizations.[73] The school was created and operated for several years before eventually closing.[74] Upon its closure, several of its teachers and its principal were transferred to a new model school, but the new model school operated under a different name and in a different neighborhood.[75] The Lincoln School had, for all intents and purposes, ceased to exist. Once the school closed, the gift-over beneficiaries sought to claim the funds.[76] Yet, the highest court in Kentucky denied the gift-over beneficiaries these funds, citing—ironically—that cy près was not necessary to effectuate the trust to the new model school.[77] In effect, the trust was allowed to continue not as the donor wished but as the court wished. The presence of the gift-over provision in the settlor's trust instrument was clear and the circumstances surrounding its invocation were met. Yet, the court applied cy près *sub rosa*, to allow the charitable trust to confer benefits to a new school, a foreigner to the settlor's originally-intended beneficiary, instead of the gift-over charities.[78]

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[73] *See id.* at 195–96 (establishing the conditions on which the fund will pass from the school to the alternative beneficiaries).

[74] *See id.* at 196 (outlining the allocation of funds and eventual vote to close Lincoln School).

[75] *See id.* ("[T]he Board of Education. . . designated that all sociological efforts unique to Lincoln School should be transferred to the renamed 'Jefferson Davis Model School' for the benefit of former Lincoln children. The principal of Lincoln School and an extra counselor who had been at Lincoln School were sent to Jefferson Davis Model School.")

[76] See *id.* ("The defendants. . . contend that the trust for the benefit of the West End Model School has failed and that as alternative beneficiaries under the trust deed they are entitled to be substituted as beneficiaries of the trust according to the trust instrument.").

[77] *See id.* at 198 (saying that "we need not and should not resort as such to the doctrine of cy pres" because the specific purpose of the testator was effectuated by the use of the trust for the new school).

[78] *See id.* (finding "neither the change in location of the building nor the change in specific educational methods is sufficient" to entitle the alternative beneficiaries to the funds).

This situation is not a one-off.[79] In fact, some courts have applied deviation rather than cy près in order to avoid a gift over.[80] In the presence of a gift-over provision, some courts may have determined that deviation, instead of cy près, was appropriate because any application of cy près would necessarily be based upon a determination that the purpose of the trust had failed, allowing the gift over to come to fruition and ending the trust completely.[81] By applying deviation instead, a court could ignore the problem entirely because deviation impacts only the administrative terms rather than the purpose of a trust.

When faced with a gift-over provision, rather than re-examining their approach to cy près, some courts employed deviation to argue "that they are merely changing the administrative details of the original trust, and not the donor's purpose."[82] But gifts over are arguably among the most material purposes of the settlor: when the charitable purpose of a trust is no longer possible, the settlor has already determined for the court who should stand to benefit next.

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[79] There is a slew of educational purpose trust cases in which courts tended to grant the successor school or another entity closely affiliated with the closed school the benefit of the educational purpose trust—whether or not there was a gift-over provision to another entity. For examples of these cases, see Harwood v. Dick, 150 S.W.2d 704 (Ky. 1941); Penn v. Keller, 16 S.E.2d 331 (Va. 1941); School Dist. No. 70 v. Wood, 13 N.W.2d 153 (Neb. 1944); Valley Sav. Bank v. Penn Coll. (*In re* Hagan's Will), 14 N.W.2d 638 (Iowa 1944); Trs. of Putnam Free Sch. v. Att'y Gen., 67 N.E.2d 658 (Mass. 1946); Exter v. Robinson Heirs 55 A.2d 622 (N.H. 1947); Tchrs. Coll. v. Goldstein, 75 N.Y.S.2d 250 (App. Div. 1947); Guilford Tr. Co. v. LaFleur, 91 A.2d 17 (Me. 1952); McKee Est., 83 Pa. D. & C. 492 (Orphans' Ct. 1953); *In re* Bank's Will, 169 N.Y.S.2d 528 (Sur. Ct. 1957); Kingdom v. Saxbe, 161 N.E.2d 461 (Ohio Prob. Ct. 1958); duPont Est., 37 Pa. D. & C.2d 456 (Orphans' Ct. 1965); Montclair Nat'l Bank & Tr. Co. v. Seton Hall Coll. of Med. & Dentistry, 217 A.2d 897 (N.J. Super. Ct. Ch. Dv. 1966); Bell v. Carthage Coll., 243 N.E.2d 23 (Ill. App. Ct. 1968) (refusing to use cy près but awarding the trust to the successor school anyway); Ball v. Hall, 274 A.2d 516 (Vt. 1971); First Nat'l Bank of Kan. City v. Jacques, 470 S.W.2d 557 (Mo. 1971); *In re* Goehringer's Will, 329 N.Y.S.2d 516 (Sur. Ct. 1972); Alexander v. Ga. Baptist Found., Inc., 266 S.E.2d 165 (Ga. 1980); *In re* Abrams, 574 N.Y.S.2d 651 (Sup. Ct. 1991); Salisbury v. Ameritrust Tex., N.A., (*In re* Bishop Coll.), 151 B.R. 394 (Bankr. N.D. Tex. 1993); *In re* Est. of Schaefer, 1998 WL 939708 (Del. Ch. 1998); Obermeyer v. Bank of America, 140 S.W.3d 18 (Mo. 2004). But, for examples of cases where closely related organizations were not given the benefit of the trust, see Waterbury Tr. Co. v. Porter, 38 A.2d 598 (Conn. 1944); Thurlow v. Berry, 32 So. 2d 526 (Ala. 1947).

[80] *See* Comm. on Charitable Trs. and Founds., *supra* note 53, at 399 (noting that "[o]ccasionally, a court has employed the deviation doctrine rather than the cy pres doctrine to avoid a gift over").

[81] *See id.* at 400 (describing a case where the court employed cy près to avoid a gift over).

[82] Chester, *supra* note 52, at 58.

In reversing the wishes of the settlor, these courts circumvent the gift-over rule by claiming that they were "preserving the original charitable purpose administratively."[83] Unequivocally, such judicial machinations lead to unpredictability—something the Uniform Laws sought to address.

D. A UNIFORM APPROACH TO UNDERSTANDING CY PRÈS?

Given the judicial conflation of cy près with related legal doctrines discussed above, legal scholars have argued that cy près should be modified or re-evaluated in some way.[84] Even since its wider acceptance in the early twentieth century, courts have had trouble applying cy près consistently, creating confusion surrounding the doctrine.[85] Perhaps in an effort to harmonize the judicial cacophony caused by the inconsistent application of the cy près doctrine among the many courts of the United States, the drafters of the Restatement and the Uniform Laws endeavored to provide greater direction for legal analysis of—and judicial outcomes regarding—the use of the cy près doctrine to change a charitable trust's purpose.[86]

1. The Restatement. In the mid-twentieth century, the drafters of the Restatement may have sought to cabin the uneven application of the doctrinal use of modification and deviation from charitable trusts' provisions.[87] If so, their plans went awry—though their understanding of the doctrine appears to have been well-grounded. The 1935 Restatement (First) of Trusts describes the appropriate use of cy près in this way:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general

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[83] *Id.*

[84] *See supra* note 3 and associated discussion.

[85] *See* Chester, *supra* note 52, at 42–43 (summarizing judges' failed efforts to apply the cy près doctrine, resulting in greater unpredictability).

[86] *See* Lopez, *supra* note 1, at 1323–24 (detailing the efforts of the American Law Institute and the National Conference of Commissioners on Uniform State Laws to clarify trust law, including the cy près doctrine).

[87] *See id.* at 1308 (noting that "[p]rior to the Restatement . . . cy pres seemed to have as many definitions as courts and commentators referring to it").

> intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[88]

This explanation, on its face, seems to be mostly in keeping with the traditional view of cy près, but it lacks two key elements. First, it makes no provisions for applying the doctrine if conditions arise that make the effectuation of the trust wasteful. Second, it applies the same language and logic to scenarios under which trustees are not bound to comply with terms of the trust which become impossible, impracticable, or illegal.[89] Given these issues, it would seem that these two errors would be a central focus of drafters' corrections in an updated Restatement. Yet, the only way in which the 1935 version and the 1959 version of the Restatement differ, in regard to cy près, is that the 1959 version contains more explanatory notes.[90] In one comment in its entry for cy près, the Second Restatement clearly evinces an understanding of the operation of deviation but conflates the doctrine with cy près because it places this commentary under the cy près entry:

> If a settlor transfers land in trust to maintain a charitable institution upon the land, and at the time of the creation of the trust it is, or owing to a change of circumstances it becomes, unsuitable for the maintenance of the institution, the court may direct or permit the trustees to sell the land and devote the proceeds to the erection and maintenance of the institution on other land, even though the settlor in specific words directed that the land should not be sold and that the institution should not be maintained in any other place. In so directing, the court is not necessarily resorting to the doctrine of cy près, since under its general power over the administration of

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[88] RESTATEMENT (FIRST) OF TRUSTS § 399 (AM. L. INST. 1935).

[89] *See id.* §§ 165–167.

[90] *See* Lopez, *supra* note 1, at 1323 n.89 (citing RESTATEMENT (SECOND) OF TRUSTS §399 (AM. L. INST. 1959)) (noting that "[t]he 1935 edition has notes a–m while the 1959 version has notes a–r").

> trusts it can permit deviations from the terms of the trust of this character.[91]

Furthermore, in analyzing the Second Restatement of Trusts' section on deviation, as compared with the First Restatement's analogous section, there appears to be another conflation with cy près in the terminology of changed circumstances, traditionally reserved for cy près.[92] That said, the drafters wisely observe narrow grounds for construing a set of facts that would merit the application of equitable deviation:

> [I]t would appear that deviation is not permitted in cases where adherence to the settlor's direction is impracticable but not impossible unless it can be shown 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." If this characterization of the doctrine of deviation is correct, then it would seem that the utility of the doctrine is somewhat limited.[93]

Some fifty years later, the Restatement drafters took another crack at reforming their guidance on the two doctrines.[94] While the Third Restatement is more concise and clearer than its previous

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[91] RESTATEMENT (SECOND) OF TRUSTS § 399, cmt. *l* (AM. L. INST. 1959).

[92] *See* RESTATEMENT (FIRST) OF TRUSTS § 167(1) (AM L. INST. 1935) (noting that "[t]he court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor"); *see also* RESTATEMENT (SECOND) OF TRUSTS §§ 167 (AM L. INST. 1935) (stating the same).

[93] Comm. on Charitable Trs. and Founds., *supra* note 53, at 398 (footnote omitted) (quoting RESTATEMENT (SECOND) OF TRUSTS § 381, cmt. d (AM. L. INST. 1959)). It should be noted that the drafters of the Restatement meant for deviation to apply only to charitable trusts and not to private trusts. *See* RESTATEMENT (FIRST) OF TRUSTS § 381 (AM. L. INST. 1935) (noting that the court may direct or permit deviation for "the trustee of a charitable trust"); RESTATEMENT (SECOND) OF TRUSTS § 381 (AM. L. INST. 1959) (same). However, there is a version for private trusts noted in §§ 165–167 and the Third Restatement removes the "charitable trust" requirement from the rule. *See* RESTATEMENT (THIRD) OF TRUSTS § 66, cmt. a (AM. L. INST. 2003) (noting that the equitable deviation doctrine "applies to both charitable and private trusts").

[94] *See* RESTATEMENT (THIRD) OF TRUSTS § 66 (AM. L. INST. 2012) (noting the drafters' purpose to "seek[] a seamless statement of the best principles of American trust law" on these "two main themes").

iterations, even providing more helpful illustrations in the commentary, it conflates the two doctrines yet again.[95] The entry on cy près contains no conditions for waste, and the distinction between cy près and deviation remains murky.[96] With respect to deviation, the drafters are correct that the objective of the rule allowing judicial modification (or deviation) and the intended consequences of its application are not to disregard the intention of a settlor.[97] The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.[98] Then, upon a finding of unanticipated circumstances, the court must further determine whether a proposed or contemplated modification or deviation would tend to advance (or, instead, possibly detract from) the trust's purposes. This latter inquiry is likely to involve a somewhat subjective process of attempting to infer the relevant purpose or purposes of a trust, analyzing the general meaning of its provisions and the nature of the beneficial interests.[99] However, the drafters' blurred lines between cy près and deviation expose the same flawed reasoning to which some courts have fallen prey, rendering the Restatement's guidance ineffectual.

2. The Uniform Trust Code. Much like the Restatements' drafters, the drafters of the Uniform Trust Code (UTC) attempted to provide some uniformity by reconfiguring cy près in 2000.[100] The UTC has now been adopted by a majority of jurisdictions.[101] In this reconfiguration, the UTC changed "one of the traditional elements

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[95] *See id.* (including "circumstances not anticipated" for deviation instead of cy près).

[96] *See id.* § 67 (lacking any provision for waste in evaluating cy près); *see also* Lopez, *supra* note 1, at 1308 (noting the "hazy distinction" between cy près and equitable deviation).

[97] *See* RESTATEMENT (THIRD) OF TRUSTS § 66, cmt. a (AM. L. INST. 2012) (noting the provision aims "not to disregard the intention of a settlor").

[98] *Id.*

[99] *See id.* at cmt. b ("This . . . Inquiry [into trust intent] is likely to involve a somewhat subjective process of attempting to infer the relevant purpose or purposes of a trust from the general tenor of its provisions and from the nature of the beneficial interests, together with the family or personal relationships involved in the trust.").

[100] *See* UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2010) (proposing a set of statutory rules for application of cy près).

[101] *See* Ryan, *supra* note 4, app. (identifying the thirty-six jurisdictions that have adopted the Uniform Trust Code as: Alabama, Arizona, Arkansas, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

of cy près—finding a general charitable intent—into a presumption that can be rebutted by the party opposing the application of the doctrine."[102] Essentially, this approach "loosens the ties to traditional cy près doctrine" and also alters cy près's theoretical framework by "attempting to redress inefficiencies in cy pres litigation."[103] Thus, this approach constitutes a substantial change to the traditional cy près doctrine but has a much greater impact on litigants than judicial decision-makers.[104] It does little to increase understanding and lessen confusion.

