Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving

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INTRODUCTION

Today, American philanthropic organizations are undergoing rapid growth and intense challenge from both donors and charitable recipients.[1] Community foundations and trusts are among the most rapidly growing sectors of American philanthropy. Comprising more than 560 institutions across the country, community foundations and trusts hold more than $30 billion in assets. They make philanthropic grants of more than $2.1 billion each year that strengthen communities, battle poverty, and support arts, culture, and other activities.[2] These

[1] For recent data on the growth of American philanthropy, see THE FOUNDATION CENTER, FOUNDATION GROWTH AND GIVING ESTIMATES 2001, *available at* http://fdncenter.org/research/trends_analysis/pdf/fgge02.pdf (last visited Apr. 9, 2003). For a recent review of some of the challenges from donors and charitable recipients, see Stephen G. Greene, *Seeking Control in Court*, CHRON. OF PHILANTHROPY, Nov. 28, 2002, at 6.

[2] These statistics reflect 2001 data, the last year for which data are reasonably complete. But this substantially underestimates the number of community foundations in the United States active as of the time of publication of this article. For example, the Council on Foundations' Community Foundation Locator service lists 657 community foundations and trusts in January 2003. COUNCIL ON FOUNDATIONS, COMMUNITY FOUNDATION LOCATOR, *at* www.communityfoundationlocator.org (last visited Mar. 10, 2003). The statistics are from THE FOUNDATION CENTER, FOUNDATION GROWTH AND

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institutions of community philanthropy are also the site of intense legal and economic conflict.[3]

In legal terms, the emergence of American community philanthropy was originally based upon a legal doctrine, the variance power. This power allows community foundations and trusts to alter the dispositions of their donors far more flexibly and with considerably more discretion than the ancient doctrines of the past. In particular, variance power as a means to alter and modernize donors' wishes was intended to be considerably more flexible than the doctrine of *cy pres*.[4] *Cy pres* allows alteration of donors' wishes but requires intervention by often-suspicious judges and the satisfaction of complex criteria. As this article makes clear, variance power and *cy pres* are distinct doctrines with distinct criteria for their exercise. Variance power is not private *cy pres*, and it may not be treated as coterminous with the strictures for granting *cy pres* petitions. Yet recent and important litigation has threatened to blur the differences between these doctrines, allowing judges and state regulators to narrow the consideration and exercise of the variance power in ways that may harm the growth and freedom of American community philanthropy.[5]

The variance power doctrine and the American philanthropic imagination that the doctrine helped to produce came under attack for the first time in eighty-five years in the recent and epic court battle

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GIVING ESTIMATES 2001, *available at* http://fdncenter.org/research/trends_analysis/pdf/fgge02.pdf (last visited Apr. 9, 2003).

[3] The development and current status of American community philanthropy is admirably surveyed and discussed in AMERICAN BANKERS ASSOCIATION, COMMUNITY TRUSTS IN THE UNITED STATES AND CANADA (1931); FRANK LOOMIS, COMMUNITY TRUSTS OF AMERICA, 1914-1950 (1950); WILMER SHIELDS RICH, COMMUNITY FOUNDATIONS IN THE UNITED STATES AND CANADA, 1914-1963 (1961); AN AGILE SERVANT: COMMUNITY LEADERSHIP BY COMMUNITY FOUNDATIONS (Richard Magat ed., 1989). For a useful comparative perspective, see BERTELSMANN FOUNDATION, COMMUNITY FOUNDATIONS IN CIVIL SOCIETY (1999).

[4] As delineated in the Restatement (Second) of Trusts § 399, the modern *cy pres* standard is as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

[5] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712 (N.Y. App. Div. 2000), *aff'd*, 751 N.E.2d 940 (N.Y. 2001); Estate of Buck, 35 Cal. Rptr. 2d 442 (Cal. Ct. App. 1994).

