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# An Historical and Empirical Analysis of the Cy-près Doctrine

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# AN HISTORICAL AND EMPIRICAL ANALYSIS OF THE CY-PRÈS DOCTRINE

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ABSTRACT

Cy près is a pivotal doctrine in estate law and indeed American jurisprudence. It places courts in the shoes of settlors of charitable trusts to discern not only their original intent but also affords the possibility of continuing the material purpose for which settlors created enduring legacies of philanthropy benefitting society. For this reason, it may well be that no other legal doctrine is as closely tied to the interests of the individual and the collective as cy près. And my first-of-its kind study puts the cy-près doctrine front and center, while providing three major contributions to the field.

First, through deliberative historical analysis, I offer an in-depth look at the types of cases American courts have heard involving the use of cy près. This historical categorization and explication is itself unique and provides significant insight into the controversies that allowed the doctrine to evolve. Second, the application of empirical methods to examine the doctrine is groundbreaking. By holistically examining the data I collected, I have been able to discern three major themes. The passage of time yields a gradual but greater adoption of the use of the cy-près doctrine. The presence of reversionary, gift-over, or private interests renders the use of the cy-près doctrine less practicable. And finally, courts are overwhelmingly more likely to apply cy près in cases involving public charitable trusts, educational purpose trusts, and medical purpose trusts, even when controlling for other independent variables and typologies of charitable trusts. Last, fifty-state surveys are commonplace; yet, none exists for the doctrine of cy près. I was able to assemble such a survey that not only assisted me in conducting this research but will undoubtedly aid other researchers for years to come, which I have addended to this Article in the Appendix.

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[*] Associate Professor of Law at the University of Louisville Louis D. Brandeis School of Law and Affiliated Scholar at the American Bar Foundation. I wish, first and foremost, to thank my research assistants—Samantha Ferrucci, Blaine Payer, Jordan Sasa, Sophia Weaver, and Madison Wurth—who devoted significant time and effort in helping me create this Article and the dataset on which my findings are based, not to mention providing valuable research assistance on an obscure topic: the cy-près doctrine. Without their assistance, none of this research would have been possible, and this Article, is a testament to their dedicated efforts. I would also like extend special thanks to Will Hilyerd for his invaluable law librarian skillset which came to fruition in the most comprehensive 52-jurisdiction survey of the cy-près doctrine imaginable. Finally, I would like to thank Allison Anna Tait (University of Richmond School of Law) and Reid K. Weisbord (Rutgers University Law School) for their charitable and useful commentary on this Article in its early stages, which immeasurably improved it.

## INTRODUCTION

The cy-près doctrine is esoteric. Perhaps as a result, it has generated modest academic interest, as a legal doctrine, especially in modern times.[1] It is also rare among legal doctrine in that is not named in the vernacular English or Latin. Rather, as the French "è" suggests, it comes from the Old French "cy près comme possible," meaning "as near as possible." But to what is the enigmatic doctrine to be applied as near as possible?

For over 200 years, courts have been petitioned to examine the "dead hand" control of decedents who leave sums of money or property, or both, in trust for charitable purposes. Once forbidden, American courts rejected cy près on the basis that the doctrine did violence to the animating principle of American estate law: the freedom of disposition. Yet, in modern times, courts have increasingly waded more deeply into the murky waters of interpreting the material purposes and administrative terms on which settlors of charitable trusts condition gifts in trust for public benefit. The result: more and more trusts are put to different uses than originally intended, when courts deem their purposes or terms to be rendered stale, through the long-standing but historically-avoided doctrines of cy près and equitable deviation, respectively. But a court's use of these doctrines to modify a trust's material or administrative purposes is fraught with complication. How extensively do these equitable doctrines permit the courts to deviate from the trust settlor's original terms and purpose, and what, if at all, is the distinction between the doctrines? In spite of these intriguing questions and captivating complexities, the implicit reasons why courts might invoke the cy-près doctrine, in particular, to alter a charitable trust's material purpose have not been explored in significant depth heretofore.[2] Consequentially, there is great uncertainty surrounding the cy-près doctrine, and its appropriate application, for judges and scholars alike.

I undertake to resolve this uncertainty in a first-ever historical and empirical analysis of a universe of cases receiving a published opinion from an American

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[1] Academic scholarship around cy pres, as a doctrine, is quite limited. There are a few seminal works on the matter, yet nearly all were published many decades ago. *See, e.g.,* Edith L. Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME L. REV. 219, 219–22 (1953); Edith L. Fisch*, Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953); Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. Q. 382, 382 (1958–1959); and C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L. J. 407, 412 (1978). Renewed attention to the doctrine is present but lacking in volume. *But see* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111 (1993); Alberto B. Lopez, *A Revaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307 (2009); Allison Anna Tait, *The Secret Economy of Charitable Giving*, B.U. L. REV. 1663 (2015); and Jeffery N. Pennell & Reid Kress Weisbord, *Trust Alteration and the Dead Hand Paradox*, __ ACTEC __ (forthcoming 2023).

[2] *But see* note 1, supra. However, academic interest in the doctrine has waned since the mid-Twentieth Century, despite its rise in use by the courts. *See* Appendix.

court, which involved an invocation of the cy-près doctrine to decide a dispute with respect to a charitable trust, from the nation's founding through 2019. It is safe to say that a study of this magnitude has never been performed on the doctrine of cy près—let alone on charitable trusts, with which the doctrine is closely coupled. Specifically, this study provides a novel analysis of cy près at inflection points in the use of the doctrine, along a lengthy timeline in American history. Additionally, and importantly, this study endeavors to test empirically whether the classification of the beneficiary of a trust, the purpose of the trust, and the time elapsing over which the doctrine evolved have bearing on whether a court employed the cy-près doctrine to deviate from the trust's original purpose. My results indicate that certain trusts created for certain purposes (i.e., public charitable trusts, educational purpose trusts, and medical purpose trusts) are more likely to also benefit from a court employing the cy-près doctrine to effect as nearly as possible the settlor's intent. Also, I find that time, as a function of the evolution of the cy-près doctrine, redounds to a greater likelihood of a court using cy près.

This Article proceeds in three parts. Part I explores the historical origin of the cy-près doctrine, charting its evolution to the present day. Part II redoubles this effort by examining specific cases, assigning them a typology, and extrapolating themes running across them. Finally, Part III unpacks the novel empirical dataset I have created, with the assistance of my able research assistants. This part investigates the types of cases that have come before probate and appellate courts and delivers an explanation of my findings.

This Article proffers three key contributions to the field of trust law. First, it examines a doctrine, cy près, about which historical knowledge is limited. Second, it surveys the historical evolution of the doctrine, which has been shaped by the passage of time, through descriptive and empirical methods—and is the first such study to do so. Last, it supplies a novel state survey of the adoption of the doctrine in 52 jurisdictions, also the only such survey of its kind. These contributions have implications not only for chronicling the doctrine's history but for projecting the future role of the doctrine's use.

## I. A HISTORY OF THE CY PRÈS DOCTRINE

### *A. Ancient Beginnings and English Roots*

As a legal mechanism, cy près has rather ancient roots.[3] Indeed, its origin dates back to the days of the Roman Empire[4] and even predates the rule of

[3] *See* Edith L. Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME L. REV. 219, 219–22 (1953) (noting Roman origins, Mortmain Act of 1736, and the 1601 Statute of Charitable Uses).

[4] Cy pres, as discussed in this example, is reported in the Digest of Justinian. Edith L. Fisch, *Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 375 (citing DIGEST OF JUSTINIAN

Emperor Constantine.[5] In one of the earliest records of a testamentary problem invoking the application of cy près, a city within the Roman Empire "received a legacy bequeathed for the purpose of commemorating the memory of the donor by using the income of the legacy to hold yearly games. As such games were illegal at that time, a problem arose concerning the disposition of the legacy."[6] The solution, as prescribed by Modestinus, was as follows:

> Since the testator wished games to be celebrated which are not permitted, it would be unjust that the amount which he has destined to that end should go back to his heirs. Therefore, let the heirs and magnates of the city be cited and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner.[7]

It is no surprise that such a decision permitting the modification of the frustrated intention of a donor would have carried favor with decision makers many years hence. Indeed, this modification of the purpose of a trust with charitable intentions is arguably efficient from an economic perspective: it does not allow a sum of money to collect dust, or scant interest, while waiting for a proper application of its use. Instead, it permits the immediate use of the trust to support a charitable purpose as near as possible to the donor's originally intended use.[8] This is the outcome desired by decision makers who employ the use of the cy-près doctrine to modify the purpose for which a charitable trust was created by a donor.

Although the Roman legacy described above was not explicitly a charitable trust, it clearly contained elements of a charitable trust. Like the doctrine of cy près, charitable trusts have a long history as well, and their emergence in medieval England informs their treatment as a favored legal instrument today. It is not known how the doctrine of cy près was introduced in England,[9] but the doctrine of charitable uses generally was introduced in England via the

33:2:16). For more on cy pres and Roman Law, *see e.g.* H. L. Manby, *The Cy Près Doctrine*, 15 LAW MAG. & L. REV. 5th Ser. 199, 201–02 (1890).

[5] As Professor Fisch puts it, "[t]he cy pres doctrine was not an innovation of Christianity as it was used before the time of Constantine." Fisch, *supra* note 8, at 375 (citing JOSEPH STORY, 3 COMMENTARIES ON EQUITY JURISPRUDENCE §1518 (Winfield Hancock Lyon, ed., 14th ed. 1918)).

[6] *Id.*

[7] DIGEST OF JUSTINIAN 33:2:16.

[8] *See* RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. L. INST. 1959).

[9] *Id.*

Ecclesiastics.[10] Professor Edith Fisch notes that charitable trusts developed "in connection with the medieval practice of alms giving as a means of expiating sin."[11] That is, donors would give to charity as a way of reserving a seat for themselves in heaven and to "avoid the clutches of the devil and the tortures of hell."[12] Cy près came into play in order to effectuate the donor's attempt to purchase salvation, the theory being that if the testator, by donating money to charity, could "purchase a position in the heavenly kingdom, he ought not to be denied entrance if the gift, for some unforeseen reason, could not be carried out in the manner specified by him."[13]

Since a great many church faithful were giving money and land to the church on their death beds, the church came into a great amount of property.[14] Because of this, the sovereign lost its expectation of escheat and other property rights.[15] Unsurprisingly, laws were enacted to prevent this result.[16] These laws "provid[ed] that lands held by religious bodies should be forfeited to the overlord; and if he failed to enter, then to his overlord, and finally to the crown."[17]

Another consequence of the attempts to purchase salvation on one's death bed was the disinheriting of donor's family members.[18] To prevent this from happening, the Mortmain Act was passed—a law voiding any attempts at death-bed salvation by charitable giving.[19]

With the reigns of King Edward VI and, subsequently, Queen Elizabeth I, English society moved towards more appreciation of charities and charitable giving.[20] However, Queen Elizabeth was faced with the rampant abuses within charities caused by the fact that charities "were subject only to the control of the visitor."[21] In other words, that the charity's founder had the right to ensure that the charity fulfilled its purposes.[22] However, as these powers were only sporadically exercised, "many abuses in the management of charitable institutions and the application of their funds resulted."[23] To correct these

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[10] Fisch, *American Acceptance of Charitable Trusts*, *supra* note 7, at 219 (citing Bascom v. Alberton, 34 N.Y. 584, 601 (1866); Joseph Willard, *Illustration of the Origin of Cy Pres*, 8 HARV. L. REV. 69, 72 (1894)).

[11] Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 8, at 375.

[12] *Id.*

[13] BOGART, TRUSTS AND TRUSTEES § 431 (1935).

[14] Fisch, *American Acceptance of Charitable Trusts*, *supra* note 7, at 219.

[15] *Id.* (citing Hubbard v. Worcester Art Museum, 80 N.E. 490, 491 (1907)).

[16] *See id.*

[17] *Id.* at 219–20 (citing 3 SCOTT, TRUSTS § 348.2 (1939); 1 BL. COMM., 1079–80, n. 7 (Jones ed. 1915)).

[18] Fisch, *American Acceptance of Charitable Trusts*, *supra* note 7, at 220.

[19] *Id.* (citing 9 GEO. II, c. 36 (1736)).

[20] *Id.* at 221.

[21] *Id.* (citing TUDOR, CHARITIES AND MORTMAIN 2 (4th ed. 1906)).

[22] *Id.*

[23] *Id.*

abuses, the Statute of Charitable Uses was enacted.[24]

The 1601 Statute of Charitable Uses, true to its name, established a system governing charitable uses for gifts in trust.[25] The Statute of Charitable Uses "gave the chancellor the power to inquire into breaches of and enforce charitable trusts by special commission, while preserving the already existing remedy afforded by the Chancery court."[26] This statute would, eventually, play a critical role in American Courts' disdain for cy près, as discussed further below.

Cy près' history in the United States depends greatly on English law and American distrust of English law. In England, there were two types of cy près: judicial (equity jurisdiction) and prerogative ("representative of the king").[27] The distinction between the two types of English cy près is important to understand the United States courts' initial rejection of the doctrine as a whole. Under prerogative cy près, charitable trusts were expected to fall in line with the public policy established by the regent. Yet, its distinction from judicial cy près in England is not obvious. To explain, the following quotation provides useful context:

> The historical causes of the division between judicial and prerogative cy près being so obscure, it is not surprising that no clear line of demarcation between the two types of cases can be found. Since the duty of applying gifts cy près was delegated by the king to the chancellor, as keeper of the king's conscience, the chancellor served a double function: he exercised the prerogative cy près power as a ministerial function, and as a judicial officer applied judicial cy près. The failure of sixteenth century reports to distinguish in which capacity the chancellor acted in any particular case makes impossible any definite differentiation between the two doctrines. Nevertheless, the English courts did continue to recognize a distinction, with the consequence that confusion mounted throughout the seventeenth and eighteenth centuries.
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> Gradually, there evolved in England the concept that

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[24] *Id.*

[25] *Id.* at 221–22; 43 ELIZ., c. 4 (1601)).

[26] *Id.* at 222.

[27] *Id.* at 229 (citing 2 PERRY, TRUSTS AND TRUSTEES §718 (7th ed. 1929)). For more information on the distinction between prerogative and judicial cy pres, *see generally*, Note, *A Revaluation of Cy Pres*, 49 YALE L. REV. 303 (1939); *see also* Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 8, at 377. For even more information about early cy pres in England, *see generally*, H. L. Manby, *The Cy Près Doctrine*, 15 LAW MAG. & L. REV. 5th Ser. 199 (1890) *and* ROBERT HUNTER MCGRATH, JR., THE DOCTRINE OF CY PRES AS APPLIED TO CHARITIES (1887). (available at: https://heinonline-org.rwulib.idm.oclc.org/HOL/Page?handle=hein.beal/doccyprs0001&id=1&collection=beal&index=beal/doccyprs).

> judicial cy près was solely an intent-enforcing doctrine, whereby the charitable intention of the donor might be effectuated. Prerogative cy près, on the other hand, was deemed to be purely at the discretion of the crown, without regard for the donor's intended purpose….[28]

Despite there being two types of cy près in antiquity, in many ways the history of the emergence of judicial cy près is unclear, and there is "no clear line of demarcation" between the two types in the modern doctrine.[29] Regardless of reasons for the historical collapse of judicial and prerogative cy près into one doctrine, it is possible that such confusion resounds today in the common conflation of the equitable deviation doctrine with cy près. But judicial cy près, as traditionally understood and as it stands today, is not a monolith. Rather, it refers to a court's specific and active power in the present moment to modify the material purpose of a trust and not its administrative provisions, the latter of which may be modified by the equitable doctrine of deviation. This distinction was once readily apparent to American jurists but may have lost its meaning in modern times. Still, both equitable doctrines were loathsome to early American courts.

### *B. Cy Près in the New American Republic*

While drawing from the English common law, the courts of the United States of America, upon the country's founding, created their own approach to cy près and eschewed certain legal doctrines as offensive to the egalitarian ideals of the new democratic republic. In the earliest decisions made by United States courts in cases involving the estates of citizens of the new nation, a clear disdain for the cy-près doctrine emerged from the opinions of the judges who decided them.[30] There are several different theories as to why U.S. courts initially rejected cy près—and continued to reject it for many decades, only to embrace the doctrine within the Twentieth Century.[31]

Many theories of why American courts were so reluctant to accept the doctrine focus on the American distrust for English systems after the Revolutionary War as well as a societal focus on an individual's property rights.

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[28] Note, *A Revaluation of Cy Pres*, 49 YALE L. J. 303, 303–05 (1939) (footnotes and citations omitted).

[29] *Id.*

[30] Edith L. Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. Q. 382, 382 (1958–1959) ("The changing attitude of the American judiciary and legislatures in regard to charitable dispositions has run the gamut from early rejection to complete acceptance and liberal support, and as pertains to the cy près doctrine in particular, has ranged from strict enforcement of its prerequisites to the present tendency towards liquefication.").

[31] *Id.* (citation omitted).

Additionally, the doctrine itself was complex, and, this too, played a role in American courts' initial rejection of cy près.[32] The doctrine is complex in the sense that it requires judges to make determinations about the settlor's material purpose for creating the charitable trust. And the doctrine is contradictory in the sense that judges have, in many cases, misapplied the doctrine to either achieve a repurposing of the trust or not to do so, even when the facts merit its use. That is, the pitfalls of the doctrine "have so confused many courts that they have proved faithless to the axiom that charities are the favorites of the law."[33] The principal theories for the doctrine's rejection, use, and misuse are described below and are categorized into "theory groups": the revocation of the Statute of Charitable Uses, separation of powers, confusion over the differences between prerogative cy près and judicial cy près, societal views, and the desire to give primacy to a testator's intent.[34]

1. Revoking the Statute of Charitable Uses

After the Revolutionary War concluded, states expressed "a feeling of great revulsion to law of English derivation."[35] As a result, states began a nearly wholesale repeal of English statutes.[36] As part of this new war against English law, the Statute of Charitable Uses was among the first victims on the chopping block.[37] Thus, the law of charitable trusts largely perished in states that repealed the Statute.[38] This was because, in the Eighteenth and early Nineteenth Century, courts believed that the entire law of charitable trusts depended upon the Statute of Charitable Uses, and when legislatures repealed the statute, many believed that the law of charitable trusts was also consequentially repealed, resulting in courts' refusal to uphold charitable trusts.[39]

Although the English Courts had enforced charitable trusts long before the Statute of Charitable Uses was adopted, American Courts, specifically the U.S. Supreme Court, determined the statute to be the origin of jurisdiction over

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[32] Note, *A Revaluation of Cy Pres*, *supra* note 28, at 303 (footnotes omitted). "The antiquity of that doctrine has made it an unwieldy tool, with the result that the American law of cy près has become complex and contradictory." *Id.*

[33] *Id.* at 303 n. 5 (citing Russell v. Allen, 107 U.S. 163, 167 (1882); Paul R. Stinson, *Modern Charitable Trusts and the Law*, 17 ST. LOUIS L. REV. 307, 307 (1932); 25 VA. L. REV. 351 (1939)).

[34] For a more in-depth discussion on the "Factors Which Retarded the Acceptance of the Cy Pres Doctrine in the United States," *see* EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 9–91 (1950). available online at: https://heinonline-org.rwulib.idm.oclc.org/HOL/Page?handle=hein.beal/cypresdus0001&id=1&collection=beal&index=.

[35] Fisch, *American Acceptance of Charitable Trusts*, *supra* note 7, at 222.

[36] *Id.*

[37] *Id.* at 223.

[38] *See id.*

[39] *See id.* at 223 (citing Bascom v. Albertson, 34 N.Y. 584 (1866); Levy v. Levy, 33 N.Y. 97 (1865)); *id.* at 224 (citing Hopkins v. Crossley, 96 N.W. 499 (1903)).

charitable trusts.[40] This interpretation was due, in part, to the statute's enumerated possible charitable purposes and because English chancery courts often referred to the statute when determining whether a trust was charitable or not.[41] Accordingly, in *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, the Supreme Court adopted the erroneous view that there could be no charitable trusts without the Statute of Charitable Uses.[42]

The Supreme Court's 1819 decision in *Trustees of the Philadelphia Baptist Association* was the result of a misconstruction of the Statute of Charitable Uses and subsequently became "the instrument that outlawed charitable trusts" in several states, including Virginia, where the case originated.[43] As Professor Fisch notes, the Court incorrectly determined that "English equity courts had no inherent jurisdiction to sustain charitable trusts, jurisdiction being derived only from the Statute of Charitable Uses…."[44] Since Virginia had repealed that statute, equity courts in the state—which had the same jurisdiction as their English counterparts—could not enforce charitable trusts. This flawed logic pervaded American Courts for many years,[45] even after the Supreme Court overruled *Trustees of the Philadelphia Baptist Association* in *Vidal v. Girard's Executors* in 1844.[46]

Akin to the misunderstanding of the Statute of Charitable Uses, there was also confusion over the states' interpretation of trust law, whether codified in state statute or not. For example, many states looked to New York, where its system of chancery (and later, surrogate) courts interpreted its state statutory trust laws. With this forbearance on the part of other state's courts, and for the reasons I will explain momentarily, American courts were slow to recognize that the law of charitable trusts was based on "judicial interpretation of the codification of the New York law of trusts."[47]

In the early 1800s, New York changed real property trust law to allow only specific, listed uses and trusts in land.[48] The New York law had no express provision pertaining to charitable trusts.[49] This ambiguity lead to an initial determination by New York Court of Appeal in *Shotwell v. Mott* that the statute only related to private trusts, meaning charitable uses were excluded but did not mean that they were altogether disallowed.[50] Despite this confusing holding,

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[40] FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES, *supra* note 38, at 11.

[41] *Id.*(citations omitted).

[42] Fisch, *American Acceptance of Charitable Trusts*, *supra* note 7, at 223 (1953) (citing Trustees of the Phil. Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1 (U.S. 1819)).

[43] *Id.* at 225 (citing Trustees of the Phil. Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1).

[44] *Id.*

[45] *See id.* at 223–27.

[46] *Id.* at 227. *See also*, Vidal v. Girard's Executors, 2 How. 127 (U.S. 1844).

[47] *Id.*

[48] *Id.*

[49] *Id.* (citing 1 N.Y. Rev. Stat. § 45 (1829)).

[50] *See id.* at 227–28 (citing Shotwell v. Mott, 2 Sandf. Ch. 46, 56 (N.Y. 1844)).

which ostensibly seemed to open the door to greater uptake of charitable trusts created from gifts of real estate, later cases failed to follow the precedent of New York's highest court, and *Shotwell* was overturned in 1873.[51] Early adopters of charitable trust law, such as Michigan, Minnesota, and Wisconsin, espoused the New York statute as well as the New York Court of Appeal's interpretation of the statute, thus refusing to uphold charitable trusts of realty.[52] As a result, charitable trust law in several states was mired from its inception.[53]

2. Confusion over Sovereign Prerogative vs. Judicial Authority to Use Cy Près

Misinterpretation of the scope of the doctrine of charitable trusts, not to mention confusion as to the nature of the cy-près doctrine, were key impediments to the development of early charitable trusts.[54] However, early American courts, in their efforts to distance the U.S. from "anything relating to the prerogative of the English sovereign, [also] failed to take cognizance of the existence of the judicial [cy près] power, and abolished the entire doctrine as one of prerogative."[55] In other words, courts rejected both a statutory as well as a judicial application of the cy-près doctrine. The result was a conflation of the doctrine of charitable trusts with cy près, thus making "many charitable gifts…unenforceable."[56]

In one such instance, *White v. Fisk*, the Supreme Court of Connecticut refused to recognize a settlor's gift as a valid charitable trust, "sustainable by the inherent power of equity, [and] held that it could be validated only by an application of the *cy près* doctrine."[57] But because Connecticut had rejected the possibility of cy près, the court determined that the trust "for the support of indigent pious young men, preparing for the ministry" failed.[58] Various other courts throughout the late Nineteenth and early Twentieth Centuries followed this same logic.[59] Unfortunately, the rejection of both the prerogative and judicial types of cy près, along with courts' steadfast refusal to reexamine the doctrine, led to "the destruction of charitable trusts that would otherwise have

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[51] *Id.* at 227; *see also* Yates v. Yates, 9 Barb. 324 (N.Y. 1850); Ayers v. The Methodist Church, 3 Sandf. 351 (N.Y. 1849); Voorhees v. The Presbyterian Church of Amsterdam, 17 Barb. 103 (N.Y. 1853); Holmes v. Mead, 52 N.Y. 332 (1873)).