Consider, for example, UTC § 412, where equitable deviation is codified within the UTC.[105] Fortunately, § 412 is entitled "Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively,"[106] a reasonably apt description of deviation. But the comments again fail to provide proper clarification about when the doctrine should be used as distinct from cy près.[107] The comments note that the standard for altering administrative terms for waste or impracticability is "similar to the standard for applying cy près to a charitable trust" and go on to state that "[j]ust as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable."[108] Here, the drafters' guidance provides no meaningful distinction between the doctrines and, if anything, relates that the two doctrines are essentially one.

Likewise, at UTC § 412(a), the drafters state that the court "may modify administrative *or dispositive* terms of a trust."[109] This is in error. Dispositive terms of a trust are often related to the material purpose or intended beneficiary of a charitable trust, both of which are the province of cy près. Furthermore, the section permits modification where "continuation of the trust . . . would be

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[102] Lopez, *supra* note 1, at 1310–11.

[103] *Id.* at 1329.

[104] *See id.* at 1312 (arguing that "the departure from history cleaved by UTC Section 413" requires changes to "sav[e] litigation costs").

[105] *See* UNIF. TR. CODE § 412 (UNIF. L. COMM'N 2010) (noting the "'equitable deviation' authorized by Section (a)" of § 412).

[106] *Id.*

[107] *See id.* (containing no provision for determining which doctrine to apply).

[108] *Id.* § 412 cmt.

[109] *Id.* § 412(a) (emphasis added).

impracticable or *wasteful*."[110] These applications of deviation contain bedrock cy près language—which are also used in § 413, the codified home of cy près within the UTC—hidden in plain sight.[111] That is, changes in circumstances that make the material purpose or dispositive terms of a charitable trust illegal, impossible, impracticable, or wasteful would probably trigger UTC § 412, the UTC's entry for equitable deviation.

While § 413, the UTC's entry for cy près, seems straightforward enough, it is worth noting that the comment following the section does nothing to further explain what it means for "a particular charitable purpose [to] become . . . . unlawful, impracticable, impossible to achieve, or wasteful."[112] More importantly, the second sentence of the comments is rather damning to the drafters' understanding of the differences between the two doctrines: "[t]he power may be applied to modify an *administrative* or dispositive term."[113] Now the drafters are conflating cy près with deviation. In this way, it seems clear that the UTC drafters failed to understand or to provide guidance on the distinction between cy près and equitable deviation.

It is my observation that the UTC approach appears to favor the public interest by making the requirements that the plaintiffs must show in order to warrant cy près less strict, and courts have been more open to reconfiguring charitable trusts in favor of the public in recent years.[114] However, this approach essentially transfers the decision-making power regarding how the trust is applied from the donor to the judiciary.[115] Reposing this authority with the court is problematic when the drafters themselves—not to mention legislatures and courts—are confused on the distinction between these two doctrines. It favors courts' repurposing of a charitable

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[110] *Id.* § 412(b) (emphasis added).

[111] *See id.* § 413 (using the same language in the UTC's cy près provision).

[112] *Id.* § 413(a).

[113] *Id.* cmt. a. (emphasis added).

[114] *See id.* (explaining that the UTC approach "modifies the doctrine of cy pres by eliminating the traditional requirement that a plaintiff seeking cy pres show that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve"); *see also* Lopez, *supra* note 1, at 1312 (claiming the UTC reform "tilts the theoretical balance . . . toward the public interest").

[115] *See* Lopez, *supra* note 1, at 1335 ("The UTC, and the Restatement (Third) of Trusts for that matter, signifies a fundamental transfer of decisionmaking power from donors to courts.").

trust without duly considering the underlying purpose for which the trust was created and without providing guidance on when this invocation is appropriate.

E. CY PRÈS AND THE ROLE OF THE JUDICIARY

Hans Kelsen, the Austrian legal philosopher, reasoned that "no legal decision is ever completely determined by the law."[116] Instead, the outcome of a court decision is determined by "non-legal empirical and philosophical considerations, while nevertheless being bounded by constraints set by the law."[117] If true, the role of the judge in cy près cases is bound up with the judge's priors. With respect to the evolution of the cy près doctrine in America, this view is not entirely accurate, but it contains a hint of truth that resonates into the present day. Whether a judge correctly decides a cy près case may depend upon numerous factors, including economic and philosophical considerations.[118]

Importantly, the role that judges play in the continued development of the cy près doctrine depends on which view judges subscribe to: whether cy près's application should be broadened, or whether it should remain narrow.[119] When judges adhere to a broader application of the doctrine, the role of the judge is to step in and ensure that the trust does not fail so that it can go to another charity aligned with the settlor's wishes. Those espousing this point of view wish to see a prioritization of public benefit over the power

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[116] Frederick Schauer, *A Frame Without a Picture: On the Relevance of Law to the Decision of Hard Cases* 1 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Paper Series, Paper No. 2022-39, 2022) (emphasis omitted) (first citing HANS KELSEN, PURE THEORY OF LAW, 245, 350–51 (Max Knight, trans., 1967); then citing HANS KELSEN, INTRODUCTION TO PROBLEMS OF LEGAL THEORY 80 (Bonnie L. Paulson & Stanley L. Paulson, trans., 1992)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4122652 [https://perma.cc/ZN4D-8XGA].

[117] *Id.*

[118] *See, e.g.,* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 22 (1960) ("The courts do not always refer very clearly to the economic problem posed by the cases brought before them but it seems probable that . . . there is some recognition, perhaps largely unconscious and certainly not very explicit, of the economic aspects of the questions at issue.").

[119] *See* Eric G. Pearson, Comment, *Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent*, 90 MARQ. L. REV. 127, 128 (2006) (noting the debate between proponents of narrowing and broadening cy près).

of dead hand control.[120] For those hewing to narrow applications, the role of the judge is to ensure the exact wishes of the settlor are followed until it is absolutely necessary to change the terms of the trust.[121] This approach encourages judicial decision-makers to uphold the trusts' conditions as stated by the settlor, or at least to utilize deviation, rather than cy près, to make administrative changes which do not change the general charitable intent of the trust.[122]

To be clear, the use of either view of the doctrine by a court may indeed lead to economic efficiency.[123] To the extent that conditions in a trust are always obeyed, the resources controlled by such conditions may be utilized inefficiently.[124] Thus, on economic

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[120] *See, e.g.*, Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 391 (1999) (arguing that an expanded view of cy près "limits temporally the amount of dead hand control the settlor can exercise over trust assets" while ensuring "assets [settlors] devote to the trust will be put to their best and highest use in perpetuity").

[121] *See, e.g.*, Pearson, *supra* note 119, at 128 (arguing that a narrow application of cy près is necessary "to allow testators to effectuate their intent long after their deaths while still addressing the economic efficiency concerns of modern scholars"). Pearson argues that to the extent that judges determine that the facts of the case merit an application of cy près to counterbalance the trend of conflation of doctrines, presuming specific rather than general charitable intent is preferable, because the burden is on the challenger to show a true general intent. Otherwise, the court must deny the cy près action. *Id.*

[122] *See id.* at 141 (describing how courts favor deviation, which "merely changes the methods of the trust's administration," over cy près, which "reaches the central purpose of the trust, and is therefore appropriately subject to greater restraint" (quoting Roger G. Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 n.6 (1988))).

[123] Some authors argue against giving consideration to economic efficiency when applying cy près. *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES, 774–75 (10th ed. 2017) (agreeing with the trial court's opinion in the infamous Beryl Buck trust case, arguing in pertinent part that "[t]he *cy pres* doctrine should not be so distorted by the adoption of subjective, relative, and nebulous standards such as 'inefficiency' or 'ineffective philanthropy' to the extent that it becomes a facile vehicle for charitable trustees to vary the terms of a trust simply because they believe that they can spend the trusts income better or more wisely elsewhere, or as in this case, prefer to do so. There is no basis in law for the application of standards such as 'efficiency' or 'effectiveness' to modify a trust, nor is there any authority that would elevate these standards to the level of impracticability." (quoting *In re* Estate of Buck, No. 23259 (Cal. Super. Ct. Marin County, Aug. 15, 1986), *reprinted in* 21 U.S.F. L. REV. 691, 749–56 (1987)).

[124] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 19.3, at 711 (9th ed. 2014) ("[I]f conditions, especially perpetual ones, in a will were always obeyed, a frequent result would be that resources controlled by such conditions would be employed inefficiently.").

grounds, the maximization of efficiency requires that trust assets be deployed in novel ways when unforeseen circumstances arise after the settlor's death.[125] This can be done whether the charitable trust assets have declined in value so as not to properly effectuate the settlor's intended purpose, or indeed when the trust assets have increased in value to a degree that the trust's effectuation is limited by administrative conditions set forth by the settlor. Yet, doing so is often at odds with the fundamental rule of the settlor's freedom of disposition.

Judge Posner argues that the invocation of cy près is sometimes "tantamount to denying the competence of a donor to balance the value of a perpetual gift against the cost in efficiency that such gifts frequently impose."[126] Indeed, it may be the case that a settlor's overly prescriptive trust conditions could be rational. This is especially so where the settlor both anticipates that circumstances may change and mistrusts a court's ability to change the terms of the trust, in light of changed circumstances, in line with the settlor's original intent.[127] In this case, why shouldn't a settlor's terms be adhered to by a court, particularly when the settlor contemplated the potential for circumstances to change—for instance, with a gift over?

The increased judicial control over charitable trusts has tended to lead to decisions about how the trust can be effectuated when exogenous, or even endogenous, factors render the trust impracticable, impossible, or wasteful. Yet, when judicial decisions about when and how to apply the doctrines of cy près and deviation lead to uncertainty in application of either doctrine, there are justifiable arguments to wrest this power from the courts.[128] Thus,

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[125] *See id.* ("Unforeseen contingencies that materialized after the testator's death might require that the resources be redeployed in order to maximize efficiency.").

[126] *Id.* at 712.

[127] *See id.* ("Some rational donors, mistrustful of judges' ability to alter the terms of a bequest intelligently in light of changed conditions, might prefer to assume the risks involved in rigid adherence to the original terms.").

[128] Creating a presumption of specific or general intent takes the power away from judges, creating a clearer rule that is easier to apply. *See* Pearson, *supra* note 119, at 128 (advocating for a clearer rule that prevents "a whimsical judge" from destroying "the testator's intent"). Taking the power away from judges is particularly beneficial where judges rely on personal preferences in determining where to distribute trust funds via cy près. *See, e.g.,* Atkinson, *supra* note 3, at 1139–40 (recounting a California court taking "matters into its own hands" in resolving a charitable efficiency dispute).

the role of judges in cy près actions should be to commit to a more consistent application of cy près so that the inconsistencies in the doctrine's application can be cured over time and therefore encourage charitable trust-making.

III. AN EMPIRICAL ANALYSIS OF THE CY PRÈS DOCTRINE'S APPLICATION

The foregoing section of this Article discusses in significant detail both the tension between the courts and settlors of charitable trusts and the sources of confusion for courts in applying cy près or deviation. It is the latter focus to which I now turn to examine empirically.

In an earlier study, I detailed the rise of the use of the cy près doctrine throughout history.[129] I now apply the dataset I used in that study to investigate not only when courts use the doctrines of cy près and deviation, but when they get it right—and wrong. This section of the Article details the dataset I created, the coding decisions I used, and my empirical findings.

A. THE DATASET

In creating the dataset I used for my empirical analysis of the cy près doctrine's application, I labored to make as comprehensive of a dataset as possible to draw data from as many judicial decisions concerning the doctrine of cy près and its relation to charitable trusts as I could muster. In the initial stages, I used several search terms in WestlawNext to compile the source material for the dataset. My search yielded 1,561 cases from which to draw results. I should note that several of the cases were not pertinent to my inquiry, either because the court did not address cy près on the merits and disposed of a case on procedural grounds, or because the case concerned cy près in the context of class action litigation. Additionally, a few cases had to be dropped from the dataset because they concerned trusts expressly for private individuals only and did not have charitable intent, or because the opinion for the case did not provide sufficient information about the trust for my coding purposes. Nevertheless, the dataset yielded over 1,300

[129] *See generally* Ryan, *supra* note 4 (analyzing the development of cy près).

codable cases between the years of 1820 to 2019, a veritable wealth of information about the cy près doctrine and its use and misuse.

B. CODING DECISIONS AND IMPUTED VALUES

In creating a dataset of this scale, decisions about what data to draw from a case required considerable forethought and adherence to a systematic protocol. As such, my team of research assistants and I coded multiple variables according to the conventions outlined below.

First, my team and I assigned every case a unique identifier as well as a special designation unique to each level of court within each state or jurisdiction. Second, we analyzed every observable characteristic of the outcome of the case to construct our dependent variables. We coded cases as follows: cases where the court invalidated the trust for lack of an ascertainable beneficiary; cases where then-existing law prohibited the trust;[130] cases where the court invalidated the trust altogether;[131] cases where the court validated the trust but did not use cy près or deviation;[132] cases

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[130] *See, e.g.*, Methodist Church v. Remington, 1 Watts 219 (Pa. 1832) (refusing to uphold the trust unless the unincorporated religious society was comprised only of Pennsylvania residents); Att'y Gen. v. Proprietors of the Meeting-house in Fed. St., 69 Mass. (3 Gray) 1, 2 (1854) (holding that trusts for a particular congregation were not public in nature). Some courts continued this prohibition well into the twentieth century; see for example, Wilson v. First Presbyterian Church, 200 S.E.2d 769, 779 (N.C. 1973). For examples of cases where then-existing law did not prohibit the trust, see Gass v. Wilhite, 32 Ky. (2 Dana) 170, 182–83 (1834); Att'y Gen. v. Jolly, 21 S.C. Eq. (2 Strob. Eq.) 379, 395 (1848); Williams v. Williams, 8 N.Y. 525, 548–59 (1853); Miller v. Chittenden, 2 Iowa (2 Clarke) 315, 316–17 (1856); De Witt v. Chandler, 11 Abb.Pr. 459 (N.Y. Gen. Term 1860); Yard's Appeal, 64 Pa. 95, 99 (1870).