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between a major New York City social services organization and New York's largest community foundation. *Community Service Society v. New York Community Trust* pitted a designated philanthropic recipient, one of New York's most respected social service agencies, against the New York Community Trust.[6] The Trust held, invested, managed, and granted funds under a trust agreement that included the power to vary the original individual donors' instructions. The legal problems at issue included the extent of the variance power granted to community foundations and trusts, and the scope of judicial and executive review of decisions by such foundations or trusts to vary the wishes of original donors.[7]

That decision also implicates broader challenges to American giving and has deeper lessons for us. Virtually every community trust or foundation has employed some form of the variance power.[8] Yet, this article demonstrates that the narrowing of variance understanding, which culminated in *Community Trust*, threatens the philanthropic imagination embodied in the original notions of the doctrine.

By the 1990s community foundations and trusts — pools of funds donated by, in most cases, local philanthropists — had begun to remake the American philanthropic landscape and to remold traditional relationships between individual donors and charitable causes. Community foundations have built their growth on the logical assumption that pooling philanthropic funds and using those pooled funds in a focused way on local problems may have a faster and deeper impact on social issues. This concept, conceived by the banker Frederick Goff in 1913, has enabled community trusts and foundations to attract funds in several important ways.[9] In certain cases, local philanthropists have donated funds or made bequests directly to a community foundation, without restricting the application of those funds to local

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[6] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712 (N.Y. App. Div. 2000), *aff'd*, 751 N.E.2d 940 (N.Y. 2001). The trial court judgment in New York Surrogate's Court is reprinted at Record on Appeal at 17-1- 17-17, *Cmty. Serv. Soc'y*, 713 N.Y.S.2d 712 [hereinafter Record on Appeal, Cmty. Serv. Soc'y v. New York Cmty. Trust].

[7] *See infra* Part III.

[8] For useful discussions of the use of variance power by community foundations and trusts, see generally CHRISTOPHER HOYT, LEGAL COMPENDIUM FOR COMMUNITY FOUNDATIONS (1996); COUNCIL ON FOUNDATIONS, COMMUNITY FOUNDATION TRAINING MANUAL, I MISSION AND HISTORY (1990).

[9] For useful background information on community foundations and trusts in the United States, see generally THE FOUNDATION CENTER, FOUNDATION GROWTH AND GIVING ESTIMATES 2001, *available at* http://fdncenter.org/research/trends_analysis/pdf/fgge02.pdf; HOYT, *supra* note 8; and information provided by the Council on Foundations at http://www.cof.org.

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charitable, educational, and other causes. This "unrestricted" form of giving is warmly welcomed by community foundations because it allows maximum flexibility in the dispersal of funds. At the same time, many philanthropists are somewhat wary of such open-ended gifts, because they would like to retain some role in the selection of charitable recipients.

Many philanthropists want the administrative convenience, investment management, and philanthropic focus of donating through community foundations. They also want a continuing role in determining where and how their philanthropic dollars will be distributed. These philanthropists often channel their donations to "field of interest" funds. When a donor endows a field of interest fund to a community foundation, he or she irrevocably provides donor funds to the organization. That donation provides tax deductions to the donor and requires the community foundation to take responsibility for investment management of the funds. The donation also specifies where the donor would like income from his or her donation to be directed, and generally gives the donor a continuing role in "advising" the community foundation as to the distribution of philanthropic funds from that targeted fund.[10]

A third and crucial form of philanthropic giving to community foundations was central to the decision in *Community Trust*. Over the decades many donors have provided funds to community foundations and trusts that are limited to specific recipients. The income from the fund must be allocated to "designated" charitable beneficiaries unless narrowly drafted conditions (such as the demise of the designated charitable organization) allow the community foundation to vary the target of the income stream.[11]

Today, American philanthropy is also facing a direct challenge from newer donors who want more control over the direction of their funds. And some donors are dissatisfied with the grant-making decisions that

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[10] *See* sources cited *supra* note 9.

[11] The New York Community Trust's website reviews these giving options in detail. *See* New York Community Trust, *at* http://www.nycommunitytrust.org (last visited Mar. 12, 2003). In reviewing variance power for the first time, a New York appellate court delineated these options with useful clarity:

> Donors to Community Trust have the options of making unrestricted gifts for general charitable purposes, creating a fund from which the income will be devoted to a designated charitable organization, or creating a "field-of-interest" fund which specifies the nature of the charity to be funded, but not designating any particular organization. *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 714.