[52] *Id.* (citations omitted).

[53] *See id.*

[54] *Id.* at 229.

[55] *Id.* at 229–30 (citations omitted).

[56] *Id.* at 230–31 (citations omitted).

[57] *Id.* at 231 (citing White v. Fisk, 22 Conn. 31, 54 (Conn. 1852)).

[58] *Id.* (citing White, 22 Conn. at 54)).

[59] *Id.* (citing Crim v. Williamson, 60 So. 293 (Ala. 1912); Ingraham v. Sutherland, 117 S.W. 748 (Ark. 1909); Robbins v. Hoover, 115 Pac. 526 (Colo. 1911); Robinson v. Crutcher, 209 S.W. 104 (Mo. 1919); Chelsea Nat. Bank v. Our Lady Star of the Sea, 105 N.J. Eq. 236 (N.J. Ct. Ch. 1929); Johnson v. Johnson, 23 S.W. 114 (Tenn. 1893); City of Haskell v. Ferguson, 66 S.W.2d 491, (Tex. Civ. App. 1933)).

been saved by adapting them to changing social and economic conditions."[60]

3. Natural Rights and a Separation of Powers

Likewise, another explanation of early American courts' disdain for cy près relates to Montesquieu's theory of separation of powers.[61] Montesquieu posited the idea that political liberty relied upon having powers separated into the executive, the legislative, and the judicial powers.[62] Early American courts expressly endorsed this theory and rejected the doctrine of prerogative cy près because separation of powers forbade "the exercise of a legislative or executive power by a judicial body."[63]

In addition to the separation of powers reasoning, courts rejected cy près "as unsuited to our democratic institutions."[64] This was because English courts exercised cy près without regard for the donor's intentions, meaning that trust property could be devoted to purposes that went against the donor's intentions.[65] For example, in *Da Costa v. De Pas,* a case before an English court during the American colonial period, one settlor created a trust to promote Jewish education, which was proscribed in England at the time. The court, applying the prerogative cy-près doctrine, diverted the trust's funds to support a Christian preacher instead.[66] This result was repugnant to the courts of the new American nation, founded just two decades after the *Da Costa* case. Because American courts held and hold testamentary freedom as sacrosanct, and this result clearly violated the settlor's intent, its outcome could have shaped early American courts' restraint from using cy près. However, early American courts failed to recognize the difference between prerogative and judicial cy près and rejected the doctrine in all forms.[67]

Perhaps this total rejection of cy près was also philosophical, given the

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[60] Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 2, at 379–80.

[61] *Id.* at 377; *See also Trusts—Power of Legislature to Authorize Deviations in Terms of a Trust*, 101 U. PA. L. REV. 1087, 1089 (1953) (citing MONTESQUIEU, SPIRIT OF LAWS, Book 11, c. 6 (Nugent ed. 1873)) (noting the potential question of "whether the legislature should even have the power to authorize deviations in trust terms only, in view of the fundamental doctrine of separation of powers"); Peter Conti-Brown, Note, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis,* 63 STAN. L. REV. 699, 723 (2011) (citing Jack A. Clarke, *Turgot's Critique of Perpetual Endowments*, 3 FRENCH HIST. STUD. 495, 495 (1964)) (noting that Montesquieu was a critic of the "law's reverence for the 'dead hand' in charitable gifts").

[62] *Id.* at 377–78 (citing MONTESQUIEU, 1 SPIRIT OF LAWS 181 (1802)).

[63] *Id.* at 378 (citing Moore's Heirs v. Moore's Devisees, 4 Dana 354, 366 (Ky. 1836); Parsons v. Childs, 136 S.W.2d 327 (Mo. 1940); Green v. Allen, 5 Humph. 170 (Tenn. 1844); Harrington v. Pier, 82 N.W. 345 (Wis. 1900)).

[64] *Id.* at 380.

[65] *Id.* (citing SCOTT, TRUSTS §399.1 (1939)).

[66] *Id.* (citing Da Costa v. De Pas, 1 Amb. 228 (1754)).

[67] *Id.*

Lockean belief that outcomes like that of the *Da Costa* case seem "undemocratic in that it violate[s] the natural rights of man, particularly his right of property."[68] This connection to the application of cy près is fostered through the notion that cy près essentially requires an alteration of the donor's wishes, because a court has limited ability to construe what the donor would prefer in the unexpected frustration of the charitable trust's purpose.[69] Therefore, it would provide more deference to, and indeed honor, the settlor of the trust and their property rights to allow the provision to fail and allow the trust to pass via intestacy rather than change the charitable trust without the testator's consent. That is, the donor has property rights which remains with the donor, rather than being given to a charitable cause not selected by the donor, even after death.[70]

4. An Emerging Judicial Preference to Give Primacy of Effect to a Settlor's Intent

Until the Eighteenth century, "the common law emphasis on individual rights and private property led to a judicial reluctance to deviate from the original plans of the donor."[71] As a result, in instances where a court could choose between the gift failing or deviating from the original plans, courts would choose the former.[72] Likewise, during the Nineteenth Century, adhering to Lockean ideas on property rights, some jurists believed that cy près "contradicted the spirit of democratic institutions."[73] Several cases, "h[olding] that a court could not substitute a new scheme merely because the trustees believed that it would be [a] better or more convenient one than the settlor's", are illustrative of this continued thought: *Harvard College v. Society for Promoting Theological Education*, *White v. Fisk*, and *Merrill v. Hayden*.[74]

As Professor Chester explains, during early American history, "opposition to philanthropy persisted" and leaders like "St. George Tucker, James Madison, Thomas Jefferson and other secular-minded and progressive Virginians felt charities symbolized advancing clerical power in society, threatening the rights

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[68] *Id.* at 381 (quoting JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, 187 (Everyman ed. 1924)). Professor Fisch argues that this rejection was premised on the teachings of John Locke, who had "great reverence for private property" and proclaimed that "[t]he supreme power cannot take from any many any part of his property without his own consent." *Id.*

[68] *See id.* (quoting Moore's Heirs, 4 Dana 354).

[69] *See id.* (quoting Moore's Heirs, 4 Dana 354).

[70] *See id.*

[71] Fisch, *Changing Concepts and Cy Pres*, *supra* note 34, at 382.

[72] *Id.* (citing White, 22 Conn. at 54; Merrill v. Hayden, 86 Me. 133 (1893); Harvard College v. Society for Promoting Theological Educ., 3 Gray 280 (Mass. 1855)).

[73] C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L. J. 407, 412 (1978).

[74] *Id.* (citing President & Fellows of Harvard Coll. v. Soc'y for Promoting Theological Educ., 69 Mass. 280 (1855); New Haven v. Huntington, 22 Conn. 30 (1852); Merrill, 29 A. 949).

of future generations."[75] In addition to these controlling fears were influential concerns which arose over the enduring power of the "dead hand" combined with "a fear of corporations in general, because of their impersonal nature and perpetual life." [76]

Yet, adding to the aforementioned factors bearing on the judicial disdain for using the cy-près doctrine was courts' reluctance to stray from the testator's original plans.[77] The reasoning was that because "no clear line could be drawn between the directions of the donor and confiscation . . . deviations from the directions of the donor would result in the overthrow of charitable trusts and ultimately imperil the safety and sacredness of all private property."[78]

American courts of the Nineteenth Century overemphasized the importance of effectuating the donor's intent when dealing with cy près.[79] Interestingly, this focus on donative intent was somewhat misplaced, considering the history of cy près. In fact, "[i]t appears quite certain that the doctrine did not originate solely as an intent-enforcing device. It has been suggested that the actual origin of cy près is to be found in the civil law."[80] For example, looking to Roman cases when applying cy près, courts placed "as much emphasis upon the social benefit to be derived from such gifts as on any desire to effectuate the donor's intention" and "[t]he rationale of these cases is that it would be unjust for a gift destined for charitable ends to fall back to the heirs because of some technical difficulty."[81] In fact, the motivating source for allowing a change was not to effectuate the donor's intent, but rather "the saving of his soul."[82] However, by the Nineteenth Century, this was quite literally ancient history and by the time cy près reached America, it was "solely an intent-enforcing instrument."[83]

5. Advancing the Promotion of Charitable Gifts

It is also possible that an ancillary goal of the early American courts' aversion to the use of the cy près doctrine was borne from a desire to encourage charitable giving. Professor Chester asserts the general theory to explain why courts were so distrustful of cy près: they were attempting to encourage charitable giving by trying to "make testators secure in making their particular charitable gifts; without the fear that their specific intent would be upset" by a

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[75] C. Ronald Chester, *supra* note 78, at 410 (citing H. MILLER, LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY 1776–1844 42–43 (1961)).

[76] *Id.* (citing MILLER, *supra* note 74, at 47).

[77] Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 2, at 381–82.

[78] *Id.* at 382 (citing State v. Adams, 44 Mo. 570, 580 (1869)).

[79] *See* Note, *A Revaluation of Cy Pres*, *supra* note 31, at 309.

[80] *Id.* (citations omitted).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 310.

court application of cy près.[84] Thus, with this additional security, testators would, under Chester's theory, be more likely to make charitable bequests. This theory is founded on the fact that when cy près was "laid down in the first decisions," the purpose of a courts was to encourage gifts to charity.[85] In making his argument that distrust of cy près was based on attempt to encourage charitable giving, Professor Chester reasons that:

> Anything that might satisfy a donor that his wishes would be respected tended, in the minds of the courts, to encourage him in having property in trust for charity. And the country needed charitable trust funds. So the decisions of the courts sounded in terms of the sanctity of the will.[86]

### *C. A Shifting Judicial Position toward the Use of Cy Près*

Despite the initial reluctance of the U.S. courts to employ the cy-près doctrine to modify testamentary purposes, the advancement of technology in the late Nineteenth Century had rippling effects on social, economic, and legal norms.[87] The adverse position of courts to the use of cy près began to shift after the Industrial Revolution, but even then, cy près remained anathema among legal doctrines. Principally, this shift was brought on by a changing attitude toward charitable trusts more generally; "as fortunes amassed in the industrial revolution began to accumulate and the need for effective mechanisms to control the use of these new forms of wealth became manifest, charitable trusts themselves slowly gained favor."[88]

Why the change? Courts began to take the perspective that, by encouraging charitable giving, they could reduce the government's expenses.[89] With this new perspective in mind, courts began to view charitable trusts as "favorites of the law" and employed liberal rules of construction in order to validate settlors'

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[84] C. Ronald Chester, *supra* note 75, at 412 (citing John S. Bradway, *Tendencies in the Application of the Cy Pres Doctrine*, 5 TEMP. L.Q. 489, 528 (1931)). I should note here that I have not come across any other scholars asserting this theory, but it is a sound one.

[85] John S. Bradway, *Tendencies in the Application of the Cy-Pres Doctrine*, 5 TEMPLE L. Q. 489, 527–28 (1931).

[86] *Id.*

[87] THE CY PRES DOCTRINE IN THE UNITED STATES, *supra* note 38, at 115. For more information on judicial views on the application of cy pres, *see id.* at 115–27 ("The variations which have taken place in the pattern of life since the founding of the United States have influence[d] and been reflected in our legal concepts and attitudes. Thus the alteration in judicial attitude towards the application of the cy près doctrine not only reflects but is the result of these social and economic metamorphoses.").

[88] C. Ronald Chester, *supra* note 75, at 411.

[89] *Id.* (citing Troutman v. De Boissiere Odd Fellows' Orphans Home & Indus. School Ass'n, 64 P. 33 (1901)).

charitable intent.[90] In lock step with social changes, where individualism was rampant, courts regularly began to hold the donor's intent as a paramount consideration in legal determinations of trust validity.[91] As a result of this more prominent viewpoint, American courts' of the late Nineteenth Century found new comfort in upholding charitable trusts, though many were still averse to applying cy-près doctrine in order to change the original purpose of charitable trusts when this would infringe on the settlor's individualism, as evidenced in the settlor's estate plan.[92] Yet, businessmen who made their wealth in the late Nineteenth century acknowledged a duty to the public as well as their private heirs when it came to their vast wealth. For example, Andrew Carnegie gave credence to the notion that "great wealth was a public trust to be administered not for the excessive benefit of private heirs, but for the good of the public."[93] This view would spill into—but largely be unfulfilled until—the early Twentieth Century.

The early Twentieth Century was marked by watershed events and new social issues—from World War I, to housing slums in urban settings, and the national crisis of the Great Depression—that spurred a new interest in the public good.[94] This era, "the era of Promise," resulted in change because, "[f]aced with the grim misery of the industrial slums, thoughtful individuals began to realize that the free market was not working for all, nor in fact for the majority."[95] Thus, the individualism of the late Nineteenth Century was replaced by a balance between individualism and collectivism.[96] During this time, the tide of public thinking truly began to shift away from the individual and towards public welfare, with a concurrent shift in courts' reverence for individual private property rights remaining consistent with public opinion.[97]

A judicial shift in attitude towards cy près accompanied this shift in public opinion. Indeed, "[d]uring the period from 1900–1950, twenty-one jurisdictions expressly applied cy près for the first time, and many statutes were passed by state legislatures expressly giving the cy près power to courts."[98] During this time, the origins of the cy-près doctrine were re-examined in a contemporary light, the requirements of the application of the cy-près doctrine were "found to

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[90] *Id.* (citing Russell v. Allen, 107 U.S. 163 (1882)).

[91] *Id.*

[92] *Id.* (citing THE CY PRES DOCTRINE IN THE UNITED STATES, *supra* note 32, at 120, n.14).

[93] C. Ronald Chester, *supra* note 75, at 414 (citing Carnegie, *Wealth*, 148 N. AM. REV. 653 (1889); Andrew Carnegie, *The Best Fields for Philanthropy*, 149 N. AM. REV. 682 (1889); C. Ronald Chester, *Inheritance and Wealth Taxation in a Just Society*, 30 RUTGERS L. REV. 62, 88-92 (1976)).

[94] *See id.* 414–15.

[95] *Id.* at 414.

[96] *See id.*

[97] Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 8, at 382–84. In part, Fisch attributes the shift in thinking to Roscoe Pound's writings on the legal consequences of individualism. *See id.* at 384–85, 387.

[98] C. Ronald Chester, *supra* note 75, at 415 (citing THE CY PRES DOCTRINE IN THE UNITED STATES, *supra* note 32, at 120 n.16).

exist in a greater number of cases and an attentive ear was turned to the needs and interests of the community."[99] It was only after 1900 that the "common law stress on individualism" began to dwindle and courts began to reason from a perspective based not on effecting solely the intent of individual donors but in considering how this intent could be promoted for the betterment of society at large.[100]

### *D. Cy Près in Modern Times*

As the previous section relates, the first half of the Twentieth Century marked a transition toward upholding charitable dispositions, ultimately leading to a much broader formulation of cy près.[101] This led to two important developments. First, cy près was remodeled "to conform to the pressures of a society intent on preserving charitable dispositions of property."[102] Second, the judiciary began to use "more flexible doctrines and trust devices in areas formerly reserved exclusively for cy près."[103] Professor Fisch describes these changes in doctrine as the "elimination of prerequisites," "changing standards of impossibility," "the doctrine of deviation," "the effect of a gift over," and "implied trusts and Rules of Construction."[104]

First, in looking to the prerequisites, Fisch noted that initially courts "meticulously sought to satisfy the prerequisites," but "[s]ince the beginning of the twentieth century the rigors of these prerequisites have been slowly melted down by judicial construction."[105] By this, she refers to two key prerequisites for the invocation of cy près: (1) that the settlor of the trust had a general charitable intent (i.e., that the trust was not made for the benefit of a specific beneficiary but for a larger greater good); and (2) that its purpose, in light of changed circumstances, had become impossible, impracticable, unlawful, or wasteful.

In particular, courts loosened the second prong—the impossibility requirement—for the application of cy près to be appropriate. An important part of this shift was due to a simultaneous relaxion of the first prong: a new trend in reading an implied general charitable intent into a charitable trust to ascertain the donor's purpose in creating the trust.[106] This meant, for example, if a settlor created a trust to benefit a particular school and the school closed—thereby creating an impossibility of effectuating the donor's intent—the impossibility of carrying out the trust should not be determined by referring to

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[99] Fisch, *Cy Pres Doctrine and Changing Philosophies*, *supra* note 8, at 385 (footnotes and citations omitted).

[100] Fisch, *Changing Concepts and Cy Pres*, *supra* note 28, at 382 (citations omitted).

[101] *Id.* at 382–3.

[102] *Id.* at 383 (citations omitted).

[103] *Id.* at 383 (citations omitted).

[104] *See id.* at 383–92.

[105] *Id.* at 383.

[106] *Id.* at 384.

the particular beneficiary of the trust but by ascertaining whether the trust can be put to new use for educational purposes.[107] In turn, this obviated the need to apply the cy-près doctrine at all; so long as the purpose of the trust continued to serve the same general charitable intention, the particular details of such a gift could be changed without applying the cy-près doctrine.[108] That is, during the mid-1900s, courts began to use the equitable doctrine of deviation, rather than cy près, as an alternate approach to achieve the purposes which were normally achieved via the cy-près doctrine.[109]

Another change revolved around gifts over, which arise when provisions in a trust enable a new property interest following the termination or failure of its prior interest. Initially, simply because a trust had a gift-over provision did not prevent the application of cy près by some courts.[110] However, in time, the presence of a gift-over clause in a trust meant that cy près would rarely, if ever, be applied, on the theory that the expressed intent of the donor in regard to the alternative beneficiary obviates the need for the use of cy près.[111] Ultimately, this American gift-over rationale "has become crystallized in the rule that the doctrine of cy près is inapplicable when the donor by a gift over declares how the funds should be used upon failure."[112]

Even in light of this progress, some argue that the law has fallen short.[113] In his 1973 article, Professor Chester explains that the erosion of the requirements of cy près leave the promise of the doctrine unfulfilled.[114] In support of that premise, he cited the continued limitations on the requirement of impossibility and impracticability.[115] For example, a California appellate court determined that "the requirement is not satisfied if the impossibility might only prove to be temporary."[116] Chester also cites courts' refusal to acknowledge calls to remove the general intent requirement altogether.[117] This, Professor Chester emphasized, meant that "the dead hand of the settlor still controls the fund through the courts' observance of his or her intent."[118] Thus, this line of argument partially considers again the tension between the individualistic and communal purposes of creating charitable trusts; that is, a conflict still brews

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[107] *Id.* at 384–85 (emphasis in original).

[108] *Id.* at 385.

[109] *Id.* at 389.

[110] *Id.* at 390.

[111] *Id.* at 391 (citing Village of Hinsdale v. Chicago City Missionary Soc'y, 30 N.E.2d 657, 664 (Ill. 1940)).

[112] *Id.* (citing Camden Trust Co. v. Christ's Home of Warminster, 101 A.2d 84 (1953); In re Shapiro's Estate, 112 N.Y.S.2d 46 (Sur. 1952); In re Price's Will, 35 N.Y.S.2d 111 (App. Div. 1942)).

[113] *See, e.g.*, C. Ronald Chester, *supra* note 75.

[114] *Id.* at 417.

[115] *Id.*

[116] *Id.* (citing Marbury's Estate, 127 Cal. Rptr. 233 (Cal. App. 1973)).

[117] *Id.*

[118] *Id.*

between the enduring role of effectuating individual control over property, even beyond the grave, and the use of that property for the common good.[119]

## II. A CLOSER LOOK AT THE EVOLUTION OF THE CY-PRÈS DOCTRINE

While the history of the cy-près doctrine is undoubtedly interesting, as addressed in the foregoing sections of this Article, perhaps more interesting still is the evolution of the doctrine evidenced by the cases brought before probate and appellate courts. This section of the Article endeavors to present a sketch of the typologies of cases where plaintiffs sought cy près relief. It is organized by categories signifying the general intent of the settlor and the status of the benefits or beneficiaries to whom the settlor wished to confer charitable assistance. In a sense, it also recounts a history of charitable trust giving—and how settlors of charitable trusts came to condition their giving across time.

I begin with a discussion of general public charitable trusts, which have a rich history. I follow this discussion by examining trends within religious purpose and church trusts, cemetery trusts, educational purpose trusts, trusts with racial restriction clauses, and trusts made for the benefit of art, library, or museum collections. Finally, I round out this discussion by analyzing the history of medical purpose trusts.

### *A. General and Public Charitable Trusts*

Satisfying the requirement of general charitable intent is often at issue in cy près cases. But a great many cases before the courts concern trusts created for general—and public—charitable benefit. These include cases in which the trust was intended to be used to house orphans or the indigent, trusts to be used for public purposes (such as the erection of town halls and the creation of public parks and infrastructure), and trusts, more generally, to ameliorate poverty in a given community.

The early cases regarding trusts for the benefit of the poor precipitated mixed results from the courts. Some held that "the poor," as a class, was too indefinite to uphold the trust,[120] while others effectuated the settlor's general charitable intent to benefit the impoverished members of the settlor's community.[121] Likewise, general charitable trusts created by early trust settlors

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[119] *Id.* Professor Chester concludes that any "progress made by courts since the 1850's [sic] in applying the cy près doctrine to failed charitable bequests ha[d] come to a standstill in the 1970's [sic] due to the persistence of the requirement of general charitable intent." *Id.* at 424.

[120] *See, e.g.,* Dashiell v. Attorney General, 5 H. & J. 392 (Md. 1822); Perin v. Carey, 65 U.S. 465 (1860); In re Hoffen's Estate, 36 N.W. 407 (Wis. 1888); and Thompson's Ex'r v. Brown, 24 Ky.L.Rptr. 1066 (Ky. 1902).

[121] *See, e.g.,* State ex rel. Wardens of the Poor of Beaufort County v. Gerard 37 N.C. 210 (N.C. 1842); Griffith v. State, 2 Del. Ch. 421 (Del. 1848); Chambers v. City of St. Louis, 29 Mo.

were often invalidated because they were not specific enough.[122] The result was, from a modern lens, a clear overcorrection by the courts not only to invalidate the charitable purposes for which settlors had set up trusts but also an indictment on the validity of charitable trusts. This trend would, however, give way to a tide of court decisions in the late Nineteenth Century and early Twentieth Century in which the settlor's general charitable purpose was upheld but cy près relief was not afforded to the plaintiff.[123]

But public charitable trust creation would become specific enough by the Twentieth Century, vitiating the need for courts to determine whether a trust was indeed created for public benefit. Instead, courts increasingly heard cases arising from trusts that lay dormant or were impracticable or impossible to effectuate the settlor's general and public charitable intent, such as the continuation of homes for the elderly and for orphans, when residency in these public charitable endeavors fell into decline.[124] In these cases, courts tended to

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543 (Mo. 1860); Appeal of Treat, 30 Conn. 113 (Conn. 1861); Mann v. Mullin, 84 Pa. 297 (Pa. 1877); Hunt v. Fowler, 12 N.E. 331 (Ill. 1887) (wherein the settlor left the residue of his estate in trust, the income from which was to be paid to "the worthy poor of the city of La Salle." The court held that the trust was not void for uncertainty, because the trust gave discretionary power to the Court of Chancery. The power to the court was construed by the court to mean that the court can select a trustee and the trustee has the power to determine the "worthy poor."); Grant v. Saunders, 121 Iowa 80 (Iowa 1903).