[131] Most of these cases dealt with construction of the trust, i.e., whether a charitable trust had been created. For examples of general public charitable trusts cases, see Dashiell v. Att'y Gen., 5 H. & J. 392 (Md. 1822); Perin v. Carey, 65 U.S. 465 (1860); *In re* Hoffen's Est., 36 N.W. 407 (Wis. 1888); Kelly v. Nichols, 21 A. 906 (R.I. 1891); Thompson's Ex'r v. Brown, 70 S.W. 674, (Ky. 1902); *In re* Davis' Estate, 23 Pa. D. 768 (Orphans' Ct. 1913); *In re* Merritt, 21 N.E.2d 365 (N.Y. 1939); *In re* Essig's Estate 74 A.2d 787 (Pa. Super. Ct. 1950); *In re* Braig's Estate, 36 Pa. D. & C.2d 469 (Orphans' Ct. 1965); *In re* Mary R. Latimer Trust, 78 A.3d 875 (Del. Ch. 2013).

[132] Likewise, most of these cases hinged on the court's interpretation of the construction of a trust in the affirmative. *See, e.g.*, McAllister v. McAllister's Heirs, 46 Vt. 272, 279–80 (1873) (holding that a trust for the education of "Freedmen of this nation" was not void for uncertainty); *In re* Lewis' Estate, 1 Pa. D. 423, 424 (Orphan's Ct. 1892) (holding as a valid charitable trust a gift used to create a foundation to "promote, aid and protect citizen of the United States of African descent in the enjoyment of their civil rights"); Hayden v. Conn.

where the court changed the trust based on impracticability, waste, or resolved an ambiguity about the beneficiary or trustee of the trust;[133] and cases where the court validated or invalidated provisions, or even the whole, of a trust on constitutional grounds.[134]

Hosp. for the Insane, 30 A. 50 (Conn. 1894) (concerning a trust made for the creation of beds at an asylum held as valid); Ingraham v. Ingraham, 48 N.E. 561 (Ill. 1897) (regarding trust accumulation provisions); Brigham v. Peter Bent Brigham Hosp., 134 F. 513 (1st Cir. 1904) (dealing with the same); Mason v. Bloomington Libr. Ass'n, 86 N.E. 1044 (Ill. 1908); Webber Hosp. Ass'n v. McKenzie, 71 A. 1032 (Me. 1908) (allowing a paltry trust for the creation of a new hospital on the grounds that the trust funds could be augmented by donation); Mason v. Mass. Gen. Hosp., 93 N.E. 637 (Mass. 1911) (construing the intended beneficiary of the settlor); French v. Calkins, 96 N.E. 877 (Ill. 1911); Hodge v. Wellman, 179 N.W. 534 (Iowa 1920); Gardner v. Sisson, 144 A. 669 (R.I. 1929); Houston v. Mills Mem'l Home, 43 S.E.2d 680, 686 (Ga. 1947) (holding that a trust was sufficiently definite for funds to go to a home for elderly Black Americans where money was left in trust, and though no home in the community was specifically named as such, the Court held that this was sufficiently definite). For examples of a voided trust, see City of Keene v. Eastman, 72 A. 213 (N.H. 1909); President of Harvard Coll. v. Jewett, 11 F.2d 119 (6th Cir. 1925). In several religious purpose trust cases, courts avoided the cy près doctrine to reach similar results. For examples, see Acad. of the Visitation v. Clemens, 50 Mo. 167 (1872) (allowing nuns to sell land left to them in trust to pay off their debts where decedent left land in trust for an order of Catholic nuns. The nuns built on the land and used it for a time; however, the town put a street through the property, removing several acres of the land. The court allowed the nuns to sell the land and pay off their debts.); Bd. of Foreign Missions of United Presbyterian Church v. Culp, 25 A. 117 (Pa. 1892) (a case where a decedent daughter left a farm to her mother and directed that after her mother's death the farm and accrued profits should go to church missionary purposes, with a restriction on sale. The court determined that the second part of the devise was an independent gift in fee simple.); Lewis v. Brubaker, 14 S.W.2d 982 (Mo. 1928) (determining that heirs had no claim to land, although a church had violated provisions of the trust decedent left to church with a provision that the land not be sold or rented); Henshaw v. Flenniken, 191 S.W.2d 541 (Tenn. 1945) (allowing a church to sell land that a settlor left in trust to a church, with a provision that the land could not be sold. The court allowed the sale but noted that the cy près was not an accepted doctrine in Tennessee.).

[133] Each of these conditions was coded separately. In other words, when cases arose where the court determined that the trust should be changed based on impracticability, this was coded with a binary variable unique to the case and others like it. When the court held that the trust should be changed based on waste, this was also coded with a binary variable separate from other outcomes, and so on.

[134] Most of these cases required the court to interpret whether race or gender restrictions were acceptable under the then-prevailing law. For examples, see Haywood v. Craven's Ex'rs, 4 N.C. (Car. L. Rep.) 360 (1816); Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867) (The trust was to be used to support the freedom of slaves which, at the time of the trust's creation, was considered against the Constitution and thus against public policy. When slavery was abolished, so the trust was without purpose. The court assigned a "Master" to come up with an acceptable scheme to execute the trust in a way that aligned with public policy.); Wesley United Methodist Church v. Harvard Coll., 316 N.E.2d 620 (Mass. 1974); Trs. of Univ. of Del.

We coded the vast possibility of these outcome categories as a function of whether the court used or did not use cy près or deviation to reach its result in these categories.

I then went back and coded whether the court got the decision right, based on: the statutory requirements within the jurisdiction;[135] the court's precedent, where discernible;[136] and whether the facts merited use of the doctrines.[137] Thus, the key dependent variables were subject to this function; to wit, whether the court employed the use of cy près or deviation to change the trust and whether the court got the decision right. This operationalization of one of my dependent variables—whether a court got its decision right—is novel and may elicit detractors because it involves decisions about *how* a court decided a given case. I attempted to eliminate subjective elements by relying on the text of the case to direct the coding of this variable, along with a fifty-state survey of the earliest adoption of these doctrines to determine if the application of them was within the jurisdictional bounds of the court's decision.[138] For instance, if a court could have used either equitable doctrine by jurisdictional permission, and it determined that a trust had a general charitable intent, discussed common cy

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v. Gebelein, 420 A.2d 1191–96 (Del. Ch. 1980); *In re* Crichfield Tr., 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980); *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990). For examples of trusts that were upheld under a similar analysis, see Wade v. Am. Colonization Soc'y, 15 Miss. (7 S. & M.) 663 (Miss. 1846); Grimes' Ex'rs v. Harmon, 35 Ind. 198, 252 (1871) (holding that American courts did not have any cy près power in a case involving a trust to promote the "well being of the colored race"); Shapiro v. Columbia Union Nat'l Bank & Tr. Co., 576 S.W.2d 310 (Mo. 1978) (determining that the discrimination on the basis of gender was not so pervasive as to void the gender restrictive clause); *In re* Est. of Johnson, 439 N.Y.S.2d 250 (Sur. Ct. 1981) (permitting a scholarship based on gender to continue per minimal State participation).

[135] This is partially to what I refer above, in terms of how my team and I coded cases where then-existing law prohibited the trust. *See supra* note 133. I then went back and coded a new variable here for cases based on whether the court got the decision right based on its statutory and judicial requirements, where discernible.

[136] *See supra* notes 130–131 for examples of cases where a court's approach to cy près was discernible.

[137] I coded this construct with three variables: whether the facts merited employment of cy près but the court did not use it and declared the trust invalid; whether the facts merited employment of cy près but the court did not use it and declared the trust valid; as well as whether the court said it was not using cy près and did not in fact do so, despite the facts meriting use of the doctrine.

[138] *See* Ryan, *supra* note 4, app. (showing a state-by-state breakdown of cy près statutes and cases throughout history).

près-triggering language in its rationale (e.g., impracticability, impossibility, unlawfulness, or wastefulness), and changed the material purpose of the trust, it can be said to have gotten the decision objectively right, regardless of whether I felt that the decision was subjectively just. Likewise, if a court took issue with an administrative provision of the trust and employed deviation to change it, the court can be said to have correctly decided the case under the doctrine of deviation. Where a court conflated the two doctrines (i.e., used cy près to change administrative provisions of a charitable trust, used deviation to change the material purpose of a trust, or used deviation or approximation instead of cy près even though the jurisdiction permitted the use of cy près), the case can be said to have been decided wrongly. These guiding principles directed my coding of court decisions and mitigated subjectivity in place of imposing objectivity in reading and coding the cases.

In creating independent variables for my empirical models, I then scoured the entire dataset to code facts about the nature of the trust in question. The categories I utilized were as follows: charitable trusts with reversionary or gift-over provisions; trusts with private recipients before the trust became charitable (i.e., life estates or life distributions to ascertainable beneficiaries); public purpose trusts; educational purpose trusts; medical purpose trusts; trusts for the benefit of art, library, or museum collections; trusts for the upkeep of cemeteries; religious purpose trusts; and trusts containing racial restriction clauses. These categories were mostly "mutually exclusive through the late [n]ineteenth [c]entury, but by the early [t]wentieth [c]entury, trusts became more complex, with material provisions concerning multiple beneficiaries that varied across categories."[139] Similarly, reversionary or racial restriction clauses were often "present within a charitable trust creation document to be used—for example, for an educational purpose."[140] In such cases, I coded the case as involving multiple categories of trusts.

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[139] *Id.* at 330.

[140] *Id.* at 330–31.

I also coded a binary variable for the decade in which the court made its decision. Likewise, I coded a variable that I refer to as a date differential.[141] This variable comprised a mathematic function of subtracting the date on which the trust was created from the date on which the court's decision made.[142] Finally, I coded another unique variable subject to another mathematical calculation: the trust value differential, which consisted of a Consumer Price Index (CPI)-adjusted figure in 2019 dollars for the value of the trust at the creation date subtracted from the value of the trust at the time the court made its decision.[143] I performed the calculation on trust assets ranging from money,[144] stocks,[145] real property,[146] and valuable personalty.[147] These variables, along with the categories of trusts described above, serve as the principal independent variables in my analysis.

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[141] In many ways, I created this variable to test a hypothesis of Professor Peter Luxton, who found—unempirically—that English courts give more deference to the settlor's wishes in the trust's early years but, once the perpetuities period has run, the courts tended to treat the property as a charitable trust for which cy près could be employed. Peter Luxton, *Cy-Pres and the Ghost of Things that Might Have Been*, 47 CONV. & PROP. L. 107 (1983).

[142] For example, if a trust was created on January 1, 1890 and the decision was rendered on January 1, 1920, the date differential would be 30 years. I also accounted for months and days between the court's decision and the trust's creation by dividing the former by 12 and the latter by 365 to form fractional values of years.

[143] I did this using a CPI adjustment calculator that accounted for historical values of money. *See, e.g.*, *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl [https://data.bls.gov/cgi-bin/cpicalc.pl].

[144] For coding monetary gifts in trust, the calculation was fairly simple. The bulk of the later 20th century cases gave a monetary value for the corpus of the trust. In earlier cases where a monetary value was provided, courts would often write that the value was represented by stocks, bonds, or other financial assets if those kinds of assets were held. As time went on, courts trended towards giving a dollar amount without breaking down asset types. This means that it is unclear whether the funds were exposed only to inflation, or whether the funds were invested into markets with greater levels of fluctuation. For the purposes of this project, I assumed that any currency value was a cash value unless the opinion stated otherwise.

When an opinion provided both an initial and present value, I simply entered the court's values into the dataset. However, when an opinion provided only the *initial value*, I assumed that the money was held in cash from the moment the testator died to the time the opinion was written. Thus, I eliminated the possibility that money left in trust was invested at a return-on-investment (ROI) outpacing inflation. Additionally, if the money had appreciated in nominal value, a court would have likely mentioned the increase, leading me to believe that the nominal value remained the same. For these cases, I used an inflation calculator to determine the value of the initial gift in real dollars for the year when the opinion was written (the present value). I also used the inflation calculator to determine the value of the trust in

real 2019 dollars. The 2019 value was the same for both the initial and present values using this approach, because the present value is an extrapolation of the initial value corresponding to inflation.

When an opinion provided only the present value, I declined to reverse engineer the initial value using an inflation calculator. This is because it is impossible to determine whether the money was invested or not from the time the testator/settlor died to the writing of the opinion. Often, a court would not include the original testamentary or *inter vivos* disposition either. For these cases, I left the initial value blank, and only found the present value in real 2019 dollars using an inflation calculator.

There were a handful of cases in the dataset in which the value of the trust was expressed in British Pounds Sterling. These cases concerned a trust that Benjamin Franklin left to the City of Boston. *See, e.g.*, Franklin Found. v. Att'y Gen., 163 N.E.2d 662, 665–66 (Mass. 1960) (describing Benjamin Franklin's trust, which began with a £1,000 bequest in 1790 that reached a value of $1,578,098 by 1959). In these cases, I used an online inflation calculator to find the real present and real 2019 values in British Pounds Sterling first, then converted the values into U.S. Dollars using an average 2019 exchange rate of 1 GBP to 1.25 USD.

[145] I did not encounter any cases with modern stock portfolio breakdowns. There were, however, some cases where company stocks were part of—or the entirety of—the trust corpus. If the case gave a stock value in nominal dollars, I simply used that figure for my calculations. However, other cases gave the company name and the number of shares, but not the share price. *See, e.g.*, Young Women's Christian Ass'n of Asheville v. Morgan, 189 S.E.2d 169, 170 (N.C. 1972) ("There remains in the fund received from Anna Johnson Moorhead the following property: 400 shares of common stock of Liggett & Myers, and 100 shares of common stock of Cannon Mills."). I tried to find some historical share price records and was able to come close to an accurate number. I was able to find some indices of defunct or obsolete stock, but none of the companies in the cases were also in these indices. For those situations, I left the stock out of the equation. If the stock was the only item of value in the corpus, I left the trust values blank.