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community foundations have made.[12] The sharp challenges by donors and donees are fueled and served by new financial instruments (such as commercial donor-advised funds) that allow donors more immediate influence on grantmaking and allow donees to claim funds with more alacrity. The first major judicial attack on the philanthropic variance power thus reflects a broader donor and recipient pressure on American philanthropy.

This is a trend that threatens the freedom, innovation, and pioneering spirit with which American philanthropy has responded to America's needs and that has led to the expansion and strengthening of civil society and an "associational revolution"[13] throughout the world. By chipping away at the variance power, the legal pillar that has freed American community philanthropy to search for innovation and support pioneering yet unpopular ideas and policies, we are in some danger of returning to a time akin to the "dead hand." That was an era when the long-irrelevant wishes of long-dead donors ruled judges and trustees, stifling initiative and innovation in the American nonprofit sector because funds could not be redirected to meet the modern era and its pressing needs.

The battle between the New York Community Trust and the Community Service Society also implicates important but rarely discussed issues of social class in American philanthropy. It particularly implicates the role of elite philanthropy, based in community and private foundations, in mediating the transfer of resources from the wealthy to community-based organizations. In *Community Trust*, the implications of Community Service Society's "transform[ation] from a social services agency to one sharing power with community-based organizations," in the words of the New York court,[14] clearly played a role in the decisions of an elite community trust. A relaxed variance power has the danger of centralizing too much power in an intermediary philanthropic organization such as a community foundation. Strict restrictions on variance, however, may encourage an inappropriate sense of entitlement within beneficiary organizations. Unrestrained variance power may encourage arbitrary behavior by community trusts and foundations.

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[12] Jon Yates & Laurie Cohen, *Dispute at Trust Freezes Grants, Non-profit Groups Feeling the Pinch*, CHI. TRIB., June 2, 2002, at 1; Jon Yates & Laurie Cohen, *Searles and Charity Fight Over Millions; Community Trust Grants in Dispute*, CHI. TRIB., Mar. 25, 2002, at 1.

[13] Lester Salamon, *The Rise of the Nonprofit Sector*, FOREIGN AFFAIRS, July-Aug. 1994, at 115-18.

[14] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 715.

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The variance power and its meanings in American law and philanthropy have not been discussed in detail in American legal scholarship. This article discusses and analyzes the roots, history, transformation, and current conflict over law, class, power, and the variance power in the development of American philanthropy. Part I discusses the variance power's origins in American philanthropy as a response to the bane of the "dead hand" of unreformable trusts and wills, and the attendant problems in renovating the *cy pres* doctrine. Part I also analyzes the establishment of the variance power by agreement between donor and community trust, its incorporation into American tax law, and judicial and legislative review.

In the eighty-five years since variance power became a key legal cornerstone of American community philanthropy, the shape, extent, and reviewability of the doctrine of "variance power" had never been fully litigated or resolved.[15] Part II discusses the historic battle over the variance power between one of New York's most distinguished foundations, the New York Community Trust, and one of its most distinguished community action and service agencies, the Community Service Society. Community Service Society's 1995 action against the New York Community Trust, alleging misapplication of the variance power in 1972 to deny Community Service Society grants due under the trusts of Laura Spelman Rockefeller and five other donors, set the stage for the first judicial consideration of the scope and standard for exercise of this important modern philanthropic power. Part II also analyzes the importance of this battle in developing the American law of philanthropy.

Part III discusses the effects of *Community Trust* on future exercise of variance power. This section also provides some normative recommendations on judicial and executive review of the exercise of variance power and on steps that philanthropic organizations can take to safeguard their autonomy, initiative, and innovation. It also analyzes the conflicts of law, philanthropy, and class that have arisen out of American community philanthropy's relationships with its two primary constituencies — donors and charitable organizations that are the recipients of its grants. Part III also discusses important policy problems arising out of the *Community Trust* case: judicial consideration of the variance power, the growing prominence of state regulators in nonprofit conflicts, and new state activism in nonprofit regulation that, while constructive, also engenders substantial doctrinal and political problems.