[122] *See, e.g.,* Bridges v. Pleasants, 39 N.C. 26 (N.C. 1845); Wheeler v. Smith, 50 U.S. 55 (1850); White v. Fisk, 22 Conn. 31 (Conn. 1852); Wilderman v. City of Baltimore, 8 Md. 551 (Md. 1855). Beekman vs. People, 27 Barb. 260 (Sup. Ct. N.Y. 1858); Levy v. Levy 33 N.Y. 97 (N.Y. 1865). *But see* McLain v. School Directors of White Twp., 51 Pa. 196 (Pa. 1863); and Erskine v. Whitehead, 84 Ind. 357 (Ind. 1882).

[123] *See, e.g.,* Hunt v. Fowler, 12 N.E. 331 (Ill. 1887); Doyle v. Waylan, 32 A. 1022 (Me. 1895); Ford v. Thomas, 111 Ga. 493 (Ga. 1900); Haynes v. Carr, 70 N.H. 463 (N.H. 1901); Grant v. Saunders, 121 Iowa 80 (Iowa 1903); Hunt v. Edgerton, 19 Ohio C.D. 377 (Ohio App. 1906); Klumpert v. Vrieland, 142 Iowa 434 (Iowa 1909); In re Creighton's Estate, 91 Neb. 654 (Neb. 1912); and City of St. Louis v. McAllister, 281 Mo. 26 (Mo. 1920). *But see* McIntire's Adm'rs v. City of Zanesville, 17 Ohio St. 352 (Ohio 1867); Women's Christian Ass'n v. Campbell, 48 S.W. 960 (Mo. 1898) (A settlor's testamentary trust left land, as well as the income from another trust, on which to build an orphanage. It became apparent that the location of the land was not suitable, and the funds were not enough to build an orphanage. Another charitable organization brought suit to ask the court to have the trustees sell the land and pool the funds with the plaintiff to build the orphanage, which the court allowed); and Att'y General ex. rel. Wright v. Pauline Temporary Home, et al., 21 A. 661 (Pa. 1891).

[124] *See, e.g.,* In re Trexler Orphans' Home Dissolution, 19 Pa.D.&C. 231 (Pa. Comm. Pl. 1933); In re Swan's Will, 261 N.Y.S. 428 (N.Y. Sup. Ct. 1933); Thatcher v. Lewis, 76 S.W.2d 677 (Mo. 1934) (trust funds left to the City of St. Louis to aid "bonafide settlers of the West" directed to other municipal purposes, as westward expansion had ceased and St. Louis was no longer the bottleneck for westward expansion); Stevens v. Smith, 183 A. 344 (Me. 1936); Citizens & Manufacturers Nat'l Bank v. Guilbert, 186 A. 564 (Conn. 1936) (holding that cy pres could be applied to send trust funds to another charity that operated a home for the elderly, given that the funds were insufficient to establish a new home for the aged); Wood v. Hartigan, 195 A. 507 (R.I. 1937); Gifford v. First Nat'l Bank, 280 N.W. 108 (Mich. 1938); Gore v. Georgia Industrial Home, 200 S.E. 684 (Ga. 1938); Kentucky Children's Home, Lyndon v. Woods, 289 Ky. 20 (Ky.

apply cy près to save the trust. But perhaps, the rise in these cases, and decisions redounding to the court's use of cy près, are attributable to the fact that many of these trusts were created one, two, or even more generations before the court heard the case, and the purpose of the trust had become frustrated by changes in circumstances.[125] Thus, as the doctrine of cy près came into vogue in the middle of the Twentieth Century,[126] American courts, spurred by a spirit of collectivism, slowly moved toward a position of granting cy près relief to meretricious cases involving public purpose trusts. Figure 1, below, descriptively charts this considerable rise in the volume of public charitable trust cases before the courts, blooming in the mid-Twentieth Century.[127]

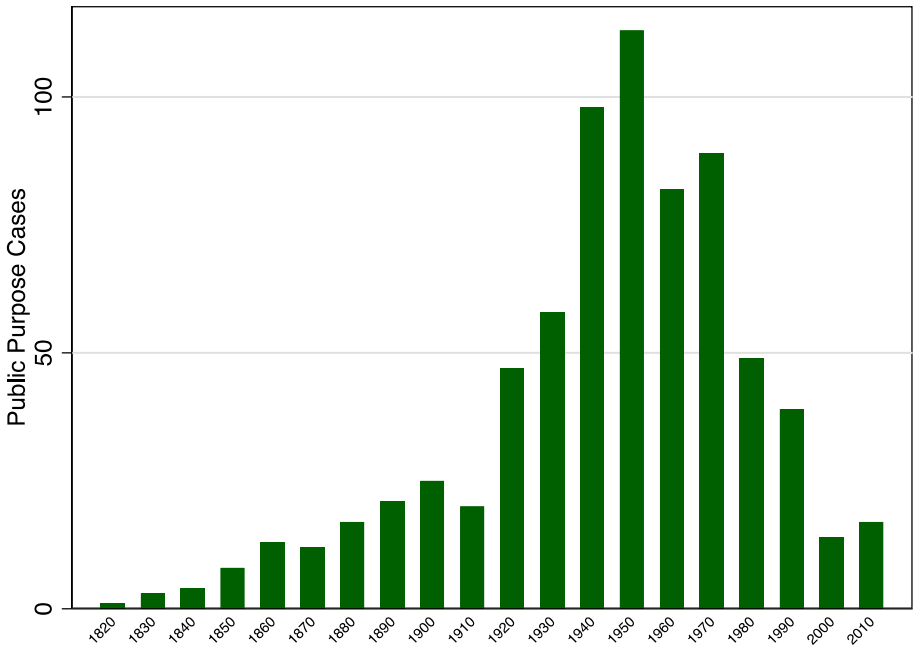
Figure 1 – Public Trust Cases

1942); Holmes v. Welch, 49 N.E.2d 461 (Mass. 1943); Soc. of Cal. Pioneers v. McElroy, 63 Cal.App.2d 332 (Cal. App. 1944) (testator gave money in trust to the "Grand Parlor of Native Sons of the Golden West, for cooperation with The Society of California Pioneers, in erecting a pioneer monument on Telegraph Hill in San Francisco." Shortly after the testator's death, a different monument was built on telegraph hill making it impossible to build anything else there. Court affirmed the lower court's decision that the trust funds be divided between the two organizations for each to add to their collections on the history of California.); First Trust Co. of Lincoln v. Thompson, 23 N.W.2d 339 (Neb. 1946); Fairbanks v. City of Appleton, 24 N.W.2d 893 (Wis. 1946); Shoemaker v. American Sec. & Trust Co., 163 F.2d 585 (U.S. App. D.C. 1947); Foust v. William E. English Foundation, 80 N.E.2d 303 (Ind. App. 1948); Stead v. American Sec. & Trust Co., 173 F.2d 650 (U.S. Ct. App. D.C. 1949); Christian Herald Ass'n v. First Nat'l Bank of Tampa, 40 So.2d 563 (Fla. 1949); Fletcher v. Safe Deposit & Trust Co., 67 A.2d 386 (Md. 1949); In re Wanamaker's Estate, 72 A.2d 106 (Pa. 1950); Fay v. Hunster, 191 F.2d 289 (U.S. App. D.C. 1950); First Nat'l Bank of Chicago v. Elliott, 92 N.E.2d 66 (Ill. 1950); In re Heckscher's Trust, 131 N.Y.S.2d 191 (N.Y. Supr. 1954); In re Faulkner's Estate, 275 P.2d 818 (Cal. Ct. App. 1954); Cushing v. Fort Worth Nat'l Bank, 284 S.W.2d 791 (Tex. 1955); Equitable Sec. Trust Co. v. Home for Aged Women, 123 A.2d 117 (Del. Chanc. 1956); In re Succession of Milne, 89 So.2d 281(La. 1956); City of Aurora ex rel. Egan v. Young Men's Christian Ass'n, 137 N.E.2d 347 (Ill. 1956); State by State Highway Com'r v. Cooper, 131 A.2d 756 (N.J. 1957); Hardy v. Davis, 148 N.E.2d 805 (Ill. App. 1958); Loats Female Orphan Asylum of Frederick City v. Essom, 150 A.2d 742 (Md. 1959); Puget Sound Nat'l Bank of Tacoma v. Easterday, 350 P.2d 444 (Wash. 1960); Anderson v. Ryland, 336 S.W.2d 52 (Ark. 1960);

[125] This assertion is something I observed anecdotally from the data. *See, e.g.,* Thatcher v. Lewis, *supra* note 124. It requires further exploration and explication, which I plan to do in follow-on analysis in another Article.

[126] *See* Appendix, *infra.*

[127] Figure 1, as well as Figures 2-7, are derived from calculations on a dataset that I describe in greater detail in the next section of the Article, *infra.*




### *B. Religious Purpose and Church Trusts*

Unlike the early general public trust cases, specificity was never the problem with religious purpose trusts. Many early trusts were made for the benefit of specific churches, but several of these trusts failed because the church, as beneficiary and often as trustee, was not properly incorporated or organized according to the laws of the state, immediately after or even prior to the settlor's death, as to constitute an entity that could benefit from the trust.[128] Similarly, a handful of early American courts held that if a trust was created for a particular congregation, the trust was not a public charity and must fail.[129] That said, a

[128] *See, e.g.,* Trustees of Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. 1 (1819); Holland v. Peck 37 N.C. 255 (N.C. 1842); Ruth v. Overbrunner, 40 Wis. 238 (Wis. 1876) (gifts in trust to two churches failed because neither church had incorporated at the time of the devise); Catholic Church v. Tobbein, 82 Mo. 418 (Mo. 1884) (holding that because the church was unincorporated prior to the devise, the church could not bring suit to recover the devise); and Mount v. Tuttle 183 N.Y. 358 (N.Y. 1906). *But see* Green v. Allen, 24 Tenn. 170 (Tenn. 1844) (in which the court deemed the original beneficiary church unascertainable but refused to divest the intended beneficiary congregation of the trust's gift). The last case is akin to the seemingly modern tendency of courts on the matter. *See, e.g.,* Matter of King's Estate, 592 P.2d 231 (Ore. App. 1979) (where a church was later incorporated, it could still take under the trust created for it by the settlor).

[129] *See, e.g.,* Methodist Church v. Remington, 1 Watts 219 (Pa. 1832) (wherein the court refused to uphold the trust unless the unincorporated religious society comprised of

majority of courts upheld such trusts as valid.[130] Also unlike general charitable trusts, religious purpose trusts were often overly conditioned. Many religious purpose trusts failed because the conditions present in the settlor's intentions to support a church or religion proved impracticable or too onerous.[131]

That said, there are similarities between the religious purpose trusts and other typologies. Regrettably, like several trusts made for the benefit of the impoverished, and on many an occasion, the religious purpose gift lacked sufficient resources to effectuate the settlor's stated purposes for the advancement of a particular religion or church beneficiary.[132] While this is a

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Pennsylvania residents to support a public purpose); Attorney General v. Federal Street Meeting House, 69 Mass. 1 (Mass. 1854) (in which the court held that trusts for a particular congregation were not public in nature). Yet, some courts continued this prohibition well into the Twentieth Century. *See, e.g.,* Wilson v. First Presbyterian Church, Reidsville, 200 S.E.2d 769 (N.C. 1973);

[130] *See, e.g.,* Gass v. Wilhite, 32 Ky. 170 (Ky. 1834); Attorney General v. Jolly, 21 S.C. Eq. 379 (S.C. 1848); Williams v. Williams, 8 N.Y. 525 (N.Y. 1853); Miller v. Chittenden, 2 Iowa 315 (Iowa 1856); De Witt v. Chandler, 11 Abb.Pr. 459 (N.Y. Supr. 1860) (wherein the court found that, even though the congregation was no longer identifiable and had merged with another congregation, the successor congregation was still identifiable and a legally permissible beneficiary); and Appeal of Yard, 64 Pa. 95 (Pa. 1870) (wherein the decedent wanted to leave funds for the congregation to which he belonged—not the church itself—but the court held that the trust left to a religious society will not fail for vagueness in purpose).

[131] *See, e.g.,* McAuley v. Wilson, 16 N.C. 276 (N.C. 1828) (in which the congregation of the beneficiary church refused to appoint a minister of the denomination specified by the settlor); State v. Bates, 2 Del. 18 (Del. 1835) (proscribing gifts to a church from the sale of land, given that state law required gifts to churches be effectuated through real property deed transfers only); Teele v. Bishop of Derry, 47 N.E. 422 (Mass. 1897) (concerning an overly specific testamentary trust for the purposes of purchasing a lot and building a chapel to be forever used for purposes of public worship under the auspices of the Roman Catholic Church, to be built in Ireland, wherein the court found this to be a valid charitable trust; however, the court held that the money must pass under the residuary clause because administering the trust would be impracticable and wasteful. The town where the church would be built was very small, under 100 residents, and the people were too poor to support a chapel. The court said that cy pres was inapplicable because the gift was to a specific charity and did not have general intent); Camp v. Presbyterian Soc. of Sackets Harbor, 105 Misc. 139 (N.Y. Supr. 1918) (wherein a trust left solely for the upkeep of the belltower of a church far exceeded the necessary cost of doing so, a court applied cy pres to allow the trustee to put the extra funds to ancillary church use—i.e., a library housed in the belltower); In re Becker's Estate, 11 Berks 81 (1919) (in which a testatrix left funds to a church in trusts to build a window in the memory of her father but where the funds were impracticable to add a window to the current building, the court allowed the church to substitute a new memorial); Dunn v. Ellisor, 225 Ala. 15 (Ala. 1932) (where a testator intended land, given in trust, to specifically used as a rectory, the court held that the land could not be used for general church purposes).

[132] *See, e.g.,* Gallego's Ex'rs v. Attorney General, 30 Va. 450 (Va. 1832) (following abatement, there was not enough money left over in the gift to the church to effectuate the settlor's intent); Rector of St. James Church v. Wilson, 82 N.J. Eq. 546 (N.J. Eq. 1913) (gift in trust of $14,000, as well as existing zoning laws, made it impossible to build a church); In re Dean's Estate, 3 N.Y.S.2d 711 (N.Y. Supr. 1938) (gift in trust for a church to open a parochial school was insuffienct and the court used cy pres to direct the funds to the church for general purposes); In re Wilkey's Estate, 30 Pa.D.&C. 561 (Pa. Orphan's 1940) (where money and land in trust to

common theme of the cases brought to courts in seeking cy près relief, it is especially true of trusts created for religious purposes, particularly those in the late-Nineteenth and early-Twentieth Centuries. Although the doctrine of waste provides grounds for cy près relief, it is seldom the case in any of the trust typologies that trust assets appreciate in value to the degree that waste would come into play. Instead, so often, the grounds of impossibility or impracticability are met by the evaporation of trust assets, either through insufficient assets at the time of trust creation or trust asset mismanagement during the life of the trust. But religious purpose trusts are unique in this regard, because so many of them were created for the benefit of a particular congregation or church, which itself must be sustained by donations from the congregation. When parishioners leave the congregation, or for various reasons the congregation dwindles in participation, the existence of the church is placed in great jeopardy. This problem is not new. It occurs throughout the historical timeline chronicled in the dataset. Yet, it is pervasive in the Twentieth Century. Thus, another theme running across trusts that sought to further a religious purpose pervading the Twentieth Century were cases of church closure or church merger. In general, courts more frequently employed the cy-près doctrine to put the trust to use for a beneficiary as near as possible to the donor's intended beneficiary.[133] Yet, in

a local Presbyterian church were insufficient to build the type of church that the settlor dictated, the court applied cy pres to build a building for Sunday school); In re Keeler's Estate, 41 Pa.D.&C. 182 (Pa. Orphan's 1941) (where a husband and wife left money in trust for the purchasing of land to be used as a home for indigent members of a church, and the combined sum was not sufficient for the purpose, the court applied cy pres to award the funds to the maintenance of the church's existing home for the aged); Matter of Trust of Rothrock, 452 N.W.2d 403 (Iowa 1990) (applying trust funds for the creation of a new church, which was impracticable, to the remodeling of the existing church).

[133] *See, e.g.,* Osgood v. Rogers, 186 Mass. 238 (Mass. 1904) (Testator left residuary estate to deacons of two churches that were dissolved. However, the congregation and clergy of one of the churches moved to the same—new—church, and the court used cy pres to alter the trust, based on testator's intent, to benefit the new church with the same original congregation.); In re McCully's Estate, 269 Pa. 122 (Pa. 1920) (Testatrix wrote a will leaving one half of her residuary to the Grace Presbyterian Church of Pittsburgh. After the will was written, and before the testatrix died, the church merged with another church and became the Waverly Presbyterian Church. The testatrix was an active member of this church before her death. She never changed the name of the church in her will. Upon her death, the heirs at law argued that the trust ceased to exist for the purposes of the Act of 1885, which provides that "in the disposition of property by will made or to be made for any religious, charitable, literary, educational, or scientific use or purpose, if the same shall be void for uncertainty, or the object of the trust be not ascertainable, or has ceased to exist or be an unlawful perpetuity, such property shall go to the heirs at law and next of kin of the decedent as in the case of persons who have died or may die intestate.' The court determined that the object of the trust did not cease to exist for the purposes of the statute and the heirs had no interest in the fund.); Hartford Nat'l Bank & Trust Co. v. Oak Bluffs First Baptist Church, 116 Conn. 347 (Conn. 1933); In re Swalley's Estate, 23 Pa.D.&C. 629 (Pa. Orphan's 1935) (Testator gave funds in trust to a church, which later burned down and was about to dissolve. The court allowed the church to transfer the funds to the local Masonic Temple); In re Mills' Will, 282 N.Y.S. 25 (N.Y. Supr. 1935) (allowing the successor church, after

some instances, courts concluded that the closure or merger precluded the use of cy près.[134]

Likewise, religious purpose trusts are unlike the first typology of trust cases in that most of them, particularly those in the Twentieth Century, were complex in terms of the conditions present in the trust creation document. In a few instances, courts had to consider whether the settlor's stated restrictions on the alienation of church property could survive cy près. Most did not explicitly use cy près or deviation but voided the restrictive clauses anyway. Likewise, some cases originated from disputes over the settlor's intended use of trust funds for particular purposes, such as maintaining church buildings or parsonages, where the court had to consider whether the intended purpose was the best use of the trust when critical needs of the congregation arose. Results varied.[135] Finally, a

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consolidation with another church, to receive the trust intended for the original church, via cy pres); In re Pentz's Estat, 42 Pa.D.&C. 296 (Pa. Orphan's 1941); In re Dillenback's Will 74 N.Y.S.2d 473 (N.Y. Supr. 1947) (Settlor left a trust to supplement the income of the local Methodist pastor. The local Methodist church merged with the local Presbyterian church. The court used cy pres to direct the funds to supplement the income of the local Presbyterian pastor.); Delaware Trust Co. v. Graham, 61 A.2d 110 (Del. Chanc. 1948); In re Stouffer's Trust, 215 P.2d 374 (Ore. 1950); Stockton v. Northwestern Branch of Women's Foreign Missionary Soc. of Methodist Episcopal Church, 133 N.E.2d 875 (Ind. App. 1956); In re Clark's Will, 150 N.Y.S.2d 65 (N.Y. Supr. 1956); Trustees of Transylvania Presbytery, U.S.A., Inc. v. Garrard County Bd., 348 S.W.2d 846 (Ky. 1961); In re Schimpf's Estate, 57 Pa. D.&C.2d 35 (Pa. Orphan's 1972); In re Belair's Estate, 57 Pa.D.&C. 68 (Pa. Orphan's 1972); In re Garbrick's Estate, 68 Pa.D.&C.2d 599 (Pa. Orphan's 1974); In re Metropolitan Baptist Church of Richmond, Inc., 121 Cal.Rptr. 899 (Cal. 1975); Fuimaono v. Samoan Congregational, etc., Church of Oceanside, 135 Cal.Rptr. 799 (Cal. 1977). *But see* Ward v. Worthington, 162 N.E. 714 (Oh. App. 1928); Duncan v. Higgins, 26 A.2d 849 (Conn. 1942); Shannep v. Strong, 160 P.2d 683 (Tenn. 1945); State Bank & Trust Co. of Harrodsburg v. Vandyke, 223 S.W.2d 750 (Ky. 1949) (wherein the court invalidated trust directed to a church that later ceased operations, because the will had a reverter provision should the church cease operations).

[134] *See, e.g.,* Gladding v. St. Matthew's Church, 25 R.I. 628 (R.I. 1904) (testatrix left a church for the deaf and mute her entire estate. Before her death, the Church was combined with another church that served the same purpose. The court determined that, since the testatrix left the estate to a specifically named church, which has since ceased to exist, there has been a lapse, and that cy pres cannot correct lapses.); Harmon v. Romberger, 18 Pa.D. 486 (Pa. Comm. Pl. 1906) (Testatrix left estate to a church, but the church disbanded after her death. Her heirs at law tried to invoke reversion to get the estate back, but the court decided that once an estate vests in the rightful beneficiary, it cannot be reverted to the heirs at law, even in cases of impracticability.); Huger v. Protestant Episcopal Church in Diocese of Georgia, 137 Ga. 305 (Ga. 1911); Bd. of Trustees of Hannibal Presbytery of Presbyterian Church in U.S. v. Taylor, 221 S.W.2d 964 (Mo. 1949); First Universalist Soc. of Bath v. Swett, 90 A.2d 812 (Me. 1952); Matter of Estate of Gray, 1987 WL 11904 (Del. Chanc. 1987); Martinez v. State 753 S.W.2d 165 (Tex. App. 1988); In re Estate of Clara H. Stover, 1995 WL 610234 (Pa. Comm. Pl. 1995).

[135] *See, e.g.,* Academy of the Visitation v. Clemens, 50 Mo. 167 (1872) (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 (1892) (decedent daughter left a farm to her mother and directed that

handful of cases dealt not with a church beneficiary at all but rather the promotion of atheist or agnostic ideals.[136] These were uncommon.