[146] Farmland values were available on the US Census website and through the USDA. *See Farmland Values*, ECON. RSCH. SERV., USDA (Nov. 2, 2020), https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/farmland-value/ [https://perma.cc/5YYL-DQTP] (providing historical data). In the early years, charts were divided into regions. Starting in the early to mid-1900s the charts were divided by state. The early issue I found with land cases was that the opinions would not give either an acreage or a price for the land in question. The price per acre was readily available online, so (1) if I had acreage, I could multiply the acreage by price per acre and find a value, or (2) if I had the total price, I could divide the price by price per acre to find an acreage. However, when the case introduced the bequest as "a certain parcel of land" or "a certain lot," or even numbered lots, it was nearly impossible to determine an initial, present, or 2019-adjusted value. For any case without sufficient information on acreage or price, I left the trust values blank.

For those with sufficient information on acreage or total price, I used the USDA and US Census charts to find an initial and present value for the land. The charts give prices every five (5) or ten (10) years, so for years in between these 5–10 year increments, I weighted the available prices. For example, if I was looking for a present value of land in 1968, and I had the price per acre in 1960 and 1970, I would sum the 1970 price multiplied by 80% and the 1960 price multiplied by 20%. This assumes a linear trajectory between each increment, which may not be precise, especially in times of deflation or real estate crashes.

Notwithstanding the richness of this dataset, it does hold possible constraints. Among these is the reality that the dataset cannot contain the entire universe of cy près cases in American courts since their inception. Rather, the dataset is comprised only of cases that received a judicial opinion, which likely represents a smaller proportion of all cases involving the invocation of cy près. Additionally, because these court opinions do not always contain optimal information about a given trust at issue before the court, not every case in the dataset could be coded for completeness according to the conventions described above. Thus, there are about 200 cases with variables that are missing at random from the 1,561 cases that comprise the dataset. Likewise, only analyzing the

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I was able to use Zillow to estimate land values outside of the United States. *See How Much Is My Home Worth?,* ZILLOW, https://www.zillow.com/how-much-is-my-home-worth/ [https://perma.cc/6MAU-F2M9] (allowing users to "enter [their] address to get [their] free Zestimate instantly"**)**; *see also* Hansen v. Government of the Virgin Islands, 53 V.I. 58, 68 (1999) (disputing the value of land outside a U.S. state). Zillow was especially convenient because it provided a historical price trend. I used Zillow to find an average value for the land in 2019, then worked backwards to find an estimated value at the time the testator died and at the time the opinion was written using an inflation calculator.

In the 1800s and early 1900s there were historical home catalogues which provided house types and the cost to construct them. However, I did not use these because in cases from that period, a proper description of the house was not sufficiently provided. Starting in 1940, the U.S. Census provided a chart for *median* home values by state. *See* U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES: HOME VALUES (2000), https://www.census.gov/data/tables/time-series/dec/coh-values.html [https://perma.cc/4FFF-L56S] (providing the data). I used these values when the house was no longer standing, or when I could not find the house using Zillow, Realtor, Redfin, or town records. *See* ZILLOW, *supra* note 146 (providing house values); *Track Your Home Value with Multiple Estimates*, REALTOR.COM, https://www.realtor.com/myhome/ [https://perma.cc/SM7S-SV4Y] (same); *How Much Is My House Worth?*, REDFIN, https://www.redfin.com/what-is-my-home-worth [https://perma.cc/CP39-J5XN] (same). I am cautious about using Census data because it is more likely that a home left in trust would be higher than the median value, but it does provide a fair, albeit rough estimate. For more modern cases, I tried to find the house on Zillow or other real estate site.

[147] For example, cases involving trusts with artwork or library collections thankfully were for entire collections, not individual works. For the most part, I used news articles about the collection or the collection's website to get a rough estimate of its value. My strategy was to find a value in real 2019 dollars first, then work backwards to find an initial and present value. I chose to proceed this way because most of the sources I used to evaluate collections were closer to 2019 than to the initial or opinion date, meaning the 2019 inflation-adjusted estimation would likely be more accurate. For example, for *Museum of Fine Arts v. Beland*, 735 N.E.2d 1248 (Mass. 2000), I found a 2017 article on the collection in question, used an inflation calculator to find its value in 2019 real dollars, then worked backwards using the calculator to find the initial and present values.

variables for which there were values across all categories limits the observations available for analysis. Despite these shortcomings, the dataset provides a first-of-its-kind basis to analyze the application of the cy près doctrine and equitable deviation through empirical methods.

C. DESCRIPTIVE RESULTS

In analyzing the dataset, I first endeavored to represent the number of times that courts correctly used either cy près or deviation throughout the decades of decisions comprising the dataset. I find that the American courts' use of either doctrine was greatest in the middle of the twentieth century, after which the correct use of either doctrine has been somewhat in decline.[148]

One possible explanation for the disuse of either doctrine is that estate planners may have increasingly provided mechanisms through which charitable trusts could be put to alternative uses in the event of changed circumstances. For example, as explained earlier, gift-over or reversionary provisions allow the settlor to have a more certain contingent beneficiary in the event that the trust is rendered impossible or impracticable to continue in its current form—or if trustees deviate from the terms prescribed by the settlor. Of course, that is not always the case, but it is possible that courts have granted greater deference to settlors' intentions when gift-over and reversionary provisions are included in settlors' estate plans.

Another possible theory to explain the disuse of the doctrines is that increased trustee discretion over which beneficiaries are entitled to receive under the trust could be at play, vitiating the need for the courts' involvement.[149] Likewise, it is also possible that the doctrines' use is in decline because donors may have increasingly turned to corporate mechanisms to effectuate charitable purposes.[150]

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[148] *See infra* Figure 1; *see also* Ryan, *supra* note 4, at 328 (noting the decline in the use of the cy près doctrine overall, without regard to a court's correct or incorrect use of the doctrine).

[149] However, this explanation is unlikely because, from the very earliest of charitable trust cases, settlors of trusts clothed trustees with considerable discretion. For examples of cases with considerable trustee discretion, see McLain v. Sch. Dirs. of White Twp., 51 Pa. 196 (1865); Taylor v. Keep, 2 Ill. App. 368 (1878); Corby v. Corby, 85 Mo. 371 (1884); Johnson v. Johnson, 23 S.W. 114 (Tenn. 1893); Spalding v. St. Joseph's Indus. Sch. for Boys of the City of Louisville, 54 S.W. 200 (Ky. 1899).

[150] In other words, charities that now incorporate as non-profit corporations, where their

Finally, and as this Article asserts, charitable trust-making is somewhat in decline[151] and this could indeed be a fatal symptom of the problem created by judicial confusion about the application of the equitable doctrines of cy près and deviation.[152] Regardless, the descriptive trend seems to indicate that, while in greater volume than the nineteenth century, neither doctrine has found much judicial application in the twenty-first century.[153] Yet, the cy près doctrine continues to present an important mechanism for courts to perpetuate the charitable purposes of a settlor's donative intent, notwithstanding judges failing to turn to it in their decisions—or to use the doctrine as it was intended.

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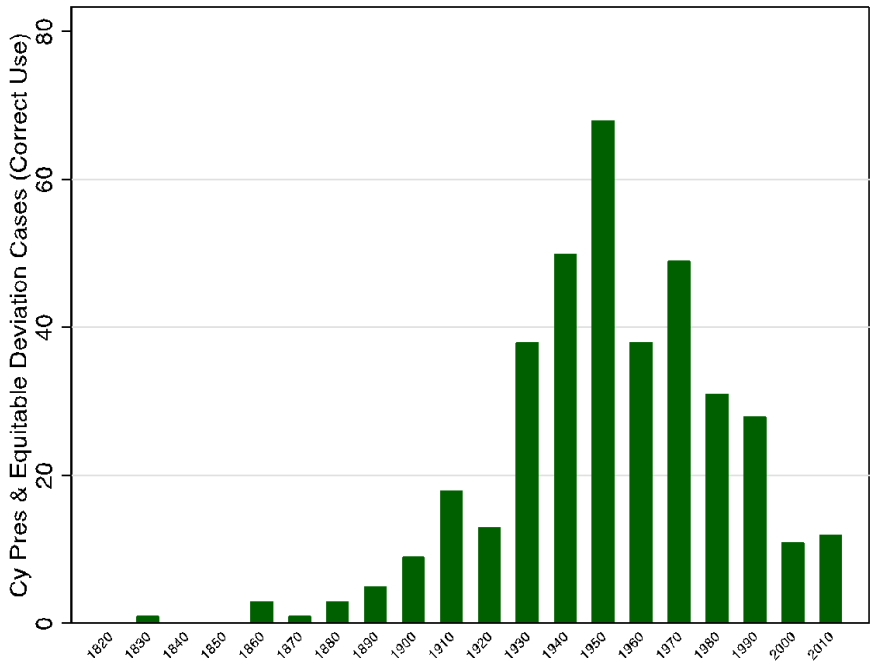
corporate directors are not burdened by the same obligations to comply with settlor restrictions as charitable trustees, could spell a decline in the charitable trust form. Yet, this explanation is somewhat incomplete, given that these alternative charitable vehicles are not new and were common throughout the twentieth century. For examples of twentieth-century scholarship discussing charitable trusts vis-à-vis non-profit charities, see generally Thomas E. Blackwell, *The Charitable Corporation and the Charitable Trust*, 24 WASH. U. L.Q. 1 (1938); Rene A. Wormser, *The Charitable Trust (The Foundation) as an Instrument of Estate Planning*, 18 OHIO ST. L.J. 219 (1957); Allan D. Vestal, *Critical Evaluation of the Charitable Trust as a Giving Device*, 1957 WASH. U.L.Q. 195 (1957); Wallace Howland, *The History of the Supervision of Charitable Trusts and Corporations in California*, 13 UCLA L. REV. 1029 (1966). Thus, this explanation calls for greater academic inquiry.

[151] *See, e.g.*, Ben Gose, *The Trust Crisis*, CHRON. PHILANTHROPY (Jan. 7, 2020), https://www.philanthropy.com/article/the-trust-crisis/ (presenting data indicating a decline of trust in nonprofits); *see also, e.g.*, *Giving USA: Total U.S. Charitable Giving Declined in 2022 to $499.33 Billion Following Two Years of Record Generosity*, INDIANA UNIV.: LILLY FAM. SCH. OF PHILANTHROPY (June 20, 2023), https://philanthropy.iupui.edu/news-events/news-item/giving-usa:-total-u.s.-charitable-giving-declined-in-2022-to-$499.33-billion-following-two-years-of-record-generosity.html?id=422 [https://perma.cc/VUN5-AK73] (noting that giving by bequest declined 5.3% in 2022 when adjusted for inflation).

[152] *See supra* notes 17–18 (providing examples of judicial confusion between cy près and deviation).

[153] *See infra* section II.C (chronicling the frequency of judicial application of the doctrines).

Figure 1 – Cy Près and Deviation Used Correctly



After examining the use of the doctrines, I assessed only the correct use of the cy près doctrine by courts over time. I constructed Table 1 below based first on a comparison of whether the court used cy près correctly from a traditional understanding of the doctrine (i.e., to change the material purpose of the trust and not some administrative term within the trust) as compared with cases where the doctrine was used but employed imperfectly (i.e., to change administrative provisions in the trust). In the second instance, I compared correct applications of cy près to incorrect applications of cy près as well as other cases in the dataset where the facts did not merit an application of cy près, cy près was forbidden in the jurisdiction, or equitable deviation was appropriately used.

The results indicate that, for the most part, American courts over the last 200 years have correctly decided cy près cases when the facts implied that cy près was the appropriate doctrine to use when repurposing the material purpose of the trust as created by the

settlor.[154] One point of note, however, is that, while the use of cy près has declined since middle of the twentieth century, its application in the twenty-first century has also been inconsistent. Half of cy près cases decided in the 2010s were decided incorrectly.[155] This is a troubling statistic and could spell increased confusion over the doctrine in the wake of the UTC's broader adoption.

Finally, I sought to analyze, descriptively, courts' use of deviation over time. In doing so, I first compared courts' correct use of deviation, from a traditional understanding of the doctrine, to an incorrect use (i.e., to change the material purpose of the trust and not an administrative provision of the trust). Secondly, I compared correct applications of deviation to incorrect applications of the doctrine, plus additional cases in the dataset where the facts did not merit an application of deviation, deviation was not accepted in the jurisdiction, or cy près was appropriately used.

Here, the results relate a different picture than that described in Table 1.[156] Instead of a majority of cases being correctly decided, I find that in a majority of cases courts imperfectly applied deviation, or its doppelgänger, approximation.[157] It is noteworthy that, in the twenty-first century, only three uses of deviation in the dataset have been correct applications of the doctrine, while eleven cases were decided incorrectly.[158] These outcomes significantly lag the correct use of deviation by courts from the 1970s through the 1990s, when a majority of cases applying deviation were correctly decided.[159]

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[154] *See infra* Table 1.

[155] *See infra* Table 1.

[156] *Compare* Table 1 *infra*, *with* Table 2 *infra*.

[157] *See infra* Table 2.

[158] *See infra* Table 2.

[159] *See infra* Table 2.

Table 1: Correct Use of Cy Près

Decade	Cy Près – Correct	vs. Cy Près – Incorrect	vs. Cy Près – Incorrect and Other Cases
1820s	0	0	3
1830s	1	0	8
1840s	0	0	12
1850s	0	0	12
1860s	4	0	17
1870s	1	0	25
1880s	3	0	23
1890s	5	1	37
1900s	9	1	50
1910s	18	2	46
1920s	14	2	53
1930s	38	5	59
1940s	51	8	95
1950s	69	8	102
1960s	36	8	80
1970s	44	6	86
1980s	27	5	58
1990s	23	3	47
2000s	10	1	24
2010s	10	5	29
TOTAL	363	55	866

Once again, this confusion could be caused by the UTC's conflation of the doctrines of cy près and equitable deviation because of the similar language used by both UTC § 412 with § 413, which contain the provisions for deviation and cy près, respectively.[160] Taken together, the results suggest that courts are not nearly as confused about when and how to apply cy près as they are about the application of deviation.