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[15] *See infra* text at notes 53-55.

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Several states, led by New York, have begun to play a sharply more aggressive role in nonprofit regulation, an issue prominent in *Community Trust* and other recent disputes. This development is by no means entirely a positive one, and Part III discusses it in some detail.

I. THE BANE OF THE DEAD HAND AND THE RISE OF THE FLEXIBLE VARIANCE POWER

A. The Futility of Cy Pres *and Effective* Cy Pres *Reform*

For more than a hundred years, the "dead hand" was a curse of American philanthropy. Nineteenth century trusts, bequests, and other written donative instruments were almost impossible to alter, even marginally, when they failed in their purposes. The purposes of these generous gifts might fail because the organizations to whom charity was given had gone out of existence, already accomplished their goals, or proven incapable of carrying out donors' wishes. The gifts remained valid and unchanged, a "dead hand" upon a growing American philanthropic and charitable sector.[16] In the nineteenth century, the only significant weapon for altering the terms of trusts, bequests, and other written donations was judicial *cy pres*. Under the restrictive doctrine of *cy pres*, first formulated in England centuries ago, trust and other donative instruments could only be altered with judicial approval. Moreover, such approval required meeting exceptionally difficult and complex technical tests.[17] Loyal to the wishes of dead testators in the

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[16] *See* ARTHUR HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY (1880). Evelyn Brody discusses Hobhouse and other critics of the "dead hand" in her exceptionally useful article, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997).

[17] The Restatement (Second) of Trusts § 399 delineates the modern *cy pres* standard. *See supra* note 4 (quoting this standard). This section is closely related to Restatement (Second) of Trusts § 413 (Failure of Charitable Trust), which specifies that:

> [w]here the owner of property gratuitously transfers it upon trust for a charitable purpose and the purpose cannot be accomplished, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless (a) the doctrine of cy pres is applicable, or (b) the transferor properly manifested an intention that no resulting trust should arise. RESTATEMENT (SECOND) OF TRUSTS § 413 (1959).

The Official Comment to § 413 explains:

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

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disposition of their property, suspicious of the motives of trustees, family and others who sought to alter those wishes, and cognizant of the partial roots of *cy pres* in English royal prerogative, American judges did little to spur *cy pres* reform.[18] The cases were famous and legion. A will established to convert a bell tower into a library could not be reformed, even decades after the tower was crammed full of books. The will of one of America's most intelligent and famous founders, Benjamin Franklin, which bequested substantial amounts for the training of apprentices, utterly unreformable under American *cy pres* law, was "frustratingly restricted long after apprentices disappeared from American society."[19]

> intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. See § 399. This is the doctrine of cy pres.
>
> On the other hand, if the settlor manifested an intention to restrict his gift to the particular charitable purpose designated, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, the trust fails and the trustee holds the property upon a resulting trust for the settlor or his estate. RESTATEMENT (SECOND) OF TRUSTS § 413 cmt. a (1959).

The courts have been restrictive in interpretations of "impracticable" and "illegal." There have been significant problems with the distinction between general charitable and specific charitable intent, and many years of calls for reform of *cy pres* law. For a useful discussion, see Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111 (1993).

The draft Restatement (Third) of Trusts § 67 would relax the *cy pres* standards, seemingly acknowledging the restrictiveness and difficulty in applying earlier doctrine. The proposed draft states:

> Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose. RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 3, 2001). Unanticipated circumstance would also be recognized under § 66 of the new draft Restatement of Trusts.

The Uniform Trust code also discusses these matters, a subject the author is taking up in further writing in this area.