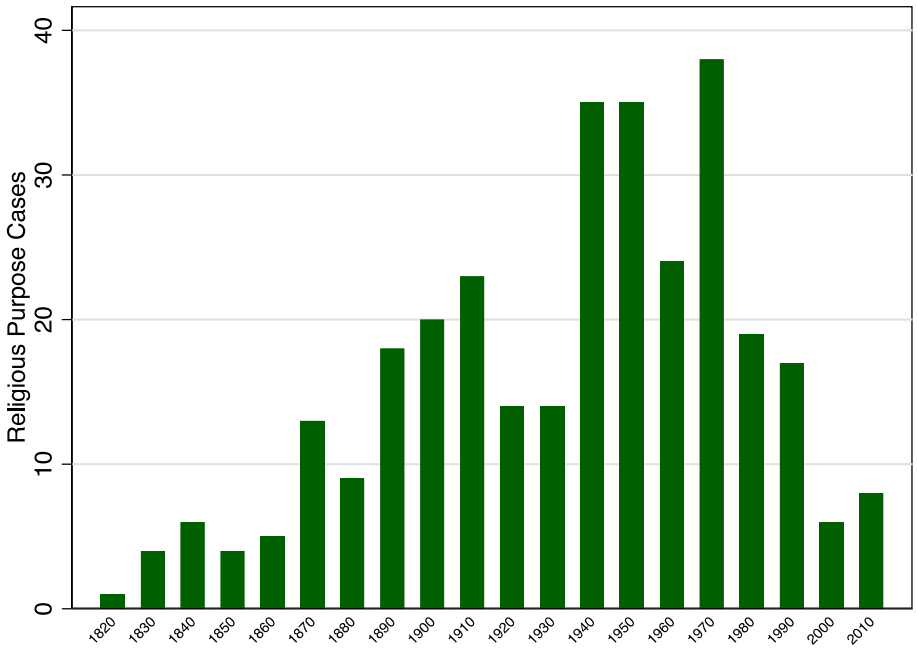
While present from the early days of litigation over the use of charitable trusts, religious purpose trust cases peaked in the middle of the Twentieth Century but were fairly stable in number for a century, between 1890 and 1990. Figure 2, below, graphs the volume of cases involving religious purpose trusts that were heard before American courts.[137]

Figure 2 – Religious Purpose Trust Cases

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 (1928) (decedent left land to a church in trust with a provision that the land not be sold or rented. Several years later, the church demolished the original building to build a combination church and office building with rental income to support the church. Decedent's heirs brought suit. Although the court determined that the church had violated the provisions of the trust, the court determined that the heirs had no claim to the land.); Henshaw v. Flenniken, 191 S.W.2d 541 (Tenn. 1945) (settlor left land, in trust, to a church, the rental income from which was to support church, but the land could not be sold. The land was undeveloped, and church received hardly any rental income from it. The church petitioned for permission to sell land and use the sale proceeds for the same purposes. The court allowed the sale but noted that the cy pres was not an accepted doctrine in Tennesee.). *But see* Heiss v. Murphy, 40 Wis. 276 (Wis. 1876) (wherein the executor of the decedent's estate retained the power to sell land, given in trust to the Roman Catholic orphans of the Diocese of LaCrosse, was held not to be a sustainable "devise under the general principles of law applicable to charitable uses" thus voiding the decedent's estate plan); First Congregational Soc. of Bridgeport v. City of Bridgeport, 99 Conn. 22 (Conn. 1923) (Testator left land to be used to build a house of worship for the local Presbyterian church. However, the gift contained the possibility of reverter if the church stopped using the land for worship. By the time of the suit, the building and surrounding land was no longer large enough for the congregation. The church brought suit for permission to sell the land and use the proceeds to build a new place of worship. Even though the court acknowledged that cy pres could be applied in this type of situation, because of the possibility of reverter, the land went to the grantor's heirs.); Roberds v. Markham 81 F.Supp 38 (U.S. Dist. D.C. 1948) (land was given in trust to erect a church, and to testator's heirs if the land stopped being used as a church. The court refused to use cy pres to change the trust when the church sought to sell the land based on changed circumstances); In re Armstrong's Estate, 29 Pa.D.&C.2d 22 (Pa. Orphan's 1963); Niemann v. Vaughn Community Church, 113 P.3d 463 (Wash. App. 2005) (pursuant to 1949 church merger and transfer of subject property, the court held that equitable deviation and not cy pres was applicable because the complainants were not seeking the change the intent of the trust, but merely seeking to remove a limitation on the alienation of the property which is more administrative in nature).

[136] For a case wherein the settlor's general intent to support Atheism was held *not* to be "contrary to every principle of good morals and religion and against the policy of the law," despite the lack of a clear beneficiary, *see* Manners v. Phila. Library Co., 93 Pa. 165 (Pa. 1880). *See also* Zeisweiss v. James, 63 Pa. 465 (Pa. 1870); and Estate of Connolly, 121 Cal.Rptr. 325 (Cal. 1975).

[137] As noted above, Figure 2, is derived from calculations on a dataset that I describe in greater detail in the next section of the Article, *infra*.




### *C. Cemetery Trusts*

Though far fewer in volume, cases involving trusts created for cemeteries and grave memorials came before the courts as early as the late Nineteenth Century. Initially, and continuing well into the late Twentieth Century, a few courts found these trusts to be void, as they flew in the face of the rule against perpetuities.[138] Others failed on the basis of abandonment of the land on which the cemetery or grave memorial sat.[139] Still, others failed because they evinced specific intent or self-interest on the part of the settlor and not a more general

[138] *See, e.g.,* Johnson v. Holifield, 79 Ala. 423 (Ala. 1885); Hopkins v. Grimshaw, 165 U.S. 342 (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 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's Estate, 121 A.2d 74 (Pa. 1956); Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675 (Tex. 1981); Hoover v. Jolley, 45 Va. Cir. 309 (Va. Cir. 1998). *But see* Security Trust Co. v. Willett, 97 A.2d 112 (Del. Chanc. 1953).

[139] *See, e.g.,* Campbell v. City of Kansas, 13 S.W. 897 (Mo. 1890).

charitable interest that could be construed as a charitable trust.[140] If anything, they were too specific, including conditions on how the grave sites were to be kept—down to the specification and regularity of which flowers were to be delivered to decorate grave memorials. But several such trusts were upheld as valid charitable trusts.[141]

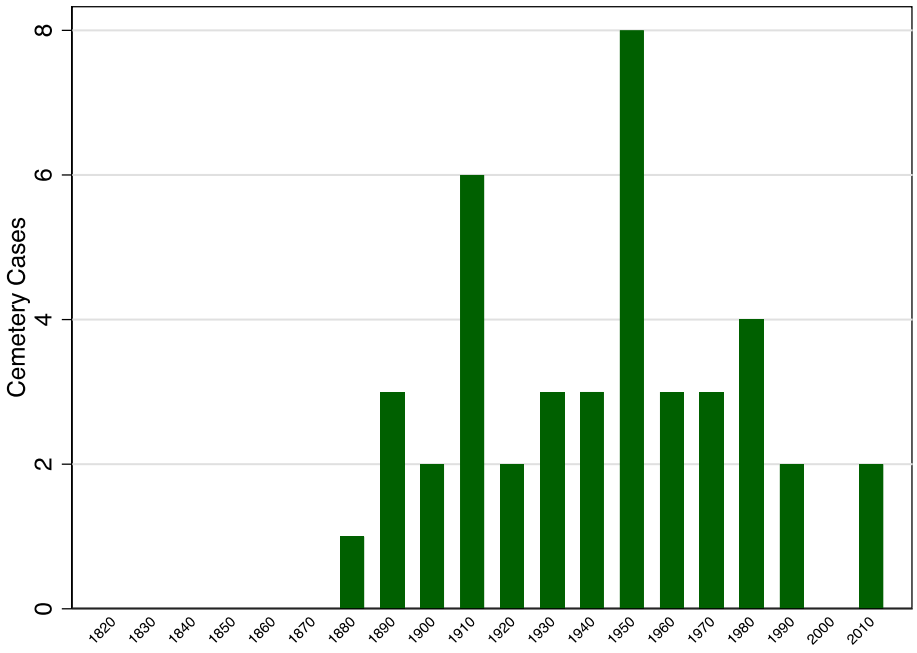
By the mid-Twentieth Century, these cases were typified by the winding up of cemetery associations, and the court was faced with the decision of whom the proper beneficiary, or trustee, should be.[142] In most of these cases, the court used cy près, or deviation, to allow the trusts to continue, albeit in modified form. The most popular decades for these cases occurred in the 1910s and 1950s, as noted in Figure 3, below.

Figure 3 – Cemetery Trust Cases

[140] *See, e.g.,* Kelly v. Nichols, 21 A. 906 (R.I. 1891); In re Davis' Estate, 23 Pa.D. 768 (Pa. Orphan's 1913); Matter of Merritt, 280 N.Y. 391 (N.Y. 1939); In re Essig's Estate 74 A.2d 787 (Pa. 1950); In re Braig's Estate, 36 Pa.D.&C.2d 469 (Pa. Orphan's 1965); Matter of Mary R. Latimer Trust, 78 A.3d 875 (Del. Chanc. 2013).

[141] In re Funck's Estate, 16 Pa.Super 434 (Pa. Supr. 1901); Jones v. Creamer, 22 Ohio C.D. 223 (Ohio Cir. 1910); Bliss v. Linden Cemetery Ass'n, 81 N.J. Eq. 394 (N.J. Chanc. 1913); In re Brundage's Estate, 167 N.Y.S. 694 (N.Y. Sur. 1917); Matter of Turk, 221 N.Y.S. 225 (N.Y. Sur. 1927); In re Deaner's Estate, 98 Pa.Super 360 (Pa. Supr. 1930); Epperson v. Clintonville Cemetery Co., 199 S.W.2d 628 (Ky. 1947); Wendell v. Hazel Wood Cemetery, 67 A.2d 219 (N.J. 1949); Johnson v. South Blue Hill Cemetery Ass'n, 221 A.2d 280 (Mass. 1966); Brown v. Saake, 190 So.2d 56 (Fla. App. 1966).

[142] *See, e.g.,* Slade v. Gammill, 289 S.W.3d 176 (Ark. 1956); In re Bryant's Estate, 168 N.Y.S.2d 21 (N.Y. Sur. 1957); In re Eckert's Estate, 352 N.Y.S.2d 48 (N.Y. App. 1974); Earney v. Clay, 516 S.W.2d 59 (Mo. App. 1974); Sharpless v. Medford Monthly Meeting of Religious Soc. of Friends, 548 A.2d 1157 (N.J. 1988).




### *D. Educational Purpose Trusts*

Throughout the Nineteenth and Twentieth Centuries, charitable trusts motivated by the settlor's stated educational purpose were frequent sources of controversy before American courts. In the Nineteenth Century and early Twentieth Centuries, many courts were asked to construe the intent of settlors who created charitable trusts affording scholarships to pupils of private schools or colleges, as well as public, or "free," schools.[143] However, in several cases, courts found the verbiage of the settlor's trust creation document to be vague but would effectuate the trusts anyway.[144] In other instances, the court found

[143] *See, e.g.,* American Academy of Arts & Sciences v. President, etc., of Harvard College, 78 Mass. 582 (Mass. 1832) (regarding an endowment at Harvard); Wright v. Linn, 9 Pa. 433 (Pa. 1848); Second Religious Soc. of Boxford v. Harriman, 125 Mass. 321 (Mass. 1878); Russell v. Allen, 5 Dill. 235 (8th Cir., 1879); Estate of Hinckley, 58 Cal. 457 (Cal. 1881); Green v. Blackwell, 35 A. 375 (N.J. Chanc. 1896); In re John's Will, 47 P. 341 (Ore. 1896); Keith v. Scales, 32 S.E. 809 (1899) (acknowledging that North Carolina did not recognize cy pres but validating the charitable trust for the creation of a church and school); and Laswell v. Hungate, 256 F. 635 (7th Cir. 1918).

[144] *See, e.g.,* McIntire's Adm'rs v. City of Zanesville, 17 Ohio St. 352 (Ohio 1867); Girard v. City of Philadelphia, 74 U.S. 1 (1868); Royal Burgh of Dumfries v. Abercrombie, 46 Md. 172 (Md. 1877); Mann v. Mullin, 84 Pa. 297 (Pa. 1877); Webster v. Wiggin, 31 A. 824 (R.I. 1895); Haynes v. Carr, 70 N.H. 463 (N.H. 1901); Lewis v. Gaillard, 61 Fla. 819 (Fla. 1911); Hitchcock v. Board of Home Missions, 259 Ill. 288, (Ill. 1913); Long v. Union Trust Co., 272 F. 699 (D.

overly-broad trusts to be invalid and refused cy près relief to extend the trust to a wider class of beneficiaries.[145]

But vagueness turned to specificity by the turn of the Twentieth Century. Several educational purpose charitable trusts of the late Nineteenth and early Twentieth Centuries were set up to create specific schools that never came to fruition, folded, or merged with other schools. Here, in general, the courts were more lenient and allowed the trust funds to be distributed to other educational purposes, whether or not the court had formally accepted the cy-près doctrine.[146]

By the middle of the Twentieth Century, school closures or mergers were commonplace, placing trusts that benefitted the non-extant school in peril. At times, the funds became insufficient to support the educational purpose of the trust outlined by the settlor. Thus, plaintiffs—often the heirs at law of the settlor—brought suit to request that the trust be voided and the assets returned. Most were unsuccessful. Courts tended to grant the successor school, or another entity closely affiliated with the closed school, the benefit of the educational purpose trust.[147]

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Ind. 1921); and Burrier v. Jones, 92 S.W.2d 885 (Mo. 1936). *But see* Tincher v. Arnold, 147 F. 665 (7th Cir. 1906) (in which a federal appellate court utilized cy pres to direct the overly specific trust to a broader class of individuals' educational pursuits); Quimby v. Quimby, 175 Ill.App. 367 (Ill. App. 1912) (wherein a court refused to redirect a trust to support a specific school—that closed—to another educational institution); and Mars v. Gilbert, 93 S.C. 455 (S.C. 1913) (refusing to adopt cy pres to reallocate the estate of a decedent who wished to operate a specific school when doing so was impracticable).

[145] *See, e.g.,* McLain v. School Directors of White Twp., 51 Pa. 196 (1865); Robinson v. Crutcher, 277 Mo. 1 (Mo. 1919); and National Bank of Greece v. Savarika, 167 Miss. 571 (Miss. 1933).

[146] *See, e.g.,* Trustees of Adams Female Academy v. Adams, 18 A. 777 (N.H. 1889); Barnard v. Adams, 58 F. 313 (U.S. Cir. Ct., 8th Cir., 1893); Att'y General v. Briggs, 42 N.E. 118 (Mass. 1895); Inglish v. Johnson, 42 Tex.Civ.App. 118 (Tex. App. 1906); Rockwell v. Blaney, 22 Ohio Dec. 107 (Ohio Ct. Comm. Pl. 1910); Lakaton Lodge No. 114 of Quakertown v. Bd. of Education of Franklin Tp., of Hunterdon County, 84 N.J.Eq. 112 (N.J. Chanc. 1915); Catron v. Scarritt Collegiate Institute, 264 Mo. 713 (Mo. 1915); Starr v. Morningside College, 186 Iowa 790 (Iowa 1919); Lupton v. Leander Clark College, 195 Iowa 1008 (Iowa 1922); Newton v. Healy, 100 Conn. 5 (Conn. 1923); City of Newport v. Sisson, 51 R.I. 481 (R.I. 1931); Hobbs v. Bd. of Education of Northern Baptist Convention, 126 Neb. 416 (Neb. 1934) (noting that the court was not using cy pres but ordinary judicial powers to hand over trust funds intended for a then-defunct school to a new educational institution); Snow v. President and Trustees of Bowdoin College, 175 A. 268 (Me. 1934); State ex rel. Att'y General v. Van Buren School Dist. No. 42, 89 S.W.2d 605 (Ark. 1936); and Bd. of Education of City of Rockford v. City of Rockford, 372 Ill. 442 (Ill. 1939). *But see* Brooks v. City of Belfast, 38 A. 222 (Me. 1897); Allen v. Trustees of Nasson Institute, 107 Me. 120 (Me. 1910) (settlor wanted his estate to be used to establish an institution of higher education for women, but the funds are insufficient. The court held that it failed "to see on what ground this court can justify itself in diverting the trust property to a purpose so radically different as the assistance of a town high school. It is the province of the court to construe a will not to construct one."); and Trustees of Cumberland University v. Caldwell, 203 Ala. 590 (Ala. 1919).

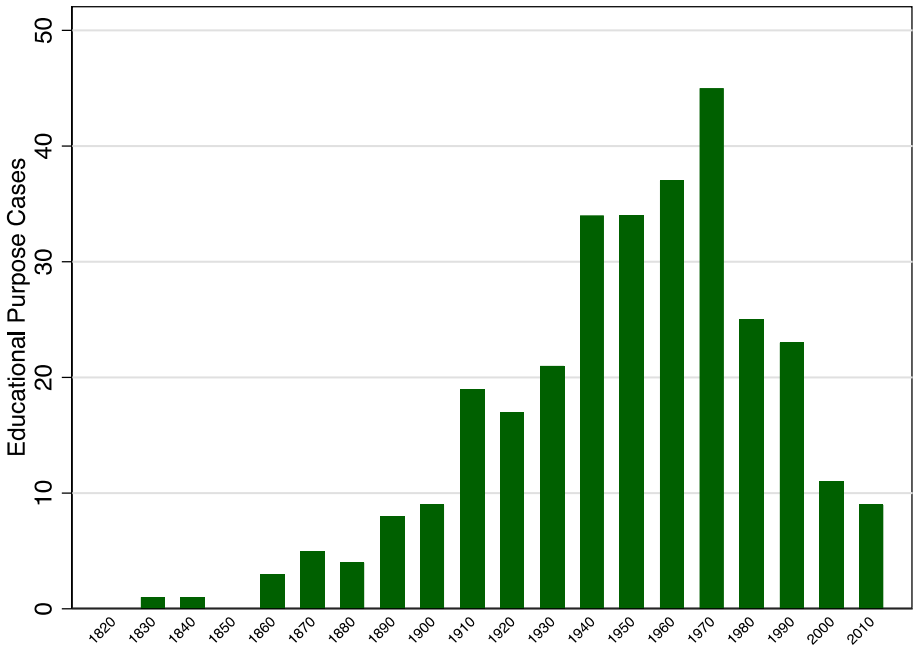
[147] *See, e.g.,* Harwood v. Dick, 286 Ky. 423 (Ky. 1941); Penn v. Keller, 178 Va. 131 (Va. 1941); School Dist. No. 70, Red Willow County v. Wood, 144 Neb. 241 (Neb. 1944); In re

With respect to trusts conferring scholarships in the Twentieth Century, many courts were faced with the prospect of reforming restrictive trust clauses. For example, a handful of trusts had accrued substantial value, making their scholarship allocation (as fixed by the donor) wasteful, while many more lost value, making their restrictions impracticable. In the majority of cases typifying this categorization, the intended beneficiary or trustee of the endowment had become defunct. In these cases, courts tended to provide petitioners relief based on cy près or deviation.[148] Figure 4 provides the observable rise in educational purpose trust cases throughout the Twentieth Century, peaking in the 1970s.

Figure 4 – Educational Purpose Trust Cases

Hagan's Will, 234 Iowa 1001 (Iowa 1944); Trustees of Putnam Free School v. Att'y General, 67 N.E.2d 658 (Mass. 1946); Exter v. Robinson 55 A.2d 622 (N.H. 1947); Teachers College v. Goldstein, 75 N.Y.S.2d 250 (N.Y. App. 1947); Guilford Trust Co. v. LaFleur, 91 A.2d 17 (Me. 1952); In re McKee's Estate, 83 Pa.D.&C. 492 (Pa. Orphan's 1953); In re Bank's Will, 169 N.Y.S.2d 528 (N.Y. Sur. Ct. 1957); Kingdom v. Saxbe, 161 N.E.2d 461 (Ohio Prob. 1958); In re duPont's Estate, 37 Pa.D.&C.2d 456 (Pa. Orphan's 1965); Montclair Nat'l Bank & Trust Co. v. Seton Hall College of Medicine and Dentistry, 217 A.2d 897 (N.J. 1966); Bell v. Carthage College, 423 N.E.2d 23 (Ill. App. 1968) (wherein a court refused to use cy pres but awarded the trust to the successor school anyway); Orphan Soc. of Lexington v. Bd. of Education of Lexington, 437 S.W.2d 194 (Ky. 1969) (in which the court refused to use cy pres but essentially did so anyway); Stackpole v. Brewster Free Academy, 247 N.E.2d 599 (Mass. 1969); Ball v. Hall, 274 A.2d 516 (Vt. 1971); First Nat'l Bank of Kansas City v. Jacques 470 S.W.2d 557 (Mo. 1971); In re Goehringer's Will, 329 N.Y.S.2d 516 (N.Y. Sur. Ct. 1972); Alexander v. Georgia Baptist Foundation, Inc., 266 S.E.2d 165 (Ga. 1980); Application of Abrams, 574 N.Y.S.2d 651 (N.Y. Sup. Ct. 1991); In re Bishop College, 151 B.R. 394 (U.S. Bankr. Tex. 1993); Matter of Schaefer, 1998 WL 939708 (Del. Chanc. 1998); and Obermeyer v. Bank of America, N.A., 140 S.W.2d 18 (Mo. 2004). *But see* Waterbury Trust Co. v. Porter, 131 Conn. 206 (Conn. 1944); Thurlow v. Berry, 32 So.2d 526 (Ala. 1947).

[148] Daughters of Am. Revolution of Kan., Topeka Chapter v. Washburn College, 164 P.2d 128 (Kan. 1945); Quinn v. Peoples Trust & Sav. Co., 60 N.E.2d 281 (Ind. 1945); Conway v. Bowe, 116 N.Y.S.2d 182 (N.Y. Supr. 1952); In re Hendrick's Will, 148 N.Y.S.2d 245 (N.Y. Supr. 1955) (concerning an endowment for Syracuse University's medical college, which disaffiliated with the university); In re Heffron's Will, 156 N.Y.S.2d 779 (N.Y. App. 1956) (concerning the same matter as Hendrick's Will but for a different endowment) (overruled in Application of Syracuse University, 148 N.E.2d 671 (N.Y. 1958)); Knights of Equity Memorial Scholarships Commission v. University of Detroit, 102 N.W.2d 463 (Mich. 1960); In re Earl and Mabel Nellis Athletic Fund of Canajoharie Cent. School Dist, 247 N.Y.S.2d 752 (N.Y. Sur. 1964) (wherein the corpus grew substantially and the funds were put to additional uses); Wilbur v. University of Vermont, 270 A.2d 889 (Vt. 1970) (donor's restrictions on enrollment for purposes of scholarships were voided under deviation); Sendak v. Trustees of Purdue University 279 N.E.2d 840 (Ind. App. 1972); South Carolina Nat'l Bank v. Bonds, 195 S.E.2d 835 (S.C. 1973); Estate of Puckett, 168 Cal.Rptr. 311 (Cal. App. 1980); Matter of U.S. Trust Co. of New York, 443 N.Y.S.2d 572 (N.Y. Supr. 1981); and In re Von Tauber, 33 Misc.2d 1224(A) (N.Y. Sur. 2011). *But see* In re R. B. Plummer Memorial Loan Fund Trust, 661 N.W.2d 307 (Neb. 2003) (in which the court declined to apply cy pres on the basis that the loan program created by the settlor could still be conducted and conversion to a scholarship fund, as requested by the university, was not necessary).




### *E. Racial Clause Trusts*

The earliest case in the dataset involves a trust providing for the freeing of enslaved people, which was expressly prohibited by the courts of the jurisdiction, on the grounds that it was contrary to public policy.[149] That changed in one of the earliest uses of the cy-près doctrine, when the Supreme Judicial Court of Massachusetts found a trust used for the abolition of slaves to be a valid trust but also that, after the edict of the Emancipation Proclamation, the underlying trust was frustrated and needed to be put to a use that effectuated the settlor's intent under a new purpose consistent with public policy.[150]

[149] *See, e.g.,* Haywood v. Craven's Ex'rs, 4 N.C. 360 (N.C. 1816). *But see* Wade v. American Colonization Soc., 15 Miss. 663 (Miss. 1846).