[160] *See supra* section II.D.*2* (discussing the confusion resulting from similar language in UTC § 412 and § 413).

Table 2: Correct Use of Equitable Deviation

Decade	Deviation – Correct	vs. Deviation – Incorrect	vs. Deviation – Incorrect and Other Cases
1820s	0	0	3
1830s	0	0	9
1840s	0	0	12
1850s	0	0	12
1860s	0	2	20
1870s	0	1	26
1880s	0	0	26
1890s	0	1	42
1900s	0	3	59
1910s	0	2	63
1920s	0	5	65
1930s	0	12	97
1940s	0	18	145
1950s	0	12	169
1960s	3	9	112
1970s	8	15	122
1980s	6	7	77
1990s	5	6	64
2000s	1	5	33
2010s	2	6	37
TOTAL	25	104	1,193

D. EMPIRICAL RESULTS

The foregoing sections of this Article describe the present state of the cy près and deviation doctrines in detail, as well as the use, misuse, and disuse of the doctrines. Yet, the descriptive findings illustrated in the discussion above still fall short of explaining when and why courts get the doctrine correct or incorrect. I endeavored to learn more about why this may be the case through a series of empirical analyses aimed at demystifying courts' decisions in the cases comprising the dataset. To date, no scholar has examined these questions in this way, and this study is the first-ever empirical

analysis of the application of the cy près and deviation doctrines to focus specifically on judicial decision-making.

In particular, my motivation for exploring when and why courts decide to employ these doctrines to change a charitable trust's material purpose, administrative terms, or both, was to see the salient factors that influenced judicial decision-making in these cases. To do so, I used several independent variables.

First, as described above, I created variables to articulate two differentials: the trust value differential (from the time of the creation of the trust to the date of the court's decision) and the date differential (again, from the time of the creation of the trust to the date of the court's decision). My primary impulse for doing so was to analyze whether these factors influenced a judge's decision to grant cy près or deviation when the denial of such doctrines was appropriate. In the former instance, if courts were more likely to change a trust's purpose or terms because of variations in trust value over time, it could suggest that courts implicitly considered economic factors and made decisions on the basis of economic efficiency. In the latter instance, if courts were more likely to modify a trust's purpose of terms because of the amount of time from the trust's creation to the court's decision, it may be the case that courts tend to substitute their view of collective interests in the charitable trust for the individual interest of the settlor of the trust. From an economic and socio-legal perspective, these questions merited closer observation, which my study provides.

Next, I controlled for several factors collectively categorizing the typology of cases before the courts involving charitable trusts and the litigants' plea for relief on cy près or deviation grounds. These categories included: trusts with reversionary interests or gifts over; private purpose trusts (those with life estates or some other interest vesting in an individual before effectuating the charitable intention of the donor); public purpose trusts; educational purpose trusts; medical purpose trusts; art, library, and museum collection trusts; cemetery trusts; religious purpose trusts; and racial clause trusts. My inclusion of these independent variables was motivated by testing whether certain cases and controversies were more likely than not to yield the application of the cy près or deviation doctrines, given their uniqueness and the fact that some have been called the

"favorites" of the charitable trust laws.[161] If this is the case, controlling for these variables has a direct impact on the reliability and effect size of estimates of the other independent variables for which I controlled—not to mention a descriptive effect on the rightness or wrongness of a judicial outcome.

I tested these independent variables against many dependent variable outcomes, described below, using a method of logistic regression analysis to forecast court decisions. This method estimates probability of decisions with a mean of one, the distance from which can be interpreted as percentage points of likelihood. Estimates above this mean indicate percentage points of positive likelihood, while estimates below this threshold represent percentage points of negative likelihood. This empirical method is preferable to an ordinary least squares regression approach because it simulates a sinusoidal and bounded-binary outcome. My results follow.

1. Correct Denial of Cy Près and Deviation Relief. In my first analysis, I sought to determine which factors influenced a court in its decision to deny relief on the basis of cy près or equitable deviation. That is, I tested whether a court correctly denied relief on traditional grounds that would prohibit cy près or deviation against the several independent variables I created. The purpose of this test is to see whether certain variables could predict a court's decision not to apply the cy près or deviation doctrines correctly.

I find that neither differential I constructed (trust value or date differentials) was predictive of the result in cases where the court declined to apply cy près or deviation relief but did so correctly.[162] This result could suggest that economic and philosophical considerations of the court are less important than other considerations of the court in correctly denying equitable relief, such as the typologies of trust cases and controversies.

Looking next to the typology of cases I constructed, I find that the presence of a reversionary or gift-over clause is both highly predictive and a highly positive indicator of a court's decision not to invoke cy près or deviation. Specifically, I find that courts were over

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[161] *See* Ryan, *supra* note 4, at 333 (describing public purpose, educational purpose, and medical purpose trusts as the "favorites" of courts).

[162] *See infra* Table 3.

three times more likely to deny cy près and deviation relief when these clauses were present in trust creation documents.[163]

This result stands to reason given that the presence of a reversionary or gift-over beneficiary makes the disposition of trust assets relatively certain. And it also effectuates the intent of the testator when a trust becomes stale or is not managed in accordance with the terms set out by the trust settlor. Likewise, to the extent that a trust served a private or business purpose before converting to a charitable trust, this factor was a positive indicator that a court would refuse cy près or deviation relief correctly. While this variable fell just shy of conventional levels of statistical significance ($p<0.073$), its directionality is unmistakable, and I find that courts were over 40% more likely to reject cy près or equitable deviation when a trust served a private or business purpose before becoming a charitable trust—a result that also stands to reason.[164]

Many of the typologies were not statistically significant predictors of this outcome (i.e., general public purpose trusts; art, library, and museum trusts; religious purpose trusts; and trusts containing racial clauses).[165] This result could be because courts were more uncertain about how to proceed towards an outcome in these cases, or because the variables had a more spurious relationship with the outcome, despite the statistical significance of the model's fit.[166] However, I would like to focus on the results for three more variables in this analysis.

First, I find that two variables were statistically significant predictors of a court's decision to correctly deny relief on cy près or deviation grounds: educational purpose trusts and medical purpose trusts. The estimates for both variables indicate that, in these cases, courts were far more likely to grant cy près or deviation relief. For educational purpose trusts, courts were more than 52% more likely than not to avoid a denial of equitable relief, and for medical purpose trusts, courts were nearly 97% more likely than not to avoid rejecting cy près and deviation relief correctly.[167] In an earlier study, I found that both types of trusts were favorites of the courts for

[163] *See infra* Table 3.
[164] *See infra* Table 3.
[165] *See infra* Table 3.
[166] *See infra* Table 3.
[167] *See infra* Table 3.

applying cy près or, in some cases, deviation.[168] By contrast, while quite near but just shy of conventional levels of statistical significance ($p<0.080$), cemetery trusts were admonished by the courts for purposes of cy près or deviation relief.[169] However, the directionality of the estimate for this variable is self-evident. In cemetery trust cases, courts were more than two times more likely to correctly reject cy près or deviation relief.[170] Much of what is driving this estimate is the fact that many courts found these trusts to be invalid—that is, noncharitable trusts—in the earlier years of cases in the dataset, because the trusts in question served private purposes.[171]

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[168] *See* Ryan, *supra* note 4, at 332 (noting courts were "overwhelmingly more likely to apply cy près to" educational trusts and medical purpose trusts).

[169] *See infra* Table 3.

[170] *See infra* Table 3.

[171] *See, e.g.*, Johnson v. Holifield, 79 Ala. 423, 426 (1885) (finding a burying-ground for the benefit of the testatrix and four relatives served private purposes); Hopkins v. Grimshaw, 165 U.S. 342, 355–58 (1897) (wherein the Supreme Court of the United States decided a case over land that was deeded to the Union Beneficial Society to be held in trust and used as a burial ground. The land was used as such for about 40 years before the Board of Health ordered that no more burials occur, and the society's membership dwindled. In dicta, the Court seemed to think that the trust was void as a violation of the rule against perpetuities since the purpose was not exactly charitable in nature. However, ultimately, the Court did not go so far as to void the "trust," concluding that the trustees held legal fee in the land which was subject to an equitable trust for the heirs of the grantor—a balancing of sorts among the parties with interests in the burial land.); *In re* Dreisbach Estate, 121 A.2d 74, 76 (Pa. 1956) ("It is now well established that trusts for the maintenance of family burial lots are a matter of private personal concern and not of charity."); Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675, 678 (Tex. 1981) (finding that the intent to "beautify the private burial plots" of the testator and her family members was not a charitable purpose and that cy près did not apply); Hoover v. Jolley, 45 Va. Cir. 309 (1998) (reforming a will to avoid invalidation under the rule against perpetuities of a cemetery trust). *But see* Security Trust Co. v. Willett, 97 A.2d 112, 113 (Del. Ch. 1953) (finding a perpetual cemetery trust valid despite the rule against perpetuities and describing the cemetery trust as "akin to a charitable trust").

Table 3: Correct Denial of Cy Près or Deviation

VARIABLES	Baseline Model
Trust Value Differential (CPI Adj. in $10K)	1.0000 (0.0000)
Date Differential - Decades	0.9597 (0.0367)
Reversion	3.1776*** (1.2855)
Private/Business Purpose	1.4295* (0.3324)
Public Purpose	0.8292 (0.2062)
Educational Purpose	0.4789*** (0.1215)
Medical Purpose	0.0365*** (0.1115)
Art, Library, Museum	1.1862 (0.4683)
Cemetery	2.2853* (1.4377)
Religious Purpose	0.8079 (0.2292)
Racial Clause	0.9448 (0.5075)
Constant	1.2788 (0.4348)
Observations	415
Linear Ratio χ^2	40.05
χ^2 p value	0.0003

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

2. Correct Use of Cy Près. Next, I sought to determine which factors influenced a court in its reasoning to grant cy près relief. I tested whether a court correctly applied cy près on traditional grounds—such as impossibility, impracticability, unlawfulness, or waste—which changed the circumstances surrounding the material purpose of the charitable trust. Thus, this inquiry was focused on whether certain variables for which I controlled could predict a court's decision to apply only cy près relief correctly. This inquiry is different from merely finding which variables predict a court's use of cy près or deviation, which I conducted in an earlier study.[172] Instead, as described above, I coded several variables that collectively imply whether a court's relief and reasoning was a correct application of cy près based on a traditional understanding of the doctrine.

Once again, I find that neither the trust value nor date differential I operationalized was predictive of the outcome of a court to apply cy près correctly, although the directionality of each variable suggests the possibility that with an increase in each, the court was more likely than not to apply cy près.[173] Similarly, I find that certain trust typologies had no statistically significant bearing on a court's decision to apply cy près correctly. These included: art, library, and museum trusts; cemetery trusts; religious purpose trusts; and trusts with racial clauses.[174] However, the former two trust typologies appear to be inversely related to the outcome, while the latter two trust typologies seem to be positively related to the outcome.[175] Yet again, the estimates from these variables indicate confusion and inconsistency about how to dispose of these cases.

That said, several trust typologies provided highly statistically significant estimates. Here, too, trusts that contained reversionary or gift-over provisions, as well as trusts that served a private purpose before becoming charitable, were negatively related to a court's correct application of cy près.[176] For the former variable, courts were more than 83% less likely to correctly apply cy près, suggesting a relative certainty of disposition in reversionary or gift-

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[172] *See generally* Ryan, *supra* note 4 (analyzing when courts use cy près or deviation).

[173] *See infra* Table 4.

[174] *See infra* Table 4.

[175] *See infra* Table 4.

[176] *See infra* Table 4.

over cases.[177] For the latter variable, courts were more than 57% less likely to invoke cy près correctly, which indicates that courts were more likely to dispose of private purpose trust cases on other grounds, such as not employing cy près to change the material purpose of the trust at all.[178]

With respect to other trust typologies—such as public purpose trusts, educational purpose trusts, and medical purpose trusts—I find positive and statistically significant estimates. For example, courts were 62.25% more likely to apply cy près correctly when cases involved a general charitable purpose, such as a trust that served their community for the relief of poverty and like societal issues.[179] But courts were more than twice as likely to apply cy près correctly for educational and medical purpose trusts.[180] These results imply that courts tend not only to favor the application of cy près in cases involving these typologies of trusts but are more apt to get the application of the doctrine correct in the outcome as well.

[177] *See infra* Table 4.
[178] *See infra* Table 4.
[179] *See infra* Table 4.
[180] *See infra* Table 4.

Table 4: Correct Use of Cy Près

VARIABLES	Baseline Model
Trust Value Differential (CPI Adj. in $10K)	1.0363 (0.0320)
Date Differential - Decades	1.019226 (0.039490)
Reversion	0.1660*** (0.0903)
Private/Business Purpose	0.4275*** (0.0984)
Public Purpose	1.6225** (0.3705)
Educational Purpose	2.1041*** (0.4666)
Medical Purpose	2.6536*** (0.6726)
Art, Library, Museum	0.7544 (0.2782)
Cemetery	0.7878 (0.4734)
Religious Purpose	1.1713 (0.3131)
Racial Clause	1.0420 (0.4810)
Constant	0.4694 (11.5564)
Observations	583
Linear Ratio χ^2	69.96
χ^2 p value	0.0000

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

3. Correct Use of Equitable Deviation. Following the analysis above, I applied the same model to assess which factors impacted a court's decision to invoke equitable deviation correctly from a traditional perspective. In other words, I sought to analyze whether the court correctly deviated from the administrative terms of the trust to prolong the life of the charitable trust. The results are striking. In two cases—cemetery and racial clause trusts—the variable predicted the outcome perfectly, and their estimates were subsequently dropped from statistical analysis.[181] Thus, these two variables may be the only reliable indicators of when courts correctly decided cases using the equitable deviation doctrine.