[18] William D. Guthrie, a former President of the Association of the Bar of the City of New York wrote in 1929, "[r]eliance upon the doctrine of *cy pres* as administered by our courts of equity has proved unsatisfactory because of the rigid rules of law which unavoidably fetter the hands of the judges and limit their power and discretion." Record on Appeal, Cmty. Serv. Soc'y v. New York Cmty. Trust, *supra* note 6, at 125. For useful history of *cy pres* and efforts to reform the doctrine, see generally EDITH FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES (1950).

[19] The Franklin will is reprinted in F. EMERSON ANDREWS, LEGAL INSTRUMENTS OF

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Another Franklin bequest, "to protect forever a stream that was colonial Philadelphia's water supply, which stream disappeared as the city grew metropolitan,"[20] was also unreformable under the strictures of American *cy pres*. Perhaps most famous in the early twentieth century American Midwest is the prominent case of the Mullanphy bequest, which aided westward travelers heading through St. Louis. That trust went through multiple litigations and was unreformable for nearly a century, severely limiting its contributions to its community and stifling its investment growth.[21]

B. The Origins of the Modern Variance Power and American Philanthropic Innovation

By the early twentieth century the problem was acute. Many trusts and wills were considered difficult to reform, generally because trustees could not meet the exceptionally complex tests for judicial *cy pres* or trust reformation.[22] Lawyers and bankers understood the problem more clearly than most, as they fought to reform long-settled trusts and wills so they could deliver a significant philanthropic impact. In the early twentieth century, Frederick Goff, a Cleveland-based banker, lawyer, community leader, and Rockefeller family adviser with extensive experience in the difficulties of amending the purposes and administration of obsolete, eccentric, or misinvested charitable trusts, had a "ringside seat . . . from which to observe the capacity of changing conditions to induce obsolescence."[23] Goff frequently came upon trusts that bound the bank as trustee to "improvident distribution"[24] of

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FOUNDATIONS 58-62 (1958). The quotation is from NATHANIEL HOWARD, TRUST FOR ALL TIME: THE STORY OF THE CLEVELAND FOUNDATION AND THE COMMUNITY TRUST MOVEMENT 6-7 (1963).

[20] HOWARD, *supra* note 19, at 7.

[21] *See* Mark Sidel, Struggles with the "Dead Hand": One Hundred Years of a Charitable Trust and its Modern Influences on American Law (2002) (unpublished manuscript) (on file with author). The Mullanphy trust is discussed by community foundations arguing for the broad discretionary application of the variance power in Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712 (N.Y. App. Div. 2000); Brief of Amici Curiae Community Foundations, *In re* Application of Community Service Society of New York (2000), *cited in* Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 10-11.

[22] *See supra* notes 14-20 and accompanying text.

[23] Ralph Hayes, Footnotes on the Foundation of the First Community Trust, Address at Memorial Luncheon Commemorating Frederick H. Goff (1858-1923) and the Fiftieth Year of the Cleveland Foundation 10 (May 16, 1963) [hereinafter Hayes].

[24] *Id.* at 11.

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"wealth . . . uselessly held in the icy grip of irrevocable wills."[25]

A flexible, innovative solution needed to be found. Goff believed firmly that "more specific remedial power should be left to rectify the dislocations that the passing years might disclose."[26] He knew that *cy pres*, the ancient doctrine still viewed with deep suspicion in the United States and England, could not fulfill that task. Goff put the problem of charitable trusts bound by a rigid *cy pres* doctrine in blunt terms:

> I hope the time will come . . . when the law will recognize that property belongs to the living and not the dead to the extent of forbidding the appropriation of wealth unalterably to a narrowly conceived public use.[27]

> How fine it would be if a man about to make a will could go to a permanently enduring organization . . . and say: Here is a large sum of money that I shall presently no longer need. I want to leave it to be used for the good of the community, but I have no way of knowing what will be the greatest need of the community fifty years from now, or even ten years from now. Therefore, I place it in your hands, because you will be there, you and your successors, throughout the years, to determine what should be done with this sum to make it most useful for people of each succeeding generation.[28]

In 1913, Goff — now credited as the originator of modern community philanthropy and its law in the United States and abroad — conceived the idea of the community trust. In Goff's simple but powerful formulation, donors grant their funds to