[150] Jackson v. Phillips, 96 Mass. 539 (Mass. 1867) (The trust was to be used to support the freedom of slaves which, at the time of the trust, 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.). *But see* Grimes' Ex'rs v. Harmon, 35 Ind. 198 (Ind. 1871) (Residuary estate left, in trust, to the "orthodox clergymen of Delphi to use to promote the . . . wellbeing of the colored race." First, the court determined that since there was no incorporated body of "orthodox clergymen of Delphi," the trust would need to be enforced by the courts. Next, the court determined that the class of beneficiaries was too vague and thus the provision was void for uncertainty. Finally, the court held that American courts did not have any cy pres power. The trust funds passed via intestacy.).

Eventually, even 130 year-old trusts were held as valid to promote the betterment of formerly enslaved people and their children.[151] Similarly, trusts for the benefit of Native Americans were regarded as valid charitable trusts.[152]

Several trusts regarding race created specific conditions that the trust be used for groups of immigrant populations on the basis of national origin. For the most part, the courts held these trusts as valid.[153] But sometimes the court did not allow such trusts as violative of public policy.[154] Likewise, many trusts placed racial restrictions—mainly for white beneficiaries—on who could receive the benefits of an otherwise public trust. For a time, these were held as valid or, in some cases, a court would use cy près to effectuate a similar discriminatory

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[151] *See, e.g.,* McAllister v. McAllister's Heirs, 46 Vt. 272 (Vt. 1873) (holding that a trust for the education of "Freedmen of the nation" was not void for uncertainty); In re Lewis' Estate, 11 Pa.C.C. 561 (Pa. Orphan's 1892) (holding as a valid charitable trust a gift used to create a foundation to "promote, aid and protect citizen of the US of African descent in the enjoyment of their civil rights"); and Houston v. Mills Memorial Home, 43 S.E.2d 680 (Ga. 1947) (money was left in trust to go to an "Old Folk's Home" for Black Americans, and though no home in the community specifically was named as such, the Court held that this was sufficiently definite for the funds to go to home for elderly Black Americans).

[152] *See, e.g.,* Collier v. Lindley, 266 P. 526 (Cal. 1928) (supporting Native Americans, inter alia); Edgeter v. Kemper, 136 N.E.2d 630 (Ohio Prob. 1955); and Olivas v. Board of Nat'l Missions of Presbyterian Church, U.S.A., 405 P.2d 481 (Ariz. App. 1965).

[153] *See, e.g.,* Dupont v. Pelletier, 120 Me. 114 (Me. 1921) (concerning French population in the county of the settlor's origin); and Imbrie v. Steen, 96 N.J. Eq. 190 (N.J. Chanc. 1924) (concerning a trust made for the benefit of an immigrant Italian community); and Barnum v. D'Hendecourt, 28 N.Y.S.2d 143 (N.Y. Supr. 1941) (benefitting the health of a French community in New York). *But see* Connecticut Bank & Trust Co. v. Coles, 192 A.2d 202 (Conn. 1963) (trust fund created by a settlor for Jewish citizens in his native Poland "had no general intent"—even though Jews were exterminated in World War II and fund ceased operation, the court did not apply cy pres); and In re Rose's Will, 265 N.Y.S.2d 91 (N.Y. Sur. 1965) (stating that a trust for the benefit of persecuted Jews was a valid charitable purpose but disqualifying the State of Israel as trustee).

[154] In re Aramian's Estate, 166 N.Y.S.2d 1006 (N.Y. Sur. Ct. 1957) (residuary estate given in trust to an Armenian school for Armenian-American students to learn about Armenian culture. The court held that this was impracticable because it could lead to anti-American indoctrination. The court directed the funds to the Armenian General Benevolent Union, an American corporation.).

purpose as that contained within the trust instrument.[155] Eventually, they failed—as violations of public policy.[156]

But several racial clause trusts were bound into educational purpose trusts. And many of these trusts were hampered by restrictive clauses on the basis of race or gender. In the case of gender-related clauses, courts generally found that the terms could be amended to allow women to benefit from scholarships originally set up for men or boys.[157] However, courts of the mid-twentieth century were often split about whether trusts creating scholarships with race restrictions could be amended. Courts of the South typically upheld the race restrictions, while contemporary courts in other regions of the country voided these restrictive clauses to allow the trusts to continue.[158] That is, like many of the cases described above, these cases—and the decisions rendered by the courts—were products of their time and place. By the late Twentieth Century,

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[155] City of Columbia v. Monteith, 139 S.C. 262 (S.C. 1926) (upholding a trust, named for the settlor, creating an orphanage to be kept as an industrial school for children of indigent white persons in the city, training them in domestic service); In re Ellis' Estate, 8 Pa.D.&C. 775 (Pa. Orphan's 1927) (concerning a testamentary trust to create and maintain a home "for white fatherless girls." Because there were so few "white fatherless girls" in need, the home had a significant excess of funds. Pennsylvania also had a statute that limited the amount of money a single charity could hold at a time. The court determined that the excess funds should be applied via cy pres to another similar cause.); and Heustess v. Huntingdon College, 242 Ala. 272 (ala. 1942) (land deeded to college with the premises to be used, kept, maintained, and disposed of as a place for the education of white women, and the court held that the college could sell the land, if the money went towards the benefit of white women).

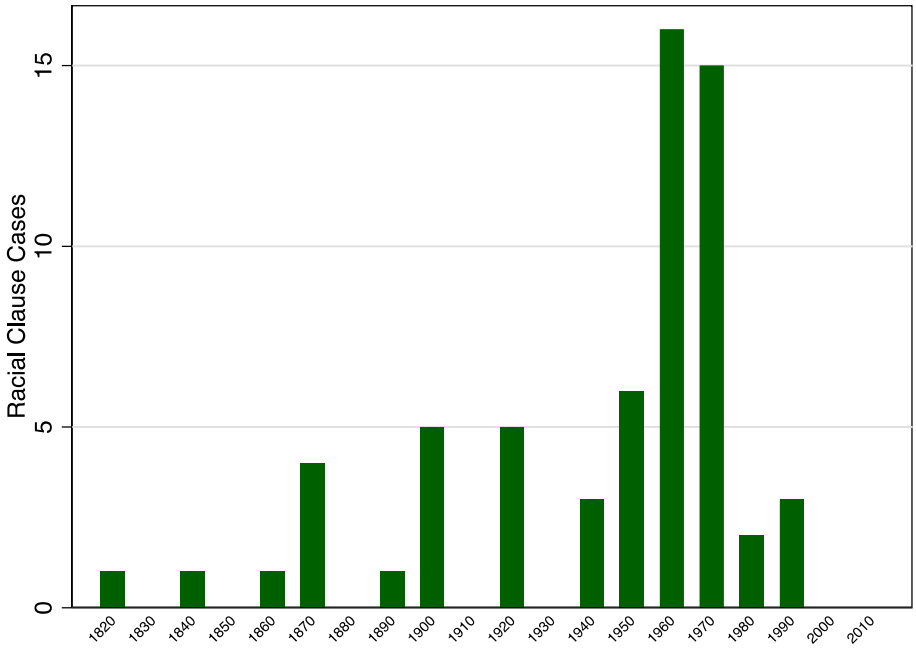
[156] La Fond v. City of Detroit, 98 N.W.2d 530 (Mich. 1959) (real estate was given to the city in trust as a playground for white children. The court held that the bequest was void as against public policy and that the trust failed.); and Evans v. Newton, 382 U.S. 296 (1966) (reversing Evans v. Newton, 138 S.E.2d 573 (Ga. 1964) and concerning a "public" park for whites only); Evans v. Abney, 165 S.E.2d 160 (Ga. 1968) (affirmed in Evans v. Abney, 396 U.S. 435 (1970) and dealing also with a so-called public park in Macon, Georgia); and In re Potter's Will, 275 A.2d 574 (Del. Chanc. 1970).

[157] *See, e.g.,* Wesley United Methodist Church v. Harvard College, 316 N.E.2d 620 (Mass. 1974); Trustees of University of Delaware v. Gebelein, 420 A.2d 1191 (Del. Chanc. 1980); Matter of Crichfield Trust, 426 A.2d 88 (N.J. 1980); and In re Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990). *But see* Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (in which the court determined that the discrimination on the basis of gender was not so pervasive as to void the gender restrictive clause); Matter of Johnson's Will, 439 N.Y.S.2d 250 (N.Y. Sur. 1981) (permitting a scholarship based on gender to continue).

[158] *See, e.g.,* Howard Sav. Institution of Newark v. Trustees of Amherst College, 160 A.2d 177 (N.J. Supr. 1960) (permitting the striking of racial and religious restrictions on scholarships) (affirmed in Howard Sav. Institution of Newark, N.J., v. Peep, 170 A.2d 39 (N.J. 1961)); In re Hawley's Estate, 223 N.Y.S.2d 803 (N.Y. Sur. 1961) (removing race and religious-based requirements for a scholarship); and New England Yearly Meeting of Friends v. Anthony, 186 A.2d 340 (R.I. 1962) (allowing race restriction to continue, because it served a Black community). *But see* In re Girard's Estate, 127 A.2d 287 (Pa. 1956) (wherein the Supreme Court of Pennsylvania refused to change a racial restriction on a scholarship); and In re Weaver's Trust, 43 Pa.D.&C.2d 245 (Pa. Orphan's 1967) (same result, also in Pennsylvania, because the institution was private).

these clauses were all but voided in the wake of the passage of the Civil Rights Act and the preemption of the Equal Protection Clause of the Fourteenth Amendment, redounding to the benefit of marginalized racial groups.[159] Figure 5 provides an illustration of the frequency of these cases.

Figure 5 – Racial Clause Trust Cases




### *F. Art, Library, and Museum Trust Cases*

Several cases in which courts were asked to afford plaintiffs cy près relief concerned art collections, libraries, and museums. These cases were rare in the Nineteenth Century, perhaps because the titans of industry, amassing fortunes in the Industrial Revolution, had not yet accrued the wealth necessary to promote the causes they would later support for public benefit. But by the late

[159] *See, e.g.,* Com. of Pa. v. Brown, 260 F.Supp. 323 (E.D. Pa. 1966); Coffee v. William Marsh Rice University, 408 S.W.2d 269 (Tex. App. 1966); Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Chanc. 1969); Dunbar v. Bd. of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969); Estate of Vanderhoofven, 96 Cal.Rptr. 260 (Cal. App. 1971); Wachovia Bank & Trust Co. v. Buchanan, 346 F.Supp. 665 (U.S. Dist. D.C. 1972); Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Chanc. 1973); Trammell v. Elliott, 199 S.E.2d 194 (Ga. 1973); Lockwood v. Killian, 375 A.2d 998 (Conn. 1977) (affirmed in Lockwood v. Killian, 425 A.2d 909 (Conn. 1979)); In re Treen's Estate, 13 Pa.D.&C.3d 115 (Pa. Comm. Pl. 1979); and Tinnin v. First United Bank of Mississippi, 570 So.2d 1193 (Miss. 1990). *But see* Smyth v. Anderson, 232 S.E.2d 835 (Ga. 1977) (dodging the question of striking a racially restrict clause).

Nineteenth Century and early Twentieth Century, a handful of cases arose from trusts for the creation of libraries or museums. In most of these cases, the controversy concerned the proper recipient of benefits the donor intended—and whether the trust was indeed a charitable trust.[160] Courts' decisions on how to deal with this issue were not uniform, but most tended to award trust assets to public trustees for purposes similar to those designed by settlors—whether or not the jurisdiction had formally adopted the cy-près doctrine.[161]

Similar cases arose into the middle Twentieth Century and reached their zenith in the 1940s.[162] By this time, courts had to consider what to do with fledgling trusts or the assets of failing art, library, and museum collections, many of which were private.[163] Adding to the complexity of the court's determination was the fact that these trusts, perhaps more so than other typologies were specifically conditioned not only on terms under which the trust should be managed but especially on restraints against the alienation of the collection. Yet, in most cases, courts bestowed these assets to public entities fulfilling the same purposes, even if that meant overriding the conditions originally specified by the donor.[164] Figure 6, below, descriptively demonstrates the prevalence of these cases, especially in the Twentieth Century.

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[160] *See, e.g.,* Cary Library v. Bliss 23 N.W. 92 (Mass. 1890); Almy v. Jones, 21 A. 616 (R.I. 1891); Tilden v. Green, 28 N.E. 880 (N.Y. 1891); Crerar v. Williams, 44 Ill.App. 497 (Ill. App. 1892); and Hubbard v. Worcester Art Museum, 194 Mass. 280 (Mass. 1907).

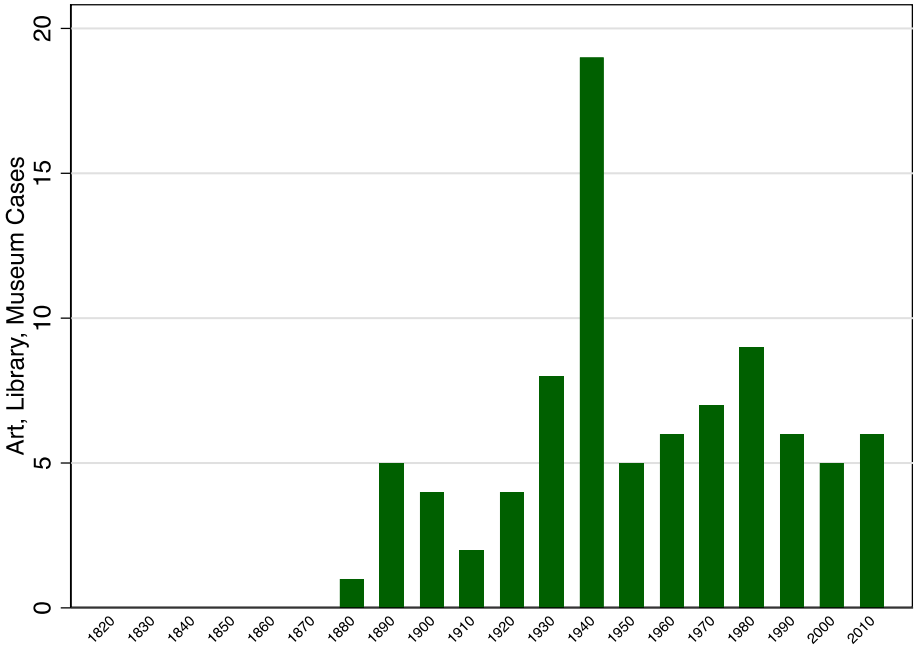
[161] *See, e.g.,* Mason v. Bloomington Library Ass'n 237 Ill. 442 (Ill. 1908); Camp v. Presbyterian Soc. of Sackets Harbor, 105 Misc. 139 (N.Y. Supr. 1918); Hodge v. Wellman, 191 Iowa 877 (Iowa 1920); Gardner v. Sisson, 49 R.I. 504 (R.I. 1929). *But see* City of Keene v. Eastman, 75 N.H. 191 (N.H. 1909); President and Fellows of Harvard College v. Jewett, 11 F.2d 119 (6th Cir. 1925).

[162] *See* Figure 6, *infra.*

[163] Parsons v. Childs, 345 Mo. 689 (Mo. 1939) (regarding an art museum's creation); Cinnaminson Library Ass'n v. Fidelity-Philadelphia Trust Co., 56 A.2d 417 (N.J. Chanc. 1948) (dealing with the winding up of a library); In re Klauber's Will, 201 Misc. 839 (N.Y. Sur. 1951) (concerning the founding of a museum of Tibetan art); Palmer v. Evans 124 N.W. 2d 856 (Iowa 1963) (regarding the establishment of a museum); and People ex rel. Scott v. George F. Harding Museum, 374 N.E.2d 756 (Ill. App. 1978) (concerning the creation of a new museum).

[164] *See, e.g.,* City Bank Farmers Trust Co. v. Arnold, 19 N.E. 288 (N.Y. 1935) (affirmed in City Bank Farmers Trust Co. v. Arnold, 283 N.Y. 184 (N.Y. 1940)); In re Gary's Estate, 288 N.Y.S. 382 (N.Y. App. 1936); State v . Federal Square Corp., 3 A.2d 109 (N.H. 1938); Village of Hinsdale v. Chicago City Missionary Soc. 30 N.E.2d 657 (Ill. 1940); In re Wagner's Estate, 50 Pa.D.&C. 607 (Pa. Orphan's 1942); Noel v. Olds, 138 F. 2d 581 (U.S. App. D.C. 1943); Matter of Stuart, 183 Misc. 20 (N.Y. Sur. 1944); Olds v. Rollins College, 173 F. 2d 639 (U.S. App. D.C. 1949); Myers v. Davis, 224 S.W.2d 690 (Ky. 1949); Bosson v. Woman's Christian Nat'l Library Ass'n, 225 S.W.2d 336 (Ark. 1949); Gordon v. City of Baltimore, 267 A.2d 98 (Md. 1970); Industrial Nat'l Bank of R.I. v. Guiteras, 267 A.2d 706 (R.I. 1970); Flynn v. Danforth, 547 S.W.2d 132 (Mo. App. 1976); Firestone Bank v. Bd. of Trustees of Taylor Memorial Public Library and Bd. of Trustees of Stow Public Library, 1981 WL 3852 (Ohio App. 1981); Bd. of Trustees of University of North Carolina at Chapel Hill v. Unknown Heirs of Prince, 319 S.E.2d 239 (N.C. 1984); Blocker v. State, 718 S.W.2d 409 (Tex. App. 1986); In re Bd. of Trustees of Huntington Free Library and Reading Room, 771 N.Y.S.2d 69 (N.Y. App. 2004); In re Barnes

Figure 6 – Art, Library, and Museum Trust Cases




### *G. Medical Purpose Trust Cases*

There is no question that trusts for medical purposes serve an important role in the evolution of the cy-près doctrine, because the bulk of these cases arose in the early- to mid-Twentieth Century, charting a path forward for the invocation of cy près.[165] The earliest medical purpose trust cases concerned the construction of the settlor's stated purpose, as well as whether accumulation provisions (those that require the trustee to hold the corpus until a specifically-defined value was reached) were valid.[166] Likewise, settlors, or their trustees, in

Foundation, 871 A.2d 792 (Pa. 2005); In re Fisk University, 392 S.W.3d 582 (Tenn. App. 2011); and Petition of U.S. on Behalf of the Smithsonian Institution, 2019 WL 3451394 (U.S. Dist. Ct. D.C. 2019). *But see* First Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 121 A.2d 296 (Del. Chanc. 1956) (refusing to collapse two trusts into one, the latter of which—for the creation of a library—failed for insufficient funds); Metropolitan Museum of Art v. Bank of Boston Connecticut, 19 Conn. L. Rptr. 557 (Conn. Supr. 1997); Museum of Fine Arts v. Beland, 735 N.E.2d 1248 (Mass. 2000); and Matter of Coe College, 935 N.W.2d 581 (Iowa 2019).

[165] *See* Figure 7, *infra.*

[166] *See, e.g.,* Hayden v. Connecticut Hospital 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. 1894) (regarding a trust accumulation provisions); Brigham v. Peter Bent Brigham Hospital 134 F. 513 (1st Cir., 1904) (dealing with the same); Webber Hospital

early cases in this line—seeking to transfer assets proposed for sanatoria or hospitals, that could not be created or did not exist, to like purposes—often *did* prevail.[167] But the onset of the Twentieth Century brought new cases, many of which allowed the court to employ cy près. Among these cases were disputes over which entity should receive trust benefits when general support for medical purposes was stated by settlors. In some of these cases, courts found the trusts to be void for uncertainty or not afforded cy près,[168] while in others, courts allocated trust funds to hospitals in the settlor's community or created a new hospital altogether.[169] Likewise, settlor restrictions on the use of funds—for capital improvements, construction of new wings, or the founding and erection of hospitals that for some reason or another failed—were often at issue. In these cases, courts tended to grant either cy près or equitable deviation relief.[170]

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Ass'n v. McKenzie, 104 Me. 320 (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. Massachusetts General Hospital, 207 Mass. 419 (Mass. 1911) (construing the intended beneficiary of the settlor); and French v. Calkins, 252 Ill. 243 (Ill. 1911).

[167] Nichols v. Newark Hospital, 71 N.J. Eq. 130 (N.J. Chanc. 1906); Hamilton, et al. v. The John C. Mercer Home, 19 Pa. D. 169 (Pa. Comm. Pl. 1909) (employing cy pres); Adams v. Page, 76 N.H. 96 (N.H. 1911); Read v. Willard Hospital, 215 Mass. 132 (Mass. 1913); and Dykeman v. Jenkines, 179 Ind. 549 (Ind. 1913). *But see* Brown v. Condit 70 N.J. Eq. 440 (N.J. Chanc. 1905); Hope's Estate, 25 Pa. D. 141 (Pa. Orphans' Ct. 1915).

[168] Bancroft v. Maine Sanatorium Ass'n, 119 Me. 56 (Me. 1920); Graff v. Wallace, 32 F.2d 960 (U.S. App. D.C. 1929); In re Derbyshire's Estate, 16 Pa.D.&C. 200 (Pa. Orphan's 1931); In re O'Hanlon's Estate, 264 N.Y.S. 251 (N.Y. Sur. 1933); Allen v. City of Bellefontaine, 191 N.E. 896 (Ohio App. 1934); In re Collins' Estate, 3 N.Y.S.2d 291 (N.Y. App. 1938); and Chicago Daily News Fresh Air Fund v. Kerner, 305 Ill. App. 237 (Ill. App. 1940).

[169] *See, e.g.,* In re Klein's Estate, 26 Pa. D. 476 (Pa. Orphan's 1917); Jones' Unknown Heirs v. Dorchester, 224 S.W. 596 (Tex. App. 1920); Harter v. Johnson, 122 S.C. 96 (S.C. 1922); Matter of Potts, 205 A.D. 147 (N.Y. App. 1923); Matter of Mills, 121 Misc. 147 (N.Y. Sur. 1923); Dingwell v. Seymour, 267 P. 327 (Cal. App. 1928); In re Fletcher's Estate, 2 N.Y.S.2d 771 (N.Y. Sur. 1938); City of Cleveland v. Duffy, 26 Ohio Law Abs. 590 (Ohio App. 1938); Noble v. First Nat'l Bank, 183 So. 393 (Ala. 1938) (although the court maintained that it was not using cy pres when it permitted land, intended for a hospital, sold to fund and relocate a hospital); In re Brundett's Estate, 87 N.Y.S.2d 851 (N.Y. Sur. 1940); State Nat'l Bank of Texarkana v. Bann, 202 Ark. 850 (Ark. 1941); Town of Milton v. Att'y General, 49 N.E.2d 909 (Mass. 1943); In re Willaims' Estate, 46 A.2d 237 (Pa. 1946); Petition of Rochester Trust Co., 49 A.2d 922 (N.H. 1946); In re Lawless' Will, 87 N.Y.S.2d 386 (N.Y. Sur. 1949); Town of Brookline v. Barnes, 87 N.E.2d 843 (Mass. 1949); and In re Dobbins' Estate, 71 Pa.D.&C. 106 (Pa. Orphan's 1951). *But see* Matter of Neher, 279 N.Y. 370 (N.Y. 1939) (transferring land to intended to be used as a hospital to the town to build a town hall); Nelson v. Madison Luther Hosp. & Sanatorium, 237 Wis. 518 (Wis. 1941) (holding that a trust for the creation of a hospital was not charitable in nature); In re Weeks' Estate, 154 Kan. 103 (Kan. 1941) (refusing to apply cy pres); Lutheran Hospital of Manhattan v. Goldstein 182 Misc. 913 (N.Y. Supr. 1944) (upholding the restrictions on the trust fund distribution and refusing to apply cy pres); and Hampton v. O'Rear, 215 S.W.2d 539 (Ky. 1948) (refusing cy pres when the intended hospital disclaimed the gift of land to build a new hospital).