For every other variable, there was considerable noise in predicting the outcome.[182] That is, there appears to be no rhyme or reason to a court's correct employment of the equitable deviation doctrine in any of the cases involving: reversionary or gift-over interest trusts; private purpose trusts; public purpose trusts; educational purpose trusts; medical purpose trusts; art, library, and museum trusts; or religious purpose trusts.[183] None of the estimates provided by the model for cases involving these trusts produced statistically significant results.[184]

Given the findings reported in Table 2, above, this result is perhaps unsurprising, but it is shocking that not one variable estimated by the model yielded a statistically significant estimate. Moreover, the model cannot be said to predict the outcome at statistically significant levels and is the only such result in my analysis to suffer from this defect.[185] The lack of statistical significance for any variable with reported results in the model, and indeed the model itself, suggests considerable judicial confusion about how the doctrine of equitable deviation ought to be used and when it ought to be used. This confusion is not new.[186] There is no question, however, that this confusion is also the byproduct of general confusion about how the doctrine is to be used, due in part to confusing guidance from the Restatement and the mistaken wording of the provisions of the UTC dealing with deviation, which

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[181] *See infra* Table 5.
[182] *See infra* Table 5.
[183] *See infra* Table 5.
[184] *See infra* Table 5.
[185] *See infra* Table 5.
[186] *See supra* Table 2.

muddle the language traditionally reserved for the cy près doctrine with the language codifying deviation. When compared with the results from the correct application of cy près,[187] it seems that courts are far more likely to mistake the application of equitable deviation for cy près than they are to confuse cy près with deviation.[188]

[187] *See supra* Table 4.

[188] This extrapolation is perhaps corroborated by the results in Table A-2, *infra* app.

Table 5: Correct Use of Deviation

VARIABLES	Baseline Model
Trust Value Differential	1.0001
(CPI Adj. in $10K)	(0.0002)
Date Differential - Decades	0.8820
	(0.1901)
Reversion	4.7104
	(5.656)
Private/Business Purpose	0.3735
	(0.4272)
Public Purpose	3.8520
	(4.6135)
Educational Purpose	0.7428
	(0.8581)
Medical Purpose	3.2657
	(3.0870)
Art, Library, Museum	2.7064
	(3.1945)
Cemetery	--
	--
Religious Purpose	1.2934
	(1.6061)
Racial Clause	--
	--
Constant	0.0114
	(1.1838)
Observations	392
Linear Ratio χ^2	12.69
χ^2 p value	0.3920

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

4. Correct Use of Cy Près and Equitable Deviation. In my penultimate analyses, I examined the courts' correct use of cy près and deviation as one dependent variable. I started with a naïve model, applying the same model I used in the analyses above to an agglomerated dependent variable characterizing the courts' correct use of cy près or deviation. This was more than a robustness check on my results outlined above.[189] I sought to discern whether there was greater or lesser predictability of the independent variables when equitable deviation was included in the dependent variable. While I do not find such a result with respect to the variables that were not statistically significant in the cy près application model, I do find consistency of effect size and direction between the model below and the cy près application model.[190] This suggests that the model is responding to the highly predictive power of the variables in the cy près model. Thus, the inclusion of equitable deviation in the dependent variable does not defeat the results found in the cy près model and indicates that the results found in that model are robust to alternative explanations on the correct use of the cy près doctrine. My results for this naïve model are below in Table 6.

[189] For additional robustness checks, see *infra* app., Tables A-1 & A-2 .

[190] *See infra* Table 6.

Table 6: Correct Use of Cy Près & Deviation (Naïve)

VARIABLES	Naïve Model
Trust Value Differential – 2019 CPI Adj. ($10K)	0.9999
	(0.0000)
Date Differential - Decades	1.0328
	(0.0328)
Reversion	0.2644***
	(0.1357)
Private/Business Purpose	0.5170***
	(0.1288)
Public Purpose	1.6662**
	(0.4221)
Educational Purpose	2.3890***
	(0.5898)
Medical Purpose	2.4748***
	(0.7118)
Art, Library, Museum	1.0125
	(0.3951)
Cemetery	0.5593
	(0.4494)
Religious Purpose	1.3428
	(0.3942)
Racial Clause	1.2652
	(0.6964)
Constant	0.2985***
	(0.0879)
Observations	421
Linear Ratio χ^2	41.74
χ^2 p value	0.0000

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

I did not conclude my analysis, however, merely with an empirical investigation of the naïve model. I sought to further interrogate the dependent variable as operationalized by the correct application of either cy près or deviation. In doing so, I included three new variables in the model.[191] All three were drawn from language taken from the court opinions comprising the dataset. When a court referenced impracticability or impossibility in its decision, I coded a binary variable to account for it. Additionally, I coded binary variables for a court's referencing of terms related to waste or ambiguity. I added each of these three new variables to the model to predict whether a court correctly used cy près or equitable deviation. And when accounting for all three new independent variables, I find that the predictive power and direction of the following variables remain fairly stable in magnitude and directionality as well as statistical significance: reversionary or gift-over trusts; private purpose trusts; educational purpose trusts; and medical purpose trusts. One of the original variables in the model, however, achieved statistical significance—public purpose trusts—demonstrating that courts were more likely to apply cy près or deviation by more than 85% when the trust involved a general public charitable purpose.[192] And of the three new variables, I find that only impracticability, or impossibility, was statistically significant, with a coefficient indicating that courts were more than five times more likely to apply cy près or deviation when referencing the impracticability or impossibility of effectuating the trust in its then-current form.[193] Yet, the other two new independent variables—waste and ambiguity—did not return statistically significant estimates in this model.[194]

I should also note that, sometimes, the best laid plans of mice and men get the better of us. I exhaustively performed calculations of trust values, where discernible, but doing so compromised the dataset, cutting the observations by more than half. Moreover, the effect of the trust value differential was not only statistically insignificant across all specifications of the models, its direction and magnitude revealed nothing about what was driving correct

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[191] For robustness checks on the models I present in Table 7, see *infra* app., Tables A-1 & A-2.

[192] *See infra* Table 7.

[193] *See infra* Table 7.

[194] *See infra* Table 7.

decision-making when courts employed cy près or deviation. It is possible that the trust value differential is meaningless, in a statistical sense, because at times the trust assets accrued substantial value while in many cases the trust assets lost value. The underlying instability that this caused in the data could reveal that economic considerations of the courts in deciding these cases correctly have a spurious correlation with the result. That is why I present the full models below, one with the trust value differential variable and one without. My discussion of the results now focuses on the model without controlling for the trust value differential because the sample is dramatically increased, the results are fairly stable across both models, and the estimates for additional variables, as well as model fit, all improve.

I find that, accounting for the three new variables and subtracting the trust value differential variable, the date differential variable finally and very nearly achieves statistical significance ($p<0.052$).[195] Additionally, its unmistakable directionality indicates that, as the differential between the date of the creation of the trust and the court's decision increases by one decade, courts are nearly 4% more likely to use cy près or deviation correctly to modify the trust.[196] This result indicates that judges may be revealing a modest preference for modifying trusts as the passage of time renders a trust ineffectual. It may also suggest that judges substitute their intentions for repurposing the trust over donors' as trusts age, even to the point of reaching fairly substantial levels of likelihood of modification (8%–12%) as the trust approaches the perpetuities period.[197] In all, the estimate of the effect of the date differential unmistakably points to an implicit, or even explicit, contemplation by judges that the passage of time impacts whether to employ either of the equitable doctrines to modify a charitable trust. Once again, this underscores the tension between the courts and dead hand control of donors.

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[195] *See infra* Table 7.

[196] *See infra* Table 7.

[197] *See infra* Table 7. This result is the first to test, empirically, Professor Luxton's theoretical claim that courts are more likely to apply cy près when the trust approaches the perpetuities period. *See* Luxton, *supra* note 141, at 116–17 (stating that a principle developed where courts would be more likely to presume a general charitable purpose as more time had passed from the point the trust failed). Although Professor Luxton wrote this claim about English courts, the result holds for American courts.

I also find fairly consistent results between the two models with respect to statistical significance and directionality of estimates on the other variables in the full model. Specifically, courts were more than 78% less likely to apply cy près or deviation to trusts with reversionary or gift-over provisions and more than 36% less likely to do the same to trusts serving private purposes before converting to charitable trusts.[198] Both results provided were at the highest levels of statistical significance and hint at the fact that judges correctly understand that when these conditions are present, modification is often inappropriate. Similarly, I find that courts were more likely to use cy près or deviation correctly to change trusts, under the following circumstances: by more than 56% for public purpose trusts; by more than 91% for educational purpose trusts; and by more than 144% for medical purpose trusts.[199]

However, the results for several trust typologies still return statistically insignificant results. Although courts appear to use cy près and deviation more frequently than not in art, library, and museum trust cases—and are less likely to use the doctrines correctly in cemetery and racial clause trust cases—these results failed to produce estimates that were statistically significant and suggest great variability on the part of courts in deciding these cases correctly.[200] That said, the coefficient for religious purpose trusts fell just shy of conventional levels of statistical significance ($p<0.061$) in the final model, but its magnitude and directionality are clear.[201] In these cases, courts were more likely than not to apply cy près or deviation correctly by more than 40%.[202] I take these results to imply that these trust typologies are not "favorites" of court, because I observed in the data that many of these trusts evinced specific intentions rather than general charitable intentions of the donor. This reality overrides consistency in the underlying data and clouds judicial decision-making in these cases.

With respect to the three new variables added to the full model, I find that impracticability, or impossibility, remains highly statistically significant and its effect size is very large. In fact, when courts referenced these terms of art in their opinions, they were

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[198] *See infra* Table 7.

[199] *See infra* Table 7.

[200] *See infra* Table 7.

[201] *See infra* Table 7.

[202] *See infra* Table 7.

more than 7.5 times more likely to employ cy près or deviation correctly.[203] Likewise, waste generated a highly statistically significant estimate. When a court used language implying that the size of the trust's returns outpaced the settlor's intended distribution of the trust's assets, the court was more than five times more likely to invoke cy près or deviation correctly to change the trust.[204] This result appears to be inversely related, rather dramatically so, to the trust value differential estimate, which was not statistically significant. And, contrary to the statistically insignificant findings with respect to the trust value differential variable, it suggests that courts are more likely to find that cy près or deviation is appropriate, and use either doctrine correctly, when trust asset values have increased rather than decreased. Finally, while missing conventional levels of statistical significance (p<0.081), a court that references what it is doing in attempting to resolve an ambiguity about the nature of the administrative terms provided by the settlor's material purpose appears more likely than not to apply cy près or deviation correctly.[205]

Thus, taking advantage of dramatically more observations available to analyze, the results of the full model with the exclusion of the trust differential variable provide excellent results for interpreting when and why courts employ the cy près and deviation doctrines correctly. But they also beg the question: what can be done to mitigate the courts' confusion over these doctrines?

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[203] *See infra* Table 7.
[204] *See infra* Table 7.
[205] *See infra* Table 7.

Table 7: Correct Use of Cy Près & Deviation (Full Model)

VARIABLES	Trust Val.	No Trust Val.
Trust Value Differential - 2019 CPI Adj. ($10K)	0.9999 (0.0000)	
Date Differential - Decades	1.0054 (0.0395)	1.0395* (0.0213)
Reversion	0.2471*** (0.1297)	0.2186*** (0.0932)
Private/Business Purpose	0.5231** (0.1351)	0.6345*** (0.1081)
Public Purpose	1.8552** (0.4920)	1.5641*** (0.2682)
Educational Purpose	2.5550*** (0.6531)	1.9115*** (0.3274)
Medical Purpose	2.4228*** (0.7187)	2.4469*** (0.4538)
Art, Library, Museum	1.1393 (0.4543)	1.0253 (0.3224)
Cemetery	0.6612 (0.5367)	0.7989 (0.4212)
Religious Purpose	1.4584 (0.4432)	1.4088* (0.2784)
Racial Clause	1.4947 (0.9478)	0.8294 (0.3284)
Impracticability	5.6493*** (2.4563)	7.5261*** (2.1266)
Waste	2.3364 (2.0729)	5.3936*** (3.1926)
Ambiguity	0.7160 (0.5109)	1.8927* (0.6961)
Constant	0.2497*** (0.0776)	0.2101*** (0.0426)
Observations	421	1,005
Linear Ratio χ^2	60.83	151.21
χ^2 p value	0.0000	0.0000

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

5. Incorrect Use of Cy Près and Equitable Deviation. Finally, I examined courts' incorrect use of cy près and deviation. I was particularly interested in analyzing the extent to which courts misapplied these doctrines from 1980 to the present given that this time period coincides both with the decline in the use of either doctrine and with the drafting and the uptake of the UTC—since 2000.[206] Building off the model I created in Table 7, above, I added one additional binary variable: whether a jurisdiction was a UTC-adopting jurisdiction. This variable captures when a given jurisdiction adopted the UTC. For example, a case in a state like Kentucky would have a value of zero until 2014, when the Commonwealth adopted the UTC—after which another case in that state would hold the value of one.[207] I applied the same covariates I used in the full model for Table 7 above to test this new independent variable against two dependent variables: correct and incorrect decisions over the time period spanning 1980 to the present. These dependent variables are represented by the left and right columns of results in Table 8, respectively.

I find that the effect sizes for the date differential generally hold across the models from the model specification in Table 7 to Table 8. That is, with the passage of each decade between when a trust was created and when a court decision was rendered, the likelihood of a correct application of cy près or deviation increase by more than 4%, while the chances of an incorrect application of either equitable remedy decrease by roughly double that effect.[208] Likewise, I find that reversionary clauses present in the trust greatly depress the likelihood of the application of either equitable remedy as well as the likelihood that a court's decision was incorrect.[209] Interestingly, both public purpose and religious purpose trusts—as well as trusts containing racially restrictive clauses—were more likely than not to be victims of incorrect decisions regarding the invocation of either cy près or deviation.[210] I do not find such a result with respect to

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[206] *See* discussion *supra* Part II.

[207] *See* Timonthy W. Dunn & M. Todd Lewis, *Kentucky Adopts Uniform Trust Code*, LEXOLOGY (Apr. 17, 2014), https://www.lexology.com/library/detail.aspx?g=f9d80616-6248-43dc-ab34-9c559149d244 [https://perma.cc/K3RH-DY2P] (noting that Kentucky adopted the UTC in 2014).

[208] *See infra* Table 8. Note that the estimated effect does not quite meet conventional levels of statistical significance but comes awfully close.