[170] *See, e.g.,* In re Grossbard's Will, 101 N.Y.S.2d 527 (N.Y. Sur. Ct. 1950); Portsmouth Hospital v. Att'y General, 178 A.2d 516 (N.H. 1962); and In re Brooke's Estate, 45 Pa.D.&C.2d

Toward the mid-Twentieth Century, several cases were brought on by the drying up of nurse- and physician-training programs at hospitals, which were replaced by medical training programs at universities. Courts tended to allocate trust funds in these cases to the beneficiary hospital itself, rather than to substitute a beneficiary university the settlor may not have intended.[171] Additionally, several trusts were created to research a cure for various diseases—for example, tuberculosis and polio—which eventually became curable. In such an instance, courts generally applied trust resources to similar medical research purposes, such as respiratory illness and childhood illness, respectively.[172] Finally, the dissolution or merger of hospitals precipitated the bulk of cases in the mid- to late-Twentieth Century. In these cases, courts would frequently award trust funds to the successor hospital, or where none existed, to regional hospitals that provided the same services as the settlor's intended beneficiary.[173]

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670 (Pa. Orphan's 1968); and Estate of McKenna, 451 N.Y.S.2d 617 (N.Y. Sur. 1982). *But see* In re Loring's Estate, 175 P.2d 524 (Cal. 1946) (ordering the size of the hospital to be downsized when the value of the trust shrank, but refusing cy pres relief); Bell v. Shannon, 367 S.W.2d 761 (Tenn. 1963) (requiring the hospital to be built on a smaller scale); Matter of Booker, 682 P.2d 320 (Wash. App. 1984).

[171] *See, e.g.,* Shawmut Bank, Connecticut, N.A. v. Yale-New Haven Hosp., Inc., 1997 WL 35814 (Conn. Supr. 1997); Carl Herzog Foundation, Inc. v. University of Bridgeport, 699 A.2d 995 (Conn. 1997); and New England Hospital v. Att'y General, 286 N.E.2d 474 (Mass. 1972). *But see* Snow v. President and Trustees of Bowdoin College, 175 A. 268 (Me. 1934); In re Hendrick's Will, 148 N.Y.S.2d 245 (N.Y. Sup. Ct. 1955) (concerning an endowment for Syracuse University's medical college, which disaffiliated with the university); and In re Heffron's Will, 156 N.Y.S.2d 779 (N.Y. App. 1956) (concerning the same matter as Hendrick's Will but for a different endowment) (overruled in Application of Syracuse University, 148 N.E.2d 671 (N.Y. 1958)); In re Ganser's Estate, 255 N.W.2d 483 (Wis. 1977).

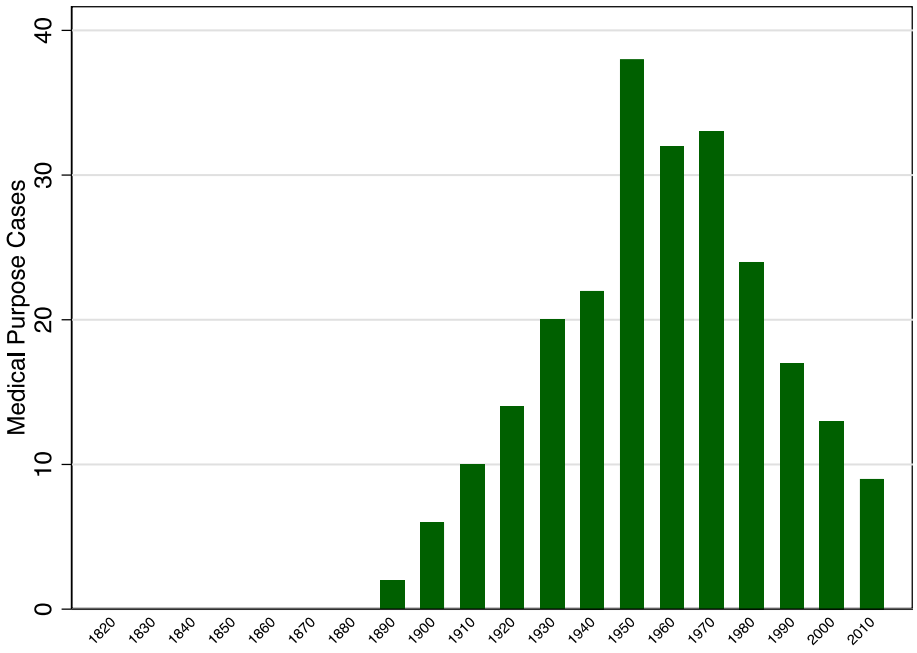
[172] *See, e.g.,* Creech v. Scottish Rite Hospital for Crippled Children, 84 S.E.2d 563 (Ga. 1954) (applying cy pres to a trust intended originally for tubercular children when the need for such services evaporated); In re Lee's Will, 156 N.Y.S.2d 813 (N.Y. Supr. 1956) (applying cy pres for a trust concerning tuberculosis sanatorium); In re Kittinger's Estate, 160 N.Y.S.2d 214 (N.Y. Sur. 1956) (concerning the same); In re Bowne's Estate, 173 N.Y.S.2d 723 (N.Y. Sur. 1958) (regarding the same); In re Scott's Will, 8 N.Y.2d 419 (N.Y. 1960) (concerning funds given in trust for the construction of a hospital for tuberculosis patients, for which there were very few, and allowing cy pres relief); In re Hasting's Estate, 217 N.Y.S.2d 810 (N.Y. Sur. 1961) (transferring funds to a university for continued respiratory disease research once sanitarium for tuberculosis was no longer needed for treatment of the disease); Sister Elizabeth Kenny Foundation, Inc., v. National Foundation, 126 N.W.2d 640 (Minn. 1964) (transferring trust funds, left to treating and finding a cure of polio, to another worthy beneficiary when polio had essentially been cured); Estate of Horton, 90 Cal.Rptr. 66 (Cal. App. 1970) (employing cy pres for excess income of trust used to research polio); Frame v. Shreveport Anti-Tuberculosis League, 538 So.2d 684 (La. App. 1989); and Matter of Estate of Craig, 848 P.3d 313 (Ariz. App. 1992) (repurposing trust for tuberculosis treatment).

[173] *See, e.g.,* Niles Post No. 2074 of Veterans of Foreign Wars of U.S. v. Niles Memorial Hospital Ass'n, 29 N.E.2d 631 (Ohio App. 1936); John Robinson Hospital v. Cross, 272 N.W. 724 (Mich. 1937); Pennsylvania Co. for Banking and Trusts v. Bd. of Governors of London Hospital, 83 A.2d 881 (R.I. 1951); First Nat'l Bank of Chicago v. King Edward's Hospital Fund for London, 117 N.E.2d 656 (Ill. App. 1954); In re Bishop's Estate, 129 N.Y.S.2d 387 (N.Y.

Figure 7, below, notes the incidence of these cases in the Twentieth Century, which closely hew to a linear path from the late Nineteenth Century to mid-Twentieth Century, after which time they have been in relative decline.

Figure 7 – Medical Purpose Trust Cases

Sur. Ct. 1954); In re Scott's Estate, 145 N.Y.S.2d 346 (N.Y. Supr. 1955); In re Sanders' Estate 161 N.Y.S.3d 982 (N.Y. Sur. 1957); In re Brown's Trust, 10 Pa.D.&C.2d 93 (Pa. Orphan's 1957); In re Ablett's Estate, 144 N.E.2d 46 (N.Y. 1957); In re Perkins' Will, 144 N.E.2d 56 (N.Y. 1957); In re Women's Homeopathic Hospital of Philadelphia, 142 A.2d 292 (Pa. 1958); Petition of Mary J. Drexel Home, 13 Pa.D.&C.2d 371 (Pa. Orphan's 1958); Anna Jacques Hospital v. Att'y General, 167 N.E.2d 875 (Mass. 1960); State ex rel. Goddard v. Coerver, 412 P.2d 259 (Ariz. 1966); Old Colony Trust Co. v, Bd. of Governors of Belleville General Hospital, 247 N.E.2d 583 (Mass. 1969); In re Farren, 272 N.E.2d 162 (Ohio App. 1970); Rhode Island Hospital Trust Nat'l Bank v. Israel, 377 A.2d 341 (R.I. 1977); Matter of Gerber, 652 P.2d 937 (Utah 1982); Hospital Authority of Barrow County v. First Nat'l Bank of Atlanta, 296 S.E.2d 54 (Ga. 1982); Matter of Kraetzer's Will, 462 N.Y.S.2d 1009 (N.Y. Sur. 1983); U.S. Nat'l Bank of Oregon v. Rhilander, 677 P.2d 745 (Ore. App. 1984); Matter of Will of Coffey, 590 N.Y.S.2d 357 (N.Y. Supr. 1992); Stockert v. Council on World Service and Finance of Methodist Church, 427 S.E.2d 236 (W. Va. 1993); In re Estate of du Pont, 663 A.2d 470 (Del. Chanc. 1994); In re Gray Living Trust, 1996 WL 33348617 (Mich. App. 1996); Tauber v. Commonwealth ex rel. Kilgore, 562 S.E.2d 118 (Va. 2002); Mattox v. The Annabella R. Jenkins Foundation, 61 Va. Cir. 492 (Va. Cir. 2003); Blumenthal v. Sharon Hospital, Inc., 2003 WL 21384569 (Conn. Supr. 2003); Bank One Trust, Co., N.A. v. Miami Valley Hospital, 2003 WL 22026337 (Ohio App. 2003); In re Hummel, 805 N.Y.S.2d 236 (N.Y. Supr. 2005); In re Trustco Bank, 954 N.Y.S.2d 411 (N.Y. Sur. 2012); and First Merit Bank, N.A. v. Akron General Medical Center, 116 N.E.3d 843 (Ohio App. 2018). *But see* In re Bodine's Trust, 239 A.2d 315 (Pa. 1968) (trust to a women's hospital was not subject to cy pres when the hospital's holding company underwent a corporate merger); Trustees of L.C. Wagner Trust v. Barium Springs Home for Children, Inc., 401 S.E.2d 807 (N.C. App. 1991) (holding that trust for a charitable hospital that ceased to exist was not eligible for cy pres, because it did not evince a "general charitable intent"); In re Winsted Memorial Hosp., 36 Bankr.Ct.Dec. 86 (U.S. Bankr. Conn., 2000) (holding that cy pres was not applicable because hospital had only filed for bankruptcy but was not yet in receivership); In re Boston Regional Medical Center, Inc., 410 F.3d 100 (1st Cir., 2005) (holding the same).




## III. AN ECONOMETRIC ANALYSIS OF THE CY PRÈS DOCTRINE

As may be apparent from the foregoing section of this Article, I have deeply analyzed the historical evolution of the cy-près doctrine as evidenced from the cases arising from various charitable trust typologies. And I have done so, as well, through an empirical lens. This section of the Article provides an empirical analysis of cy près that adds tremendous insight into the inner workings of the doctrine. Specifically, I sought to test what kinds of cases were more likely than not to produce a judicial outcome that used cy près to repurpose a charitable trust. This section of the Article details the dataset I created, the coding decisions I used, and my empirical findings.

### *A. The Dataset*

First, I endeavored to create as comprehensive of a dataset as possible, so as to draw data from as many judicial decisions made, concerning the doctrine of cy près and its relation to charitable trusts. To do so, I used various search terms in WestlawNext to compile the source material for the dataset. In total, my search yielded 1,561 cases from which to draw results. That said, several the cases were not pertinent to my inquiry, either because the case did not address cy près on the merits and disposed of it on procedural grounds, or because the

case concerned cy près in the context of class action litigation. A few cases had to be dropped from the dataset as well, given that 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 coding purposes. Still, the dataset yielded over 1,300 codable cases, a treasure trove of information about the cy-près doctrine and its use, or disuse, between the years of 1820 to 2019.

### *B. Coding Decisions and Imputed Values*

In creating a dataset of this magnitude, decisions about what data to draw from a case, in order to quantify and to analyze these data, required considerable forethought and following a systematic protocol for doing so. As such, my team of research assistants and I coded multiple variables according to the conventions outlined below.

First, we analyzed every observable characteristic of the outcome of the case to construct our dependent variable. We coded cases along these lines: cases where the court invalidated the trust for lack of an ascertainable beneficiary; cases where then-existing law prohibited the trust; cases where the court invalidated the trust altogether; cases where the court validated the trust but did not use cy près or deviation; cases where the court changed the trust based on impracticability, changed circumstances, waste, or resolved an ambiguity about the beneficiary or trustee of the trust; and cases where the court validated or invalidated provisions, or even the whole, of a trust on constitutional grounds. We coded the vast possibility of these outcome categories as a function of whether the court used or did not use cy près to reach its result in these categories. Thus, the key dependent variable was this function; to wit, whether or not the court employed the use of cy près to change the trust.

I then combed through the entire dataset to code facts about the trust in question. The categories 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. For the most part, these categories were mutually exclusive through the late Nineteenth Century, but by the early Twentieth Century, trusts became more complex, with material provisions concerning multiple beneficiaries that varied across categories. Likewise, reversionary or racial restriction clauses might be present within a charitable trust creation document to be used—for example, for an educational purpose. In such cases, I coded the case as involving multiple categories of trusts. These categories of trusts serve as the germane independent variables in my analysis, along with the decade in which the court made its

decision regarding the trust.

Despite the richness of this dataset, it does hold a couple of possible constraints. Among these is the reality that the dataset cannot contain the entire universe of cy près cases before American courts since their inception. Rather, the dataset is comprised only of cases that received a judicial opinion, and more specifically, those searchable on the WestlawNext database. 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. Notwithstanding these shortcomings, the dataset is itself a first-of-its-kind endeavor to explore the cy-près doctrine through both historical and empirical lenses.

### *C. Empirical Findings*

As can be inferred from the discussion above, the principal inquiry I attempted in this study was to test the kinds of cases in which courts applied use of the doctrine of cy près. Descriptively, Part II of this Article already provides a portrait of the cases in which courts were asked to grant cy près relief. However, the descriptive sketch is but the tip of the proverbial iceberg. Digging into the cases is undoubtedly a contribution to the literature on cy près, but to date, no scholar has attempted to apply empirical methods to examine the doctrine. Thus, my vision for the exploration of the doctrine was grander than mere descriptive statistics and required me to employ empirical methods to get to the root of a court's decision to employ cy près to change the material purposes of a charitable trust.

Specifically, I sought to examine which kinds of cases yielded the result of cy près and which did not. Moreover, I sought to identify whether the use of cy près over time was only an aberration or if it in fact was predictive of a trend toward the greater use of the doctrine. In doing so, I utilized several independent variables. First, I controlled for the decade in which the court's decision was made. Second, I controlled for each typology of case, to wit: 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. I tested these independent variables against an outcome in which a court applied cy près to change the material purposes of a trust to discern why a court would do so.

I used a method of logistic regression analysis to forecast court decisions. This method estimates probability of decisions with a mean of 1—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.

First, I find that the use of cy près over the passage of time was not a mere illusion. With the turn of each decade, a court was more likely to use cy près by 1.4 percent, at the highest level of statistical significance. By contrast, for charitable trusts with a reversionary or gift-over provision, a court was 82.6 less likely to use cy près to change the trust. And likewise, courts were 53.1 percent less likely to use cy près if a trust had a private or business purpose before achieving their charitable purpose. But these results are, perhaps, expected.

More unexpectedly, in certain cases, courts were overwhelmingly more likely to apply cy près to a trust, while in others, the relationship between the case typology and the outcome was too noisy to reliably predict the application of cy près. Examples of the former include public purpose trusts, educational purpose trusts, and medical purpose trusts. In cases where the trust supported an art, library, or museum collection, or where the trust was a religious purpose trust, cemetery trust, or racial clause trust, the results were not statistically significant. However, a clear picture emerges from the former sets of cases. Public purpose trusts—those involving general charitable purposes for the benefit of a community at large—had a statistically and directionally strong relationship with the outcome. In these cases, courts were 36.3 percent more likely to apply cy près than not. Stronger still were educational purpose trust cases, where if the trust supported an educational purpose, the court was 75.5 percent more likely to apply cy près than not. Finally, strongest of all, trusts that served a medical purpose were the favorites of the courts for the application of cy près. In these cases, the court was more than twice as likely to use cy près to change the purpose of the trust.

These results were not only unexpected because they have never been proffered by a scholar before, but more importantly, because across all typologies of trusts, courts seemed to be moving toward the application of cy près. Yet, even controlling for time and reversion or gift-over provisions, which undoubtedly impact court decisions, only in the cases involving the public purpose, educational purpose, and medical purpose cases do the results yield significant and strong results. It is true that far fewer cases in the dataset emerged from the typologies of art, library, and museum trusts, cemetery trusts, and racial clause trusts than the other typologies. If anything, this fact should inure to the statistical significance of the courts' tendency to reform these trusts when so decided. It does not. Still, these results suggest a convergence on the courts' appetite for cy près and the kinds of controversies for which they are willing to apply cy près to offset the settlor's deadhand control.

These findings perhaps require further explanation, in the sense that these

patterns evince not only court preferences for certain charitable trusts but also their relationship to increased court usage of the doctrine to change them. With respect to the latter, charitable trust making became more and more common with the advent of the Twentieth Century, and along with a social shift toward the collective good more broadly, courts were faced with increased questions requiring them to use mechanisms to keep the trusts alive, albeit in different forms. Thus, it stands to reason that courts looked to the legal mechanism afforded by cy près to effectuate the settlor's charitable wishes with renewed application, given the rise in volume of cases involving charitable trusts that came before them. With regard to the former, courts seem to be making decisions in these cases by evaluating trusts' charitable worthiness. That is, public purpose trusts, educational purpose trusts, and medical purpose trusts are "favorites" of the courts because they provide the most good to society. Thus, keeping them alive is a value-based calculus on which courts condition their use of the cy près doctrine.

But it may also be the case that these trusts are favorites of the courts because their drafting is typically "better" than other trust typologies. In other words, if a trust instrument is too vague or overly prescriptive trusts, it may fail to evidence a general charitable intent required to invoke cy près. On the other hand, trusts created to clarify the settlor's general charitable intent while specifying enough evidence of the settlor's specifically stated purpose for creating the trust—as well as defining the class of persons whom the trust should benefit—strike the balance necessary for a court to apply cy près in the event that the trust's purpose becomes frustrated. A great many of the public purpose, educational purpose, and medical purpose trusts occurring in the dataset do just that, and do it well. That is, it is possible that these trusts helped courts come around to accepting the doctrine because they were created by skilled trust drafters who made their mark on the doctrine in the Twentieth Century.

Drafting charitable trust instruments is at once art and science. Striking the balance between specificity and general charitable intent places the trust drafter at the front and center of the judicial decision to use cy près or not. Likewise, the judicial task of determining whether a trust merits continuation in a repurposed form is made all the easier when the trust instrument clearly demonstrates both a general charitable intent and a specific philanthropic purpose capable of repurposing. And where the settlor has clear intentions to cease the trust on the occasion of a deviation from the original trust purpose, that has bearing on judicial decisions, too. Thus, it stands to reason that judicial decision makers rejected application of cy près in the presence of gift-over and reversionary interests and applied cy près to meritorious cases involving public, educational, and medical purpose trusts simply because it was the settlor's will to do so in the former cases and within the realm of the settlor's wishes in the latter cases.

Table 1 – Logistic Regression Analysis

| VARIABLES | Logistic Regression Model |
|---|---|
| Decade | 1.014*** |
| | (0.002) |
| Reversion | 0.174*** |
| | (0.068) |
| Private/Business Purpose | 0.469*** |
| | (0.072) |
| Public Purpose | 1.363** |
| | (0.201) |
| Educational Purpose | 1.755*** |
| | (0.265) |
| Medical Purpose | 2.004*** |
| | (0.331) |
| Art, Library, Museum | 1.056 |
| | (0.267) |
| Cemetery | 1.085 |
| | (0.451) |
| Religious Purpose | 1.107 |
| | (0.189) |
| Racial Clause | 1.249 |
| | (0.373) |
| Constant | 1.86e-12*** |
| | (7.07e-12) |
| Observations | 1,234 |
| Linear Ratio $\chi^2$ | 142.76 |
| $\chi^2$ $p$ value | 0.0000 |

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

## CONCLUSION

Cy près is a pivotal doctrine in the law of charitable trusts and indeed in American jurisprudence. It places courts in the shoes of settlors of charitable trusts to discern not only their original intent but also affords the possibility of continuing the material purpose for which settlors created enduring legacies of philanthropy benefitting society. For this reason, it may well be that no other legal doctrine is as closely tied to the interests of the individual and the collective

as cy près. Yet, because of the paucity in scholarship around cy près, as a doctrine, so little is known about its long history and its promise, both fulfilled and unfulfilled. This Article aims to change that fact by proffering three notable contributions.

First, through deliberative historical analysis, I offer an in-depth look at the types of cases American courts have heard involving the use of cy près. This historical categorization and explication is itself unique and provides significant insight into the controversies that allowed the doctrine to evolve. This insight relates a history in which courts increasingly embraced cy près only to use it somewhat less frequently in the present day.[174] Why is that? The reasons may be myriad,[175] but the foregoing discussion paints a portrait of growing philanthropy in America that has not waned but evolved from vague charitable intentions to specific—and at times overly specific—trust instrumentation. This approach would eventually cede, in many cases, to the impossibility and impracticability of trust effectuation. In this way, the history of philanthropy explored in this analysis reflects not only the life cycle of a trust but the very grounds on which the cy-près doctrine is predicated.

Second, the application of empirical methods to examine the doctrine is groundbreaking. By examining the data holistically, I have been able to discern three major themes. The passage of time yields a gradual but greater adoption of the use of the cy-près doctrine—which, as noted above has been used slightly less frequently in the Twenty-first Century. Notwithstanding the decrease in application in the last two decades, courts increased use of the doctrine over

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[174] *See, e.g.,* Figures 1-6, *supra*. The heyday of the doctrine seems to correspond roughly to the 1940 – 1970 period. After that time, petitions, and court usage of the doctrine has been in decline.

[175] One possibility might be the increase in trustee discretion afforded to charitable trust managers in the Twentieth Century. However, this is unlikely, because from the very earliest of charitable trust cases, settlors of trusts clothed trustees with considerable discretion. *See, e.g.,* McLain v. School Directors of White Twp., 51 Pa. 196 (Pa. 1865); Taylor v. Keep, 2 Ill.App. 368 (Ill. App. 1878); Corby v. Corby 85 Mo. 371 (Mo. 1884); Johnson v. Johnson, 23 S.W. 114 (Tenn. 1893); and Spalding v. St. Joseph's Industrial School for Boys of the City of Louisville, 54 S.W. 200 (Ky. 1899). It is also possible that high-wealth charitable trust settlors in modern times have turned to the incorporation of charitable trust foundations and donor-advised funds to have corporate legal mechanisms supplant those of estate law. That is, charities that now incorporate as non-profit corporations, where their corporate directors are not burdened by the same obligations to comply with settlor restrictions as charitable trustees. It could be the case that the decline in cy pres decisions corresponds with decreased popularity of the charitable trust form as greater alternatives have become available in the late Twentieth century. These alternative charitable vehicles, however, are not new and were common throughout the Twentieth Century, making this explanation somewhat dubious. *See, e.g.,* 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 (1965). Thus, this question calls for greater academic inquiry.

time reflects a willingness on the part of courts to put charitable trusts to new uses, prolonging their charitable life. Additionally, the presence of reversionary, gift-over, or private interests renders the use of the cy-près doctrine less practicable. This stands to reason, given that these clauses and purposes reveal a settlor's wishes to let the trust *qua* charitable trust die. And finally, courts are overwhelmingly more likely to apply cy près in cases involving public charitable trusts, educational purpose trusts, and medical purpose trusts, especially over the other four typologies for which I controlled in my empirical analysis. Thus, the court has revealed a preference for these trusts that calls for further analysis in follow-on scholarship.

Last, fifty-state surveys are commonplace; yet, none exists for the doctrine of cy près. With the incredible research efforts of Will Hilyerd, I was able to assemble such a survey that not only assisted me in conducting this research but will undoubtedly aid other researchers for years to come. It produces greater understanding of the adoption—whether statutorily, judicially, or both—of the cy-près doctrine, explicitly evidencing a greater acceptance of the doctrine over the passage of time. I have addended the 52-jurisdiction survey to this Article in the Appendix.

Like several examples of legal doctrine before it, interest in the cy-près doctrine has gathered some dust, despite its increased use by courts in the Twentieth Century and beyond. But why should this be the case? For society, cy près represents opportunity. For settlors, it offers longevity—perhaps in perpetuity—to their charitable wishes, even if the settlor may not see it that way from beyond the grave. This Article affords cy près its moment in sunlight as a purposeful legal mechanism for prolonging the life of charitable trusts. Let us keep it there.

* * *

APPENDIX

## Alabama

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|---|---|
| Oldest Case applying cy pres or deviation | "The appeal in this case is not to any cy pres power of the court, but to the equitable doctrine of approximation in virtue of which the court of chancery exercises jurisdiction merely to vary the details of administration in order to preserve the trust and carry out the general purpose of the donor." Lovelace v. Marion Inst., 215 Ala. 271, 273, 110 So. 381, 382 (1926). |
| Oldest Statutes | Equitable Deviation –<br><br>ALA. CODE §10438 (1923). (This section appears for the first time in the 1923 code revision. There is no act of the legislature that contains similar language. It was most likely added in the code revision.)<br><br>Cy Pres –<br><br>ALA. CODE, Tit. 47, §145 (1940) (The legislative history for this section references several sections from the 1928 code, but none of the sections in the 1928 code incorporate the cy pres power. The cy pres portion appears for the first time in the 1940 revision to the code and seems to have been added in the code revision rather than by act.) |
| Current Statute | ALA. CODE §19-3B-413 (2015) (enacted by 2006 Ala. Laws p.314, 332-33, eff. Jan. 1, 2007.) |

## Alaska

| | |
|---|---|
| Oldest Case applying cy pres or deviation | None - Alaska does not recognize the concepts of cy pres or equitable deviation. |
| Oldest Statute | None - Alaska does not recognize the concepts of cy pres or equitable deviation. |

| | |
|---|---|
| Current Statute | None - Alaska does not recognize the concepts of cy pres or equitable deviation. |

## Arizona

| | |
|---|---|
| Oldest Case applying cy pres or deviation | Matter of Est. of Craig, 174 Ariz. 228, 848 P.2d 313 (Ct. App. 1992). (Confirming cy pres had not been adopted in Arizona but allowing equitable deviation.) |
| Oldest Statute | 2003 Ariz. Sess. Laws p.814, 831, eff. Jan. 1, 2006) (Codified as ARIZ. REV. STAT. ANN. §14-10413 (Supp. 2003). (Repealed during the next legislative session by 2004 Ariz. Sess. Laws p.479.) |
| Current Statute | ARIZ. REV. STAT. ANN. §14-10413 (2012) (enacted by 2008 Ariz. Sess. Laws p.1119, 1142-43, eff. Jan. 1, 2009.) |

## Arkansas

| | |
|---|---|
| Oldest Case applying cy pres or deviation | McCarroll v. Grand Lodge, I.O.O.F., 154 Ark. 376, 243 S.W. 870 (1922). (Affirming order of chancery court applying cy pres to uphold testator's charitable purpose) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | ARK. CODE ANN. §28-73-413 (2012) (enacted by 2005 Ark. Acts vol. 1, p.3177, 3196-97, eff. Sept. 1, 2005). |

## California

| | |
|---|---|
| Oldest Case applying cy | "We entertain no doubt that in the general devolution upon the Courts of this State of all judicial power, with respect to charities, is included in the power *cy pres,* so far as the same |

| | |
|---|---|
| pres or deviation | may be employed in directing trustees named in a will or deed to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable, or has become unlawful." Est. of Hinckley, 58 Cal. 457, 512–13 (1881). |
| Oldest Statute | CAL. CIV. CODE §1317 (1874). (This section appears to have been added in the 1874 revision to the civil code rather than by act).<br><br>"A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." |
| Current Statutes | CAL. PROB. CODE §5658 (West Supp. 2022) (enacted by 2021 Cal. Stat. pp.4367, 4377-78, eff. Jan. 1, 2022.)<br><br>*See also* CAL. PROB. CODE §15409 (West 1991) (enacted by 1990 Cal. Stat. p.458, 935, eff. July 1, 1991.) |

## Colorado

| | |
|---|---|
| Oldest Case applying cy pres or deviation | "It appears that while, to a certain extent, 43 Elizabeth c. 4, is a part of the law of Colorado, its details and remedies are not. Nevertheless, under their ordinary equity powers, the courts of this state may make such modifications and alterations in charitable bequests, otherwise impossible of exact execution, as are consistent with testator's intent." Fisher v. Minshall, 102 Colo. 154, 157, 78 P.2d 363, 364 (1938). |
| Oldest Statute | No statute prior to current statute |
| Current Statute | COLO. REV. STAT. §15-5-413 (2021) (enacted by 2018 Colo. Sess. Laws. pp.1144, 1164-65, eff. Jan. 1, 2019.) |

## Connecticut

| | |
|---|---|
| Oldest Case applying cy pres or deviation | 1st Case applying deviation – aka approximation –<br><br>"To hold this is in no sense to invoke the English sign manual crown prerogative doctrine of cypres. It is only to apply the judicial principle of construction to ascertain and effectuate intention" Hayden v. Connecticut Hosp. for the Insane, 64 Conn. 320, 30 A. 50, 51 (Conn. 1894).<br><br>1st case applying cy pres-<br><br>"The jurisdiction of the courts over charitable trusts is administered not only under these liberal rules of construction, but also under the undoubted right of the court to exercise prerogative authority in dealing with a charitable gift. That authority gives to it the right to apply the cy pres doctrine to charitable trusts…" First Congregational Soc. of Bridgeport v. City of Bridgeport, 99 Conn. 22, 121 A. 77, 80 (Conn. 1923). |
| Oldest Statutes | *See* CONN. GEN. STAT. ANN. §47-2, below.<br><br>1925 Conn. Acts. p.3935 (First codified as CONN. GEN. STAT. §4825 (1930), (first statute specifying that gifts to charitable causes shall not be void due to uncertainty as to the beneficiary.) |
| Current Statutes | CONN. GEN. STAT. §47-2 (2021) (enacted by 1702 Conn. Acts. p. 64-65).<br><br>"All estates granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care and maintenance of any cemetery, cemetery lot or monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they were granted, according to the true intent and meaning of the grantor, and to no other use whatever." |

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| | This statute was originally passed in 1684 but did not appear in the printed statutes until the revision of 1702 – *See* note CONN. GEN. STAT. Tit. 18, §2, p.352 (1875).<br><br>CONN. GEN. STAT. ANN. §45a-499gg & 45a-499hh (West Supp. 2022) (Both enacted by 2019 Conn. Acts p.980, 997, eff. Jan. 1, 2020). |

## Delaware

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| Oldest Case applying cy pres or deviation | Delaware Tr. Co. v. Graham, 30 Del. Ch. 330, 337, 61 A.2d 110, 113 (1948). (Holding that cy pres is recognized in Delaware) (Note that this case cites to the syllabus in *Griffith v. State*, 2 Del. Ch. 421 (1848) as proof that cy pres was historically recognized in Delaware. While the citation to the syllabus is correct, the syllabus in Griffith misstates the courts' holding.) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | DEL. CODE. ANN. tit. 12, §3531 (2021). (Enacted by 62 Del. Laws p.303 (1979).) |

## District of Columbia

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| Oldest Case applying cy pres or deviation | "Courts generally hold that '[a] will purporting to establish a charitable trust is to be given liberal construction and legacies for the use of charity will not be declared void if they can, by any possibility, consistent with law, be held valid.'" Washington Hosp. Ctr. Health Sys. v. Riggs Nat. Bank of Washington, D.C., 575 A.2d 719, 722–23 (D.C. 1990) (citing Fidelity Union Trust Co. v. Ackerman, 18 N.J.Super. 314, 320, 87 A.2d 47, 50 (1952) and Mercy Hospital of Williston v. Stillwell, 358 N.W.2d 506, 509 (N.D.1984)) |
| Oldest Statute | No statute prior to current statute |

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| Current Statute | D.C. CODE §19-1304.13 (2012) (Enacted by 51 D.C. Reg. p.208, 219-20 (Jan. 9, 2003, eff. Mar. 10, 2004). |

## Florida

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| Oldest Case applying cy pres or deviation | "Perhaps the above reasoning would savor too much of special pleading and be unsupportable without the assistance of the doctrine of cy pres as now almost universally recognized by the courts of this country. Not as at one time enforced in England as a special prerogative of the High Chancellor, under the Sign Manual of the King, as parens patriae, but under or independent of St. 43 Eliz. c. 4, as an ordinary equitable doctrine of a liberal construction in favor of public charitable bequests, especially where the bequest has once vested." Lewis v. Gaillard, 61 Fla. 819, 843-44, 56 So. 281, 288 (1911). |
| Oldest Statute | No statute prior to current statute |
| Current Statute | FLA. STAT. §736.0413 (2022) (Enacted by 2006 Fla. Laws p.2323, 2341-42, eff. July 1, 2007) |

## Georgia

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| Oldest Case applying cy pres or deviation | Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900) (Applying GA. CIV. CODE §4007 which was a renumbered version of GA. CIV. CODE §3086 (1861). (See below) |
| Oldest Statutes | Approximation: GA. CIV. CODE §3086 (1861)<br><br>Cy Pres: GA. CIV. CODE §3087 (1861).<br><br>Note: Both of these statutes seem to have been added to the civil code in the 1861 revision rather than by act. |
| Current Statute | GA. CODE ANN. §53-12-172 (2011) (2010 Ga. Laws 579, 598, eff. July 1, 2010.) |

## Hawaii

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| Oldest Case applying cy pres or deviation | "We choose to resolve this issue by applying the doctrine of equitable approximation (also known as the cy pres doctrine) so that the trust will not violate the Rule or its underlying policies and the testator's expressed desires will be satisfied." In re Chun Quan Yee Hop's Est., 52 Haw. 40, 47, 469 P.2d 183, 184 (1970). |
| Oldest Statute | No statute prior to current statute |
| Current Statute | HAW. REV. STAT. §554D-413 (West Supp. 2022) (2021 Haw. Sess. Laws 55, 67, eff. Jan. 1, 2022.) |

## Idaho

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| Oldest Case applying cy pres or deviation | No cy pres or deviation cases |
| Oldest Statute | No statute prior to current statute |
| Current Statute | IDAHO CODE §68-1204 (2017) (enacted by 1994 Idaho Sess. Laws p.617, 618, eff. July 1, 1994)) (Not really cy pres or deviation, but does allow the trustee to change the terms of the trust to comply with changed IRS or Idaho tax rules) |

## Illinois

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| Oldest Case applying cy pres or deviation | "The courts have adopted and administered charities upon *cy pres* principles, only with the view of sustaining and carrying into effect the benevolent intention of the donor." Gilman v. Hamilton, 16 Ill. 225, 231 (1854). |

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| Oldest Statute | No statute prior to current statutes |
| Current Statutes | 760 ILL. COMP. STAT. 55/15.5 (West 2017) (provision added 1996 Ill. Laws p.2432, eff. Jan 1. 1997) (see above)<br><br>760 ILL. COMP. STAT. 3/413 (West Supp. 2022) (enacted by 2019 Ill. Laws 3240, 3265-66, eff. Jan. 1, 2020) |

## Indiana

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| Oldest Case applying cy pres or deviation | The earliest case in Indiana recognizing cy pres was *McCord v. Ochiltree*, 8 Blackf. 15 (1846). This was overruled by *Grimes' Ex'rs v. Harmon*, 35 Ind. 198 (1871), which found that cy pres did not exist in Indiana. *Erskine v. Whitehead*, 84 Ind. 357 (1882), agreed with *Grimes* that the prerogative cy pres power did not exist in Indiana, but found that the judicial cy pres power did exist and always had. |
| Oldest Statute | 1929 Ind. Acts p.723-25 (first codified as IND. CODE ANN. §6051.1-6051.3 (Supp. 1929) (Allowing county commissioners to collect funds of failed trusts and redisperse the funds) |
| Current Statute | IND. CODE ANN. §30-4-3-27 (West 2009) (enacted by 1971 Ind. Acts p.1910, 1933) |

## Iowa

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| Oldest Case applying cy pres or deviation | "The argument of counsel on both sides is devoted almost entirely to a discussion of the cy pres doctrine, counsel for appellant contending that it has not been adopted in this state, and that the facts of this case do not bring it within the rule thereof. The doctrine cy pres, which is translated "as near as may be," applied by the courts of equity, as said in Perry on Trusts (5th Ed.) §727, is only a liberal rule of construction to ascertain the intention of the testator…As given effect generally by courts of equity, the rule does not violate the law of this state, nor is it inconsistent with our institutions, but, on the contrary, is in harmony with the |

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| | liberal attitude of the court in dealing with charitable trusts." Hodge v. Wellman, 191 Iowa 877, 179 N.W. 534, 536–37 (1920).<br><br>For more information regarding the early history of cy pres in Iowa, see Note, *The Cy Pres Doctrine in Iowa*, 6 IOWA L.BULL.177 (1921). |
| Oldest Statute | 1911 Iowa Acts p.79-81 (first codified as IOWA CODE §§1652-b, 1652-c & 1652-d (Supp. 1913). |
| Current Statute | IOWA CODE §633A.5102 (2022) (originally enacted as IOWA CODE ANN. §633.5102 by 1999 Iowa Acts p.235, 256, eff. July 1, 2000) |

## Kansas

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| Oldest Case applying cy pres or deviation | Miami Cnty. Comm'rs v. Wilgus, 42 Kan. 457, 22 P. 615 (1889) (cy pres applied to land grant).<br><br>In re Weeks' Est., 154 Kan. 103, 114 P.2d 857 (1941). (First case applying cy pres to charitable trusts.) |
| Oldest Statute | No statute prior to current statutes |
| Current Statutes | KAN STAT. ANN §59-22a01 (West 2008) (enacted by 1988 Kan. Sess. Laws p.1245-46, eff. July 1, 1988).<br><br>KAN. STAT. ANN. §58a-413 (West 2008) (enacted by 2002 Kan. Sess. Laws p.699, 710-11, eff. July 1, 2002). |

## Kentucky

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| Oldest Case applying cy pres or deviation | "The statute 43 Eliz. of charitable uses, is in force in this state; and consequently, though there were a defect or want of cestui que trust to take the use &c. or if the use were of a character too indefinite and uncertain to be enforced independent of the statute, the trust would not therefore be |

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| | void--as the chancellor could obviate those difficulties." Gass v. Wilhite, 32 Ky. 170, 177 (1834).<br><br>For a list of early Kentucky cases applying cy pres, see 2 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 1531, n.1-Kentucky (2d ed. 1892) |
| Oldest Statute | See entry for KY. REV. STAT. ANN §381.260 below |
| Current Statutes | KY. REV. STAT. ANN §381.260 (West 2006) (enacted by 1893 Ky. Acts p.909, eff. 1893).<br><br>KY. REV. STAT. ANN §273.303 (3) (West 2020) (enacted by 1968 Ky. Acts 669, 693, eff. June 1968)<br><br>KY. REV. STAT. ANN §386B.4-130 (West 2017) (enacted by 2014 Ky. Acts 96, 106-7, eff. July 15, 2014) |

## Louisiana

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| Oldest Case applying cy pres or deviation | In re Succession of Milne, 230 La. 729, 89 So. 2d 281 (1956). (Applying 1954 statute (LA. STAT. ANN. §§9:2331-2337) (See below.) |
| Oldest Statute | 1920 La. Acts pp.266-68 (First codified as LA. GEN STAT. §§9830-9832 (1932). |
| Current Statutes | LA. STAT. ANN. §§9:2331-2337 (2018) (enacted by 1954 La. Acts p.1090, 1091) |

## Maine

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| Oldest Case applying cy pres or deviation | Lynch v. S. Congregational Par. of Augusta, 109 Me. 32, 82 A. 432, 433 (1912). (First case applying cy pres to trusts.) (Although this case cites older cases, the older cases ruled the bequests lapsed. This is the first case which applied cy pres to retain the trust). |

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| Oldest Statute | No statute prior to current statute |
| Current Statute | ME. REV. STAT. ANN. tit. 18, §413 (West 2020) (enacted by 2003 Me. Laws p.1854, 1862, eff. July 1, 2005). |

## Maryland

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| Oldest Case applying cy pres or deviation | Fletcher v. Safe Deposit & Tr. Co., 193 Md. 400, 420, 67 A.2d 386, 395 (1949) (applying Virginia's cy pres law to a trust situated in Virginia)<br><br>Miller v. Mercantile-Safe Deposit & Tr. Co., 224 Md. 380, 168 A.2d 184 (1961) (first case applying Maryland cy pres statute). |
| Oldest Statutes | 1931 Md. Laws p.1143-44, eff. June 1, 1931 (First codified as MD. CODE Art. 16, §268A (Supp. 1935)).<br><br>*Also see* MD. CODE ANN., CORPS. & ASS'NS §5-209 below (also enacted 1931). |
| Current Statutes | MD. CODE ANN., CORPS. & ASS'NS §5-209 (West 2019) (enacted by 1931 Md. Laws p.746)<br><br>MD. CODE ANN., EST & TRUSTS §14-302 (West 2014) (enacted by 1945 Md. Laws p.806, eff. June 1, 1945). |

## Massachusetts

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| Oldest Case applying cy pres or deviation | "It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled, as nearly in conformity with the intent of the donor as practicable. Where the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as |

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| | administering a branch of the prerogative of the king as *parens patriæ."* Am. Acad. of Arts & Scis. v. President, etc., of Harvard Coll., 78 Mass. 582, 596 (1832).<br><br>For a long list of early Massachusetts cases applying cy pres, see 2 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 1530, n.1 (2d ed. 1892). |
| Oldest Statute | 1929 Mass. Acts p.110 (First codified as MASS. GEN. LAWS ch. 214, §3 (11) (Supp. 1929). (Extending cy pres power of courts to trusts benefiting cities, counties, or other public subdivisions.) |
| Current Statutes | MASS. GEN. LAWS ANN. ch. 214 §10B (West 2016) (1974 Mass. Acts p.542)<br><br>*See also* MASS. GEN. LAWS ANN. ch.12, §8K (West 2017) (Originally enacted 1974 Mass. Acts p.542, repealed and reenacted verbatim 1979 Mass. Acts 755, 759). |

## Michigan

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| Oldest Case applying cy pres or deviation | First case approving of, but not applying cy pres<br><br>"We find no occasion, however, to resort to the doctrine of cy pres, but would, if necessary, unhesitatingly do so, for the residuum was devoted to charitable purposes." Appeal of Hannan, 227 Mich. 569, 577, 199 N.W. 423, 426 (1924).<br><br>First case applying cy pres.<br><br>"While, as before stated, it deviates somewhat from the plan of using the funds contemplated by the donor, still it is within the same field of charitable activity and is permissible under the doctrine of cy pres which is recognized in this State." Gifford v. First Nat. Bank, 285 Mich. 58, 69, 280 N.W. 108, 113 (1938) |

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| Oldest Statute | 1907 Mich. Pub. Acts p.153 (First codified as MICH. STAT. ANN. §10700 (1912)). |
| Current Statutes | MICH. COMP. LAWS ANN. §554.351 (West 2005) (enacted by 1915 Mich. Pub. Acts 496-97). (This act repealed 1907 Mich. Pub. Acts p.153).<br><br>MICH. COMP. LAWS ANN. §14.254 (West 2020) (cy pres portions added by 1965 Mich. Pub. Acts p.693, 695, eff. Mar. 31, 1966.)<br><br>MICH. COMP. LAWS ANN. §451.926 (West 2011) (enacted by 2009 Mich. Pub. Acts, No. 87, §6, p. 3, eff. Sept. 10, 2009.)<br><br>MICH. COMP. LAWS ANN. §700.7413 (West 2012) (enacted by 2009 Mich. Pub. Acts No. 46, p.32-33, eff. Apr. 1, 2010.) |

## Minnesota

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| Oldest Case applying cy pres or deviation | In re Peterson's Est., 202 Minn. 31, 38, 277 N.W. 529, 533 (1938). (Applying MINN. STAT. §8090-3). |
| Oldest Statute | 1927 Minn. Laws p.272 (First codified as MINN. STAT. §8090-3 (1927)). |
| Current Statute | MINN. STAT. ANN. §501B.31 (West 2014) (enacted by 1989 Minn. Laws p.3021, 3029-30, eff. Jan. 1, 1990.) |

## Mississippi

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| Oldest Case applying cy pres or deviation | Nat'l Bank of Greece v. Savarika, 167 Miss. 571, 148 So. 649 (1933) (Cy Pres has no effect in Mississippi, but equitable doctrine of approximation is allowed) |

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| Oldest Statute | No statute prior to current statute |
| Current Statute | MISS. CODE ANN. §91-8-413 (West 2017) (Enacted by 2014 Miss. Laws p.876, 899, eff. July 1, 2014). |

## Missouri

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| Oldest Case applying cy pres or deviation | "The statute of 43 Elizabeth concerning charitable uses is, it seems, in force in this state. Gifts to charitable uses were valid and binding dispositions previous to the passage of the statute 43 Elizabeth, ch. 4; the law of charities did not derive its existence from said statute. The jurisdiction of courts of equity over charitable uses and devises is not grounded, in this state, upon said statute, but upon the common law." Chambers v. City of St. Louis, 29 Mo. 543, 543 (1860). |
| Oldest Statute | No statute prior to current statute |
| Current Statutes | MO. ANN. STAT. §456.4-413 (West Supp. 2022) (Enacted by 2004 Mo. Laws 738, 759-60, eff. Aug. 28, 2004)<br><br>*See also* MO. ANN. STAT. §442.555(2) (West 2000) (enacted 1965 Mo. Laws p.628, eff. Oct 13. 1965) (allowing modification of any trust to avoid violating rule against perpetuities) |