[209] *See infra* Table 8.

[210] *See infra* Table 8.

other typologies of trusts, whether the court's decision was correct or incorrect. But most importantly, I find empirically that the UTC has caused great judicial confusion. For jurisdictions that adopted the UTC, the court was nearly half as likely to correctly apply cy près or deviation when the facts merited it, and more than twice as likely to get the decision wrong.[211] This is clear evidence that the uniform guidance has been anything but.

[211] *See infra* Table 8. While the estimates for this variable came just shy of conventional levels of statistical significance, the magnitude and directionality are unmistakable. Moreover, because these estimates come from all published cases within the time period, statistical significance matters less, given that these effects are not borne from a sample but rather a population of cases. In this way, the estimates are closer to parameters than they are to sample statistics.

Table 8: Incorrect Use of Cy Près & Deviation (1980 – 2019)

VARIABLES	Correct	Incorrect
Date Differential - Decades	1.0499*	0.9124*
	(0.0348)	(0.0597)
Reversion	0.1988*	0.0809**
	(0.1800)	(0.1023)
Private/Business Purpose	0.5344	1.0843
	(0.2117)	(0.4536)
Public Purpose	0.8954	2.3318**
	(0.3605)	(1.0177)
Educational Purpose	1.3049	0.9755
	(0.5060)	(0.4062)
Medical Purpose	1.5300	1.2483
	(0.6422)	(0.5506)
Art, Library, Museum	0.7627	1.2118
	(0.4398)	(0.7153)
Cemetery	0.6504	0.7250
	(0.6697)	(0.8615)
Religious Purpose	1.1284	2.7567**
	(0.5061)	(1.2843)
Racial Clause	-	12.3928*
	-	(10.0819)
Impracticability	5.0132***	1.4509
	(3.0955)	(0.8535)
Waste	18.7700**	0.4251
	(21.7031)	(0.4996)
Ambiguity	1.5489	0.8448
	(1.4687)	(0.8100)
UTC Jurisdiction	0.5226*	2.1689*
	(0.2409)	1.1483
Constant	0.5222	0.1903**
	(0.2539)	(0.1027)
Observations	181	184
Linear Ratio χ^2	32.97	19.25
χ^2 p value	0.0017	0.0940

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

IV. THE FUTURE OF CY PRÈS

While scholarly treatment of cy près has been fairly limited, attention to the doctrine has focused on the possibility of its re-evaluation and further reform. As discussed above, the impetus behind this movement rests upon the fact that the three requirements of the cy près doctrine—having a charitable trust, with a general intent, which is impossible or impractical to effectuate—are not definite enough, causing courts to apply the doctrine inconsistently. To the extent that it is conflated with equitable deviation, this leads to unpredictable results, unreliable case law, and undermines donors' incentives to engage in charitable trust-making.

Accordingly, scholars have argued that the second of these requirements, the general intent prerequisite, could either be changed to specific intent or eliminated altogether. Others favor merging cy près with equitable deviation because the doctrines share similarities and courts conflate the doctrines. This conflation is the primary reason for inconsistent judicial application of the doctrines. Finally, some argue for leaving cy près, as a judicial doctrine, alone.

Amending the uniform guidance on cy près and equitable deviation to return to a traditional understanding would properly distinguish the two doctrines and establish judicial certainty when discerning which doctrine to employ. This increased certainty will reduce unpredictable results and unreliable case law, thus realigning donor incentives for charitable trust-making.

A. DEALING WITH THE GENERAL INTENT REQUIREMENT

Some scholars argue that the UTC approach to the application of cy près, mentioned above, does not properly consider the need to efficiently use scarce resources from charitable trusts and that cy près, as a doctrine, needs further modification regarding its prerequisites.[212] Once more, the traditional prerequisites necessary to apply cy près maintain: that there be a charitable trust; that the

[212] *See* Lopez, *supra* note 1, at 1312 (noting that "UTC Section 413 . . . fails to fulfill its underlying goal of promoting efficient use of scare resources" and "propos[ing] replacing the UTC's presumption of general charitable intent with a presumption of specific charitable intent").

testator have a general charitable intent (i.e., seek to benefit society in some way, as opposed to a specific beneficiary); and that the terms of the trust have become impossible or impracticable such that circumstances have changed.[213] However, these prerequisites, some scholars argue, have contributed to the unpredictable outcomes seen across the judiciary.[214]

Specifically, the general intent prerequisite is a chief topic of debate. There are those who feel that the general intent factor should be replaced with specific charitable intent (i.e., the settlor's desire to benefit a particular charitable entity in some way).[215] Despite potentially resulting in more cy près denials, this change would arguably benefit charities more generally by increasing the number of charities that will receive cy près distributions without sacrificing efficiency, which in turn reduces ambiguity in the cy près case law.[216]

Similar arguments have been made that general charitable intent is unnecessary because courts should have the power to use the trust property for a similar purpose if the original purpose of the trust has become impossible or impracticable. This makes the American gift-over rule, that a gift over following the initial gift precludes application of cy près to save the gift, unnecessary.[217] Moreover, there is an additional argument that evidence of a charitable trust's general charitable intent is unnecessary because courts have used equitable deviation to achieve similar objectives and there is no requirement for general charitable intent in

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[213] *See* Fisch, *Changing Concepts*, *supra* note 3, at 383 (listing the three traditional prerequisites of cy près).

[214] *See, e.g.*, Johnson, *supra* note 120, at 354 (arguing that the traditional prerequisites are a "narrow interpretation" that "has resulted in indeterminate outcomes").

[215] *See, e.g.*, Lopez, *supra* note 1, at 1307–08 (arguing that a presumption of specific charitable intent should be adopted).

[216] *See id.* at 1308 (stating that "presuming specific charitable intent is likely to result in an increase in cy pres denials" but that doing so "benefits charity generally by increasing the number of charities that will receive assets via cy pres without any loss in efficiency"); *see also* Magallanes, *supra* note 3, at 431–32 (arguing for an objective "reasonable donor" standard rather than a rebuttable presumption of general charitable intent which would increase efficiency of charitable giving).

[217] *See* Chester, *supra* note 3 at 424 ("Once the testator expresses the primacy of his general intent via the original charitable gift, one may argue that he has put the gift within the public realm where a court should be empowered, upon failure, to apply it for a related purpose, regardless of any secondary dispositions which may have been made.").

equitable deviation.[218] Further, most donors do not have general charitable intent when creating the trust because donors, like all humans, have limited capacity to predict the future, let alone consider the possibility that the trust will be deemed impracticable or impossible years after the creation of the trust.[219] Yet, one could argue that the very fact that a cy près action is filed shows that the donor did not have a general charitable intent, because if the donor's intent was truly general, there would be no need for cy près modification because "[t]he probability of a cy près modification is inversely proportional to the generality of the language describing the purpose of the charitable trust."[220]

Thus, scholars have argued that specific charitable intent should replace general charitable intent, because a presumption of specific intent "increases the protection given to donative intent by forcing cy près plaintiffs to proffer evidence that the donor had a broader charitable purpose than that which is expressed by the specific language of the donative instrument."[221] Therefore, if cy près applicants cannot overcome the specific intent presumption and demonstrate a donor's more general charitable intent, then the cy près application will not prevail. Such an outcome arguably protects the donor's intent and tips the proverbial scales back in favor of the donor.[222]

However, this argument should be treated with some degree of skepticism. Removing general charitable intent as a prerequisite for the application of cy près will likely increase the amount of cy près denials. It will be more difficult for cy près applicants to overcome the presumption of charitable intent, given that it is already difficult to show the donor's actual intent apart from that which is articulated in the trust instrument itself.[223] Additionally, when more cy près actions are denied, there is a greater possibility that

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[218] *See* Fisch, *Changing Concepts*, *supra* note 3, at 389 ("Unlike the cy pres doctrine, the court need not find a general charitable intent as a prerequisite to [deviation's] application.").

[219] *See* Lopez, *supra* note 1, at 1343 ("[D]onors, in all likelihood, do not consider the possibility that future circumstances might nullify the original charitable objective.").

[220] *Id.* at 1346.

[221] *Id.*

[222] *Id.* at 1346–47.

[223] *See id.* at 1350 (stating that "without the benefit of . . . written instructions from the donor. . . . [T]he decision regarding which charitable entity should receive the charitable assets" can be a complicated and costly process).

charitable trusts will be turned over to the donor's estate when the charitable trust cannot carry on as directed.[224]

This becomes problematic when unnamed heirs stand to benefit from these assets.[225] If the donor wanted these heirs to take under the estate, then they presumably would have been named beneficiaries.[226] Further problems arise when the charitable trust involves the distribution of land, especially if the charitable trust fails and the land must be distributed to the unnamed heirs, because splitting up land between heirs is costly, time consuming, and rarely a smooth process.[227] However, courts normally deal with disputes over land ownership by partitions, and partitioning property may actually promote more efficiency than if the property was laying fallow. Because land use changes as time passes, the partition may actually be beneficial to promote the most efficient use of the land that otherwise would not have been possible.[228] Thus, on economic grounds, I am not opposed to this approach, but its downsides present considerable problems.

B. MERGING EQUITABLE DEVIATION WITH CY PRÈS

As with the argument above, some scholars would recommend that courts remove the traditional distinction between equitable deviation and cy près in order to have more stable and predictable outcomes within the court system.[229] Because these are two discrete but similar doctrines, courts have, in the past, arbitrarily decided how a case should be resolved by characterizing the proposed change to the trust as administrative (warranting equitable deviation), or substantive (warranting cy près), depending on which

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[224] *See id.* at 1347 ("The traditional answer is that the charitable assets are returned to the donor's estate by way of resulting trust.").

[225] *See id.* (stating that returning assets to the donor's estate is "the subject of much criticism, particularly if unnamed heirs are in the best potition to obtain the charitable assets upon return").

[226] *Id.* at 1348. The same argument can be made about any cy près beneficiary because the donor did not contemplate that the terms of the trust would need to be changed. *See id.* at 1348–49 (stating that any party, whether heirs, residual beneficiaries, or cy près beneficiaries "is the beneficiary of a windfall").

[227] *See id.* at 1352 ("Common ownership of real property can lead to inefficiency because of high transaction costs of dealing with the property.").

[228] *Id.* at 1353.

[229] *See, e.g.*, Pearson, *supra* note 119, at 128 (arguing for the elimination of the "meaningless dichotomy" between equitable deviation and cy pres).

outcome would be more preferential based on the facts of the case.[230] Additionally, as my results above illustrate, it may be the case that the distinction between the two doctrines has lost meaning, especially where deviation is concerned.[231] Because of this, some scholars argue that the doctrine of equitable deviation should be incorporated into the overall cy près analysis, as the UTC's cy près approach focuses on promoting how effective and efficient charitable trusts can be despite changing circumstances.[232] Moreover, some courts go beyond misuse and even intentionally "confuse" the doctrines in order to avoid the gift-over rule.[233] Thus, the argument goes, the doctrines should be combined, and there should be one test used when considering both administrative and substantive changes to a trust.[234]

However, the issue with combining the two doctrines is apparent with regard to charitable trusts that contain gift-over provisions.[235] When a trust contains a gift-over provision, which provides a secondary purpose for the trust if the original charitable purpose fails, cy près generally cannot apply, because it follows that there is no general charitable intent at all in the presence of a gift-over provision.[236] Essentially, the gift-over provision is a clear indication that the donor had a specific intent for who should benefit from the trust and contemplated what they would like to occur should the original charitable purpose of the trust fail. Yet, the equitable deviation doctrine can still be applied to failed trusts with gift-over provisions, because equitable deviation does not require a general

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[230] *See* Johnson, *supra* note 120, at 354 ("[C]ourts can rather arbitrarily determine ex ante the outcome of a particular dispute or litigation by simply characterizing a proposed change . . . as administrative . . . or as substantive . . . .").

[231] *See* Pearson, *supra* note 119, at 151 (arguing that "the broadened cy pres in the UTC and the latest Restatement are sufficient" without deviation to promote efficiency of charitable trusts).

[232] *Id.* (arguing that courts should be deprived of the equitable deviation doctrine because of its misuse and the cy près doctrine's ability to function in its place).

[233] *See* Chester, *supra* note 52 at 53–54 (describing courts' use of forfeiture to avoid the gift-over rule regardless of whether cy près or deviation is applied).

[234] *See* Pearson, *supra* note 119 at 150 (advocating for removing the division between cy près and equitable deviation).

[235] *See* Chester, *supra* note 52 at 48–49 (describing how the gift-over rule should operate differently under the traditional view of the two doctrines).

[236] *See id.* at 48 (stating that "a gift over for another specific purpose may indicate that the grantor preferred the alternative purpose to any different use the court could fashion out of the initial gift" under cy près).

charitable intent prerequisite.[237] Thus, merging equitable deviation with cy près—the latter of which requires a general charitable intent—would result in more failed charitable trusts because a gift over defeats the general intent requirement.[238] Therefore, if the two doctrines were merged, the general intent prong of cy près may need to be relaxed or removed in order to preserve the purpose of charitable trusts.[239]

Additionally, taking the argument a step further that cy près should encompass equitable deviation and have a broader application, some scholars have pushed for the expansion of cy près into the noncharitable trust realm, arguing that cy près can be an alternative plan for noncharitable trusts with frustrated purposes.[240] Although this would rewrite the terms of the trust and not truly be in line with the material purpose of the trust, there arguably needs to be some sort of cy près rule for modification of noncharitable trusts in order to prevent waste or for the settlor's intent to be completely frustrated altogether.[241] Further, by providing a mechanism for noncharitable trusts to be modified, it would account for trust modifications that are not aligned with the standard noncharitable trust modification procedures.[242]

While deviation has traditionally been applied to private trusts where cy près has not, a merger of the doctrines, or an application of cy près to private trusts through a merger of the doctrines, is a bridge too far. For this reason—and others, including the fact that doing so instantiates the way that courts already bungle the distinction between cy près and equitable deviation—I take the view that this approach of merging the two distinct doctrines is the most problematic. While ostensibly leading to greater certainty, it perpetuates the same morass in which we presently find ourselves,

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[237] *See id.* (explaining that the settlor's initial charitable purpose is not altered when courts apply equitable deviation).

[238] *See id.* (stating that a gift over indicates a lack of general charitable intent).

[239] *See id.* at 49 (stating that the general view in the mid-twentieth century was that "a gift over blocks cy pres application to the original gift").

[240] *See, e.g.*, Thomas E. Simmons, *Purpose Trust Cy Pres*, 45 ACTEC L.J. 67, 71 (2019) ("[W]hat's needed, it seems, is a *cy pres* sort of rule for noncharitable purpose trusts.").

[241] *See id.* (arguing for a rule that would permit modifications of a noncharitable purpose trust).

[242] *Id.* ("A rule permitting modifications when a noncharitable purpose becomes unlawful, impractical, impossible, or wasteful would account for trust revisions that do not otherwise fit within existing trust reformation procedures.")

with respect to the great confusion over the distinctions between the salient equitable doctrines used to modify charitable trusts. This proposal would also continue to depress charitable trust-making on the grounds that it makes trust reform all but a certainty.

C. LEAVING CY PRÈS ALONE*

Although some of the arguments to broaden the cy près doctrine are compelling, a number of them should be met with suspicion. Many of the arguments in favor of the above alternatives suppose legislative prerogative to rewrite judicial equitable doctrines. Assuming that the settlor is best equipped to make decisions about their own assets, the legislature ought not to have the power to change settlors' wishes after their death, which flies in the face of the donor's expectation of his or her freedom of disposition.[243] There should also be concern that broadening the judicial application of cy près will result in fewer gifts to charities. Would-be settlors of charitable trusts have every right to fear changes in the terms, to say nothing of the purpose, of their trusts.[244] Thus, some scholars argue that in order to prevent cy près from being applied too broadly and neglecting the wishes of the settlor, courts must continue to interpret impossibility and impracticability narrowly to encourage charitable giving.[245]

Despite the arguments that cy près should be modified or expanded, there are strong arguments in favor of the preservation of a narrow application of the cy près, one that returns it to its origins. Specifically, some scholars argue that cy près should be preserved so that settlors can rely on judges to uphold their intent upon their death.[246] Not to mention that broadening the application of cy près may lead to courts favoring certain widely known charities

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[243] *See* Pearson, *supra* note 119, at 147 (discussing the philosophical criticism of broadening the cy près doctrine that a settlor's individual right to control property after death should not be interfered with).

[244] *See id.* at 148 (acknowledging the importance of allowing settlors to control their post-death charitable giving).

[245] *See id.* ("Rigid adherence to a literal interpretation of [impossible, impractical, and illegal] is fundamentally important to the incentive to accumulate wealth and to make charitable gifts.").

[246] *See id.* at 145–46 (arguing that cy près reform should be limited to trusts with large surpluses because in many cases, "settlors would not wish to place their assets in the hands of a judge armed with an expansive cy près").

and ignoring less popular causes that may have only been of interest to the settlor.[247] Quite possibly, a broader interpretation of the doctrine discourages charitable trust-making altogether.

Admittedly, this position is the minority view, and by holding it, I find myself outflanked by the number of scholars arguing for cy près's re-evaluation or modification. However, it is not the case that this line of thought fails to take into consideration the problems that arise if the charitable trust also fails. Rather, it seeks to uphold the stability of case law when a trust inevitably does fail.

That is, returning to a traditional understanding of cy près should promote greater certainty than any other alternative can provide. The trend toward a broader cy près application, including by conflating it with equitable deviation, disregards the donor's intent. The law of trusts has historically favored donor control, and the courts—where this law evolved—are the proper forum for ensuring that the settlor's donative intent is carried out as near as possible and according to the settlor's wishes. The same brings greater balance to the "dead hand" paradox in that this tension forces courts into the position of reading the doctrine narrowly and not confusing it with equitable deviation. Were the impossibility or impracticability of charitable trusts narrowly construed, the courts would have less, not more, power to change the terms of the trust on a whim.[248] This is arguably the best-case scenario for encouraging charitable trust-making.

However, some scholars argue that courts should reduce dead hand control over charitable assets due to the concerns that accompany the passage of time, in favor of a more flexible approach and "increased charitable autonomy."[249] Indeed, the passage of time is one factor that courts should and implicitly do consider[250] in making decisions about what ends best effectuate the longevity of charitable trusts. Impossibility and impracticability are byproducts

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[247] *Id.* at 148 ("[C]ourts may also impede philanthropic variety by altering trusts that serve causes that may otherwise be ignored except by those settlors with a special interest in them.").

[248] *Id.* at 148–49 (arguing that, when a court construes impossibility, impracticability, and unlawfulness broadly, settlors are deterred from using charitable trusts).

[249] Atkinson, *supra* note 3, at 97–98.

[250] *See supra* Table 7 (indicating that the passage of time makes courts more likely to modify a trust).

of time and rarely plague a charitable trust from its inception.[251] But that is why a narrow application of cy près is all the more important: to ensure that a settlor's intent is not undone one judge at a time.

This is not to say that the doctrine should stagnate. In fact, it evolved tremendously over the course of the twentieth century.[252] Yet, I have no doubt that its modern application can still be consistent with traditional notions of the doctrine. To concede a point to the alternative view, if notions of cy près remain traditional, it may be worthwhile to consider if charitable trusts should be penned with cy près opt-in or opt-out provisions, which will reduce the error rate of judges deciding whether the donor evinced a general or specific intent.[253] Another option legal scholars have considered is to leave the distribution of the trust at issue to the trustees' discretion, so long as the trustees ensure the trust is used for charitable purposes.[254] Leaving the decision to the trustees would allow those with the closest knowledge of the settlor's intent to make decisions about the continuation of the trust. Yet, this approach has weaknesses too, not the least of which is that it could lead to disagreements among the trustees and the beneficiaries.

It is my view that a narrower, not broader, construction of the doctrine best balances the interests of the individual and the collective. This is key to the tension between the dead hand control of settlors and the courts, and it should be a place of tension. To the extent that we want to encourage charitable trust-making, we must offer settlors a reasonable degree of certainty that their material donative purpose will not be rewritten—only repurposed in line with their wishes should their trusts fail. This view supports the idea that courts should return to the traditional distinctions between the two equitable doctrines of cy près and deviation—that is, leaving them alone. But doing so requires a rewriting of the UTC, if only to make the distinction between cy près and equitable

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[251] *See* Ryan, *supra* note 4 at 332 (finding that, with each decade that passes, a court is 1.4% more likely to apply cy près).

[252] *See id.* at 303–07 (examining the evolution of cy près in the twentieth century).

[253] *See* Lopez, *supra* note 1 at 1354 ("[S]traightforward opt-in and opt-out clauses reduce the error rate associated with the intent determination because they unambiguously indicate the donor's preferences . . . .").

[254] *See* Atkinson, *supra* note 3 at 1115–16 (advancing a solution to the confusion around cy près that would "[e]liminate legal enforcement of dead hand control and leave the disposition of charitable assets to the discretion of their trustees").

deviation more readily apparent to its interpreters. If broadcast to the judiciary and would-be settlors of charitable trusts correctly, reforming the cy près doctrine to align with its traditional underpinnings offers the best course of future action.

V. CONCLUSION

Cy près is an essential doctrine in American charitable trust law. It permits courts to modify trusts so that their settlors' original intent can be repurposed for the greater good, perhaps in perpetuity. No other legal doctrine lies more closely to the inflection point of the tension between "dead hand" control and the interests of the collective. But no other doctrine offers greater potential for effectuating the will of both. Yet, beyond calls for reform, little is known about the doctrine and how its evolution, leading to its conflation with deviation, may lead to its demise. This Article aims to change the former and ensure that the latter need not be the case.

Although the discussion provided in this Article sheds greater light on the cy près doctrine, the principal contribution of this Article is its novel application of empirical methods to analyze when and how courts use the cy près doctrine and equitable deviation correctly, as well as incorrectly.[255] No other study to date has captured raw data to descriptively relate that the problem lies not with the cy près doctrine but its conflation with equitable deviation by modern courts. Likewise, no other study to date has put this trend under the microscope of logistic regression analysis to decipher when and how courts use the doctrine rightly and wrongly.

My results indicate that, for the most part, courts apply the cy près doctrine correctly. That is, when reversionary or gift-over clauses are present, or where the trust serves a private purpose before effectuating a charitable purpose, they are less apt to apply cy près to change a trust.[256] Similarly, where certain trusts (i.e., public purpose, educational purpose, and medical purpose trusts) are concerned, they are more inclined to use the cy près doctrine as a mechanism for continuing the settlor's general charitable intent rather than allowing the trust to wither on the vine.[257] Courts may

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[255] *See* discussion *supra* section II.A.

[256] *See supra* Table 3; *see also supra* Table 4.

[257] *See supra* Table 4.

indeed tend to do the same for religious purpose trusts, as well.[258] These results reveal courts' preferences for maintaining these trusts, perhaps because they serve the greatest good among all typologies of charitable trusts. But regardless of the typology of trust, courts seem only to turn to cy près when the facts so merit and sufficient time has passed following the trust's creation. This latter fact evinces courts' preferences for the collective over the wishes of the individual—something that is key to the tension between courts and donors of charitable trusts in charitable trust modification cases.[259]

But it is also the case that courts are presently confused on when to apply cy près or deviation, especially when courts seek to alter the material purpose of a trust incorrectly under the doctrine of deviation.[260] And it is especially the case that courts' confusion of the two doctrines has only grown since the passage of the UTC, as my results demonstrate.[261] This confusion is dangerous when considering the economy of charitable trust-making overall. Inconsistent case law may depress charitable trust-making if not corrected.[262] Worse still, it may cause feelings of distrust of and illegitimacy in the court system for donors, trustees, and beneficiaries.

My results indicate that the use of cy près is in decline but its conflation with other equitable doctrines that result in trust modification has only increased. However, this confusion tends to run in one direction. Principally, courts are greatly confused about when and how to apply the equitable deviation doctrine. This is likely because the distinction between cy près and deviation has eroded through legislative measures as well as judicial interpretation of these measures.[263] To the extent that the Uniform Laws become more uniform across jurisdictions, we can expect more of the same, further obscuring the difference between the two doctrines. That is, the decline in judicial use of the cy près doctrine

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[258] *See supra* Table 4.

[259] *See* Atkinson, *supra* note 3, at 99 (articulating the tension between donor intent and promoting the general welfare in the disbursement of charitable assets).

[260] *See supra* section III.C.*5*.

[261] *See supra* Table 8.

[262] *See* Pearson, *supra* note 119, at 148 ("[F]ailing to respect testamentary schemes of settlors will result in fewer gifts to charity . . . courts may impede philanthropic variety by altering trusts that serve causes that may otherwise be ignored. . . .").

[263] *See* discussion *supra* section III.C.

is no doubt related to the hampering of traditional understandings of the doctrine through complications of so-called uniform guidance. But by resurrecting the traditional distinction between the two doctrines—both in terms of uniform guidance and court adoption—charitable trust case law can promote greater certainty. Charitable trust settlors can have an expectation that the underlying purpose for which they created these trusts will not be violated and that courts will allow their charitable intent to carry forward for generations. In turn, this certainty encourages charitable trust-making. When that is the case—and it can be again—we all win.

VI. APPENDIX

Table A-1: Correct Use of Cy Près & Deviation (Stepwise)

VARIABLES	Impracticability	Waste	Ambiguity
Date Differential Decades	1.0041 (0.0392)	1.0324 (0.0385)	1.0270 (0.0374)
Trust Value Differential - 2019 CPI Adj. ($1Ks)	0.9999 (0.0000)	0.9999 (0.0000)	0.9999 (0.0000)
Reversion	0.2553*** (0.1333)	0.2529*** (0.1306)	0.2554*** (0.1316)
Private/Business Purpose	-0.5105*** (0.1314)	0.5251** (0.1315)	0.5208*** (0.130)
Public Purpose	1.8841** (0.4983)	1.6579** (0.4248)	1.6723** (0.4281)
Educational Purpose	2.5884*** (0.6567)	2.2989*** (0.5714)	2.3684*** (0.5881)
Medical Purpose	2.4956*** (0.7363)	2.4586*** (0.7128)	2.5038*** (0.7235)
Art, Library, Museum	1.1608 (0.4613)	1.0269 (0.4059)	1.0418 (0.4113)
Cemetery	0.7046 (0.5705)	0.5250 (0.4230)	0.5505 (0.4423)
Religious Purpose	1.4351 (0.4350)	1.3559 (0.4008)	1.3619 (0.4033)
Racial Clause	1.4301 (0.9057)	1.4133 (0.8655)	1.4161 (0.8675)

Impracticability	5.6512*** (2.4555)		
Waste		0.3020 (0.0895)	
Ambiguity			0.6421 (0.4561)
Constant	0.2487*** (0.0770)	0.3020*** (0.0896)	0.3077*** (0.0914)
Observations	421	421	421
Linear Ratio χ^2	59.64	42.55	42.12
χ^2 p value	0.0000	0.0000	0.0000

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$

Table A-2: Incorrect Use of Cy Près & Deviation (Full Model)

VARIABLES	Full Model
Date Differential - Decades	1.0031
	(0.0333)
Reversion	0.5041**
	(0.2015)
Private/Business Purpose	1.4708**
	(0.2258)
Public Purpose	0.6709*
	(0.1579)
Educational Purpose	0.9684
	(0.2299)
Medical Purpose	0.9461
	(0.2616)
Art, Library, Museum	1.2055
	(0.4453)
Cemetery	0.3654
	(0.2500)
Religious Purpose	1.1322
	(0.3031)
Racial Clause	1.8107
	(0.8729)
Impracticability	1.7832*
	(0.5936)
Waste	3.2602*
	(2.3654)
Ambiguity	0.5851
	(0.3859)
Constant	0.4250***
	(0.1318)
Observations	574
Linear Ratio χ^2	42.48
χ^2 p value	0.0382

Standard errors in parentheses
*** $p<0.01$, ** $p<0.05$, * $p<0.1$