## Montana

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| Oldest Case applying cy pres or deviation | "First, application of the cy pres doctrine requires the existence of a trust and does not operate to convert a nonprofit corporation into a trust. We have already determined that no trust has been established here, but further, the Foundation's charitable purposes have not here become "impossible, impracticable, or illegal to carry out." The cy pres doctrine is inapplicable in these circumstances." New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc., 374 Mont. 229, 249–50, 328 P.3d 586, 601, overruled (on other grounds) by Warrington v. Great Falls |

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| | Clinic, LLP, 400 Mont. 360, 467 P.3d 567 (Only case mentioning cy pres in Montana) |
| Oldest Statute | 1989 Mont. Laws p.1828, 1837, (Codified as MONT. CODE ANN. §72-33-504) (West 2009) (Repealed by 2013 Mont. Laws p.919, 938-39.) |
| Current Statute | MONT. CODE ANN. §72-38-413 (West Supp. 2022) (Enacted by 2013 Mont. Laws p.919, 938-39, eff. Oct. 1, 2013) |

## Nebraska

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| Oldest Case applying cy pres or deviation | "[W]e are disposed to the view that the doctrine of charitable trusts was a part of the common-law jurisdiction of the courts of chancery of England exercising judicial powers only, and as such has been transplanted in the courts of this state possessing common-law equity powers, and that in the administration and enforcement of charitable trusts of the character under consideration the exercise of the powers of the courts must be solely judicial, and none other." In re Creighton's Est., 60 Neb. 796, 84 N.W. 273, 276 (1900). |
| Oldest Statutes | 1915 Neb. Laws p.361-62 (First codified as NEB. COMP. STAT. §§571-573 (1922). (Allowing for distribution of property of extinct religious societies.)<br><br>1919 Neb. Laws p.920-21 (First codified as NEB. COMP. STAT. §§586-587 (1922). (Full cy pres statute) |
| Current Statutes | NEB. REV. ST. ANN. §30-3839 (West 2009) (enacted by 2003 Neb. Laws p.[340], [348], eff. Jan. 1, 2004.)<br><br>*See also* NEB. REV. ST. ANN. §58-615 (West 2021) (enacted by 2007 Neb. Laws p.142, 144). |

## Nevada

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| Oldest Case applying cy pres or deviation | Su Lee v. Peck, 40 Nev. 20, 160 P. 18 (1916) (court approves of cy pres in dicta but does not apply it directly). |
| Oldest Statute | No historical cy pres statutes |
| Current Statute | No current cy pres statutes |

## New Hampshire

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| Oldest Case applying cy pres or deviation | First case where court approves of cy pres, but does not apply-<br><br>"Sitting as a court of equity, by virtue of the general jurisdiction we have over gifts to charitable uses, if the charitable intention of the testator could not be carried into effect, we might perhaps apply the doctrine technically called *cy pres,* and, to prevent a failure of the charity, … But happily, the testator has relieved us from all difficulty on this point." Second Congregational Soc. in Hopkinton v. First Congregational Soc. in Hopkinton, 14 N.H. 315, 330 (1843).<br><br>First case applying cy pres<br><br>"The doctrine of cy pres, although, perhaps, not formally adopted in this state, has been recognized." Trustees of Adams Female Acad. v. Adams, 65 N.H. 225, 18 A. 777, 777 (1889) |
| Oldest Statute | *See* N.H. REV. STAT. §498:4 below |
| Current Statutes | N.H. REV. STAT. ANN. §498:4 (2010) (enacted by 1941 N.H. Laws p.355, eff. June 13, 1941) |

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| | N.H. REV. STAT. ANN. §§498:4-a, 498:4-b, 498:4-c (2010) (enacted by 1971 N.H. Laws pp.642-643, eff. Sept. 5, 1971)<br><br>N.H. REV. STAT. ANN. §498:4-e (2010) (enacted by 1973 N.H. Laws p.206, eff. Aug. 18, 1973.)<br><br>N.H. REV. STAT. ANN. §§547:3-c, 547:3-d, 547:3-e, 547:3-f, 547:3-h (2019) (enacted by 1992 N.H. Law pp.574, 587-588, eff. Jan. 1, 1993.)<br><br>N.H. REV. STAT. ANN. §564-F:17-1703 (2019) (enacted as N.H. REV. STAT. ANN. §564-E:17-1703 by 2017 N.H. Laws p.532, 589-90, eff. Oct. 1, 2017.)<br><br>N.H. REV. STAT. ANN. §§564-B:4-412, 564-B:4-413, 564-B:4-414 (2019) (enacted by 2004 N.H. Laws p.139, 150-51, eff. Oct. 1, 2004).<br><br>N.H. REV. STAT. ANN. §31:22-a (2019) (enacted by 1977 N.H. Laws pp.102-3, eff. Aug. 1, 1977) |

## New Jersey

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| Oldest Case applying cy pres or deviation | First Case applying equitable deviation –<br><br>"The present case does not call for any opinion on the important question how far, in the application of simply judicial standards, the courts of this state would undertake to exercise the doctrine of cy pres by construction; the subject is referred to only for the purpose of exemplifying with what strength of favor charitable bequests are regarded by the courts. But without resorting to a method of interpretation which, until it has received the sanction of the courts of this state, must be considered as of questionable validity, and following none but the ordinary guides in the construction of wills, I cannot doubt that the inevitable conclusion must be that the testamentary disposition in the case cited from the Connecticut reports, as well as the one now under consideration in this court, confers upon the trustees not only the power to distribute the funds confided to them, but, as a necessary incident to that function, also the right |

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| | to select the beneficiaries. Hesketh v. Murphy., 36 N.J. Eq. 304, 310 (1882).<br><br>First case applying cy pres –<br><br>"The judicial doctrine of cy-pres, thus defined and applied to charities, may have, we think, a proper place in the jurisprudence of this state." MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652, 673, 61 A. 1027, 1036 (1905). |
| Oldest Statute | No statute prior to current statute |
| Current Statute | N.J. STAT. ANN. §3B:31-29 (West Supp. 2022) (enacted by 2015 N.J. Laws p.1540, 1556, eff. July 17, 2016.) |

## New Mexico

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| Oldest Case applying cy pres or deviation | No cases in New Mexico have applied cy pres to charitable trusts.<br><br>Farmers & Merchants Bank v. Woolf, 86 N.M. 320, 523 P.2d 1346 (1974). (Applying Texas' cy pres law to trust situated in Texas).<br><br>Gartley v. Ricketts, 107 N.M. 451, 760 P.2d 143 (1988) (recognizing cy pres in New Mexico, but not applying). |
| Oldest Statute | 1983 N.M. Laws p.1292 (Codified as N.M. STAT. ANN. §47-1-17.1 (Supp. 1983) (This statute allowed cy pres to be applied only if the bequest violated the rule against perpetuities) |
| Current Statute | N.M. STAT. ANN. §46A-4-413 (West 2003) (enacted by 2003 N.M. Laws p.1295, 1319-20, eff. July 1, 2003.) |

## New York

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| Oldest Case applying cy pres or deviation | "At one time this doctrine seems to have been considered established in New York. Under the influence, apparently, of the revision of the statutes of New York in 1830, which abolished all uses and trusts in realty not otherwise authorized, and which failed to authorize expressly all trusts for charitable purposes, it was subsequently declared that the doctrine of cy-pres had no place in New York law. … By the act of 1893 …the doctrine of cy-pres, as it was formerly stated to exist in New York, was, according to some authorities, enacted by necessary implication…All doubt, however, was finally removed by Laws 1901, p.751, c. 291. Loch v. Mayer, 50 Misc. 442, 446, 100 N.Y.S. 837, 839–40 (Sup. Ct. 1906) (citations omitted). (first case to apply cy pres after doctrine had been reestablished by statute in the state of N.Y). |
| Oldest Statute | 1893 N.Y. Laws p.1748 (First appeared in the N.Y. code at N.Y. REV. STAT, INDEP. STAT. OF 1777-1895, p.2937). (This statute has been repealed and re-enacted twice. It exists in current form as N.Y. EST. POWERS & TRUSTS LAW §8-1.1 (see below)) |
| Current Statute | N.Y. EST. POWERS & TRUSTS LAW §8-1.1 (c) & (j) (McKinney 2002) (Enacted by 1966 N.Y. Laws p.2761, 2821-23) |

## North Carolina

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| Oldest Case applying cy pres or deviation | N. Carolina Univ. v. Gatling, 81 N.C. 508, 511 (1879) (applying the doctrine of approximation to a trust creating scholarships). |
| Oldest Statute | 1925 N.C. Sess. Laws p.512-13 (First codified as N.C. CODE §4035(a) (1927)). |
| Current Statutes | N.C. GEN. STAT. §36C-4-413 (2019) (enacted by 2005 N.C. Sess. Laws p.345, 363, eff. Jan. 1, 2006.) |

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| | *See also* N.C. GEN. STAT. §36C-4A-2 (2019) (enacted by 2005 N.C. Sess. Laws p.345, 366, eff. Jan. 1, 2006.) |

## North Dakota

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| Oldest Case applying cy pres or deviation | No cy pres or deviation cases |
| Oldest Statute | DAKOTA TERR. CIV. CODE §§720-21 (1883) (adopting verbatim CAL. CIV. CODE §1317 (1874) (See history note to DAKOTA TERR. CIV. CODE §720 (1883))). (This statute was adopted as part of the 1883 revision of the civil code).<br><br>"A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." |
| Current Statute | N.D. CENT. CODE §59-12-13 (2020) (enacted by 2007 N.D. Laws p.1896, 1915, eff. Aug. 1, 2007.) |

## Ohio

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| Oldest Case applying cy pres or deviation | "Where circumstances are so changed, that the direction of the donor prescribing the use, cannot be literally carried into effect, the legislature or the court, in those cases where general intention can be effected, may lawfully, in some cases, enforce its execution as nearly as circumstances admit, by the application of the doctrine of cy pres." Le Clercq v. Trustees of Town of Gallipolis, 7 Ohio 217, Pt. 1, 7 Hammond 217, PT. I, 28 Am.Dec. 641 (1835). |
| Oldest Statute | *See* OHIO REV. CODE ANN. §109.25 below |
| Current Statutes | OHIO REV. CODE ANN. §§5804.12-5004.13 (West 2007) (enacted by 2006 Ohio Laws p.7420, 7485-86, eff. Jan. 1, 2007). |

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| | *See also* OHIO REV. CODE ANN. §109.25 (West 2015) (enacted by 1953 Ohio Laws 351, 352, eff. Oct. 14, 1953) (requiring the Attorney general to be a party in any cy pres actions) |

## Oklahoma

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| Oldest Case applying cy pres or deviation | Matter of Shaw's Est., 620 P.2d 483, 485 (Ok. Ct. App. 1980). (Applying 60 Ok St. Ann §602)<br><br>*Also see* In re Nuckols' Est., 199 Okla. 175, 176, 184 P.2d 778, 779 (Okla. 1947) (granting money left in trust to a defunct church to its parent organization) |
| Oldest Statute | *See* OKLA. STAT. tit. 84 §151 below. |
| Current Statutes | OKLA. STAT. ANN. tit. 84 §151 (West 2013)<br><br>"A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."<br><br>This law appeared in the first code of the Territory of Oklahoma as OKLA. TERR. STAT. §§6835-36 (1890) and was adopted directly from DAKOTA TERR. STAT. §§3343-44 (1887), which was a renumbered version of DAKOTA TERR. CIV. CODE §720 (1883) which was adopted verbatim from CAL. CIV. CODE §1317 (1874) (*See* history notes to OKLA. REV. LAWS §8381 (1910) & DAKOTA TERR. CIV. CODE §720 (1883)).<br><br>OKLA. STAT. ANN. tit. 18, §564.1 (West 2012) (enacted by 1943 Okla. Sess. Laws p.39, eff. Mar. 5, 1943) (allowing disposition of funds of extinct religious societies)<br><br>OKLA. STAT. ANN. tit. 60, §602 (West 2010) (enacted by 1965 Okla. Sess. Laws p.92, eff. May 5, 1965) (full legislative adoption of cy pres) |

## Oregon

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| Oldest Case applying cy pres or deviation | "We are of the opinion that the testator manifested a general charitable purpose in his will and not a special purpose, and the doctrine of cy pres obtains in this case." In re Stouffer's Tr., 188 Or. 218, 227, 215 P.2d 374, 379 (1950) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | OR. REV. STAT. ANN. §130.210 (West 2016) (enacted by 2005 Or. Laws p.937, 947, eff. Jan. 1, 2006). |

## Pennsylvania

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| Oldest Case applying cy pres or deviation | "The statute 43 Eliz. ch. 4, of charitable uses, is not extended to Pennsylvania, but still the principles of it, as applied by chancery, in England, obtain here, by force of our own common law, and relief will be given so far as the power of the courts will enable them." Witman v. Lex, 17 Serg. & Rawle 88, 17 Am.Dec. 644 (Pa. 1827). |
| Oldest Statute | 1855 Pa. Laws p.328, 331, at §10 (PURDON'S DIGEST: A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-EIGHTH DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND FIFTY-THREE; TOGETHER WITH THE ANNUAL DIGESTS FOR 1854, 1855, 1856 AND 1867 (8th ed., rev.) p.1119) |
| Current Statute | 20 PA. STAT. AND CONS. STAT. ANN. §7740.3 (West 2014) (enacted by 2006 Pa. Laws p.625, 659, eff. Nov. 6, 2006). |

## Puerto Rico

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| Oldest Case applying cy | "Thus, we conclude that, while use of funds for purposes closely related to their origin might be the best application, the cy pres doctrine and the courts' broad equitable powers now permit use of these funds for other public interest |

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| pres or deviation | purposes by either educational, charitable, or other public service organizations, both for current programs or to constitute an endowment and source of future income for long-range programs." In re San Juan Dupont Plaza Hotel Fire Litig., 687 F. Supp. 2d 1, 2–3 (D.P.R. 2010) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | P.R. LAWS ANN., tit 32, §3354e (2017) (enacted by 2019 P.R. Laws p.330, 360, eff. Aug. 31, 2012) (Note: This act was passed in 2012, but was not printed in English until it was released in the 2019 edition of P.R. Laws) |

## Rhode Island

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| Oldest Case applying cy pres or deviation | "The law of charitable uses as administered by English chancery in its regular jurisdiction is a part of the law of this State. The Supreme Court of Rhode Island having full chancery powers by statute has so much of the cy pres power as is exercised by English chancery, without recourse to the prerogative powers delegated to it in particular cases by the sign manual of the crown." Pell v. Mercer, 14 R.I. 412, 412 (1884). [Note: Rhode Island Hosp. Tr. Co. v. Olney, 14 R.I. 449, 449 (1884) was decided on the same day, but the court refers the parties to its decision in Pell]. |
| Oldest Statute | *See* 18 R.I. GEN. LAWS §18-4-1 below |
| Current Statute | 18 R.I. GEN. LAWS §18-4-1 (2013) (originally enacted 1866 R.I. Pub. Laws p.234, amended 1909, 1923, & 1938) |

## South Carolina

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| Oldest Case applying cy pres or deviation | "It does not result, however, that the details of the plan laid down in the will must be followed to the letter. The main purpose being kept in view, considerable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions." Mars v. Gibert, |

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| | 93 S.C. 455, 77 S.E. 131 (1913) (rejecting cy pres but allowing deviation) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | S.C. CODE ANN. §62-7-413 (2021) (enacted by 2005 S.C. Acts p.280, 359, eff. Jan. 1, 2006)<br><br>See reporter's comment to §62-7-413 "When the Section 62-7-413 was enacted, the words "cy pres" in the Uniform Trust Code version were deleted and replaced with language referring to equitable deviation because South Carolina courts have refused to recognize the doctrine of cy pres." *See also* South Carolina Comment to §62-7-413 (2005 S.C. Acts p.361) |

## South Dakota

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| Oldest Case applying cy pres or deviation | No cy pres or deviation cases |
| Oldest Statute | DAKOTA TERR. CIV. CODE §§720-21 (1883) (adopting verbatim CAL. CIV. CODE §1317 (1874) (See history note to DAKOTA TERR. CIV. CODE §720 (1883))). (This statute was adopted as part of the 1883 revision of the civil code).<br><br>"A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." |
| Current Statute | S.D. CODIFIED LAWS §55-9-4 (2012) (enacted by 1955 S.D. Sess. Laws p.505). |

## Tennessee

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| Oldest Case applying cy | "It is true the doctrine of cy pres as it existed in England where a representative of the Crown has peculiar powers with reference to charities does not apply in |

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| pres or deviation | Tennessee.…This does not mean that in the interpretation of wills under which an attempt is made to create a charitable trust our Courts of Equity are bound by rigid rules of construction which ignore substance for mere matter of form." Hardin v. Indep. Ord. of Odd Fellows of Tenn., 51 Tenn. App. 586, 596–97, 370 S.W.2d 844, 849 (1963) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | TENN. CODE ANN. §35-15-413 (2020) (enacted by 2005 Tenn. Pub. Acts p.1285, 1298-99, eff. July 1, 2004.) |

## Texas

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| Oldest Case applying cy pres or deviation | "So, too, where the execution of the trust is to be by a trustee, with the objects thereof pointed out, the court will take the administration of the trust, and in the strict discharge of their judicial duty may apply a fund devoted to a particular charity to a cognate purpose to prevent a failure of justice, and to carry into effect the intention of the donor as manifested by the written instrument when such intention can be discovered with reasonable probability." Inglish v. Johnson, 42 Tex. Civ. App. 118, 122, 95 S.W. 558, 560 (1906) |
| Oldest Statute(s) | 1889 Tex. Gen. Laws p.143-44 (First codified as TEX. STAT. ANN. Art. 3681c §3 & Art. 3681d §3 (Supp. 1889)). (Applying only to property donated for the purpose of establishing or assisting in establishing a scholarship or professorship at the University.) |
| Current Statute | TEX. PROP. CODE ANN. §113.026 (West 2014) (enacted by 1999 Tex. Gen. Laws p.421-22, eff. Aug. 30, 1999.) |

## Utah

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| Oldest Case applying cy | "We are of the opinion that the decree of the supreme court of the United States in this cause does not forbid us |

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| pres or deviation | from limiting and appointing this fund to any charitable use that is lawful, within the scope of the purpose to which it was originally dedicated." United States v. Late Corp. of Church of Jesus Christ of Latter-Day Saints, 8 Utah 310, 31 P. 436, 440 (Terr. Utah 1892), rev'd sub nom. United States v. Late Corp. of the Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145, 14 S. Ct. 44, 37 L. Ed. 1033 (1893) |
| Oldest Statute | No statute prior to current statute |
| Current Statute(s) | UTAH CODE ANN. §75-7-413 (West 2004 & Supp. 2022) (enacted by 2004 Utah Laws p.331, 348, eff. July 1, 2004.) |

## Vermont

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| Oldest Case applying cy pres or deviation | "It appears to me, from the examination which I have been enabled to bestow upon the subject, that the law in relation to charitable uses is not founded on any statute, but that it existed at the common law, the elements of which were derived from the civil law, and the principles of it may be found both in the statutes and in the adjudicated cases, long before the reign of Elizabeth." Burr's Ex'rs v. Smith, 7 Vt. 241, 291 (1835) |
| Oldest Statute | 1945 Vt. Acts & Resolves p.58, eff. Apr. 6, 1945 (First codified as VT. STAT. §1282 (1947)). |
| Current Statute | VT. STAT. ANN. tit. 14A, §413 (2019) (enacted by 2009 Vt. Acts & Resolves p.100, 110, eff. July 1, 2009.) |

## Virginia

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| Oldest Case applying cy pres or deviation | "In 1946 the General Assembly enacted what is now commonly called the cy pres statute. Acts 1946, ch. 187, p.294. It appears as sections 55-31 and 55-32, Code 1950, but only section 55-31 is material to the question at hand and appears below. Prior to the passage of this act, there was no decided case that had applied the cy pres doctrine in |

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| | Virginia." Shenandoah Valley Nat. Bank of Winchester v. Taylor, 192 Va. 135, 148, 63 S.E.2d 786, 794 (1951) |
| Oldest Statutes | 1893 Va. Acts p.485 (First codified as VA. CODE §1406 (Supp. 1898) (provision for property of extinct religious societies).<br><br>1946 Va. Acts p.294 (First codified as VA. CODE §587a (Supp. 1946) (full cy pres statute) |
| Current Statute | VA. CODE ANN. §64.2-731 (2017) (enacted by 2012 Va. Acts p.1167, 1219, eff. Oct. 1, 2012) (This statute previously appeared as VA. CODE ANN. §55-544.13 (enacted 2005 Va. Acts p.1793, 1803, eff. July 1, 2006). It was repealed and reenacted verbatim by the 2012 act). |

## Washington

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| Oldest Case applying cy pres or deviation | First case approving of, but not applying cy pres -<br><br>Horton v. Bd. of Educ. of Methodist Protestant Church, 32 Wash. 2d 99, 201 P.2d 163 (1948) (approving of cy pres, but not applying it)<br><br>First case applying cy pres. -<br><br>"We hold that the trial court correctly applied the doctrine of cy-pres to uphold the trust in accord with the testator's intent." Puget Sound Nat. Bank of Tacoma v. Easterday, 56 Wash. 2d 937, 951, 350 P.2d 444, 451 (1960). |
| Oldest Statute | No statute prior to current statute |
| Current Statute | WASH. REV. CODE ANN. §23.100.1315 (West Supp. 2022) (enacted by 2019 Wash. Sess. Laws p.203, 249, eff. July 28, 2019 (requiring attorney general approval for application of cy pres). |

## West Virginia

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| Oldest Case applying cy pres or deviation | "Counsel are in accord that until the enactment of our present statute (Code, 35–2–2), the English doctrine of charitable uses generally known as cy pres was not in force in West Virginia." Beatty v. Union Tr. & Deposit Co., 123 W. Va. 144, 13 S.E.2d 760, 761 (1941). |
| Oldest Statute | W. VA. CODE §35–2–2 (1931) (This statute was added as part of the 1931 revision of the code of West Virginia and has no associated act). |
| Current Statute | W. VA. CODE ANN. §44D-4-413 (West 2015) (enacted by 2011 W.Va. Acts p.670, 730, eff. June 10, 2011.) |

## Wisconsin

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| Oldest Case applying cy pres or deviation | "The cy pres doctrine, as indicative of prerogative authority, does not prevail in this state, but as regards liberal rules of construction of charitable trusts, applied in chancery in England independent of the statute of Elizabeth, it does prevail." Harrington v. Pier, 105 Wis. 485, 82 N.W. 345, 346 (1900). |
| Oldest Statute | 1933 Wis. Sess. Laws p.879, eff. July 15, 1933 (First codified as WISC. STAT. §231.11(7)(a)-(d) (1933)) |
| Current Statute | WIS. STAT. ANN. §701.0413 (West 2016) (enacted by 2013 Wis. Sess. Laws p.822, 836-37, eff. July 1, 2014). |

## Wyoming

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| Oldest Case applying cy pres or deviation | Only two cases exist in Wyoming – both discuss and approve of cy pres, but determine it does not apply to the case at hand.<br><br>Town of Cody v. Buffalo Bill Mem'l Ass'n, 64 Wyo. 468, 196 P.2d 369 (1948) |

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| | First Nat. Bank & Tr. Co. of Wyo. v. Brimmer, 504 P.2d 1367, 1370 (Wyo. 1973) |
| Oldest Statute | No statute prior to current statute |
| Current Statute | WYO. STAT. ANN. §4-10-414 (2015) (enacted by 2003 Wyo. Sess. Laws 304, 318, eff. July 1, 2003) |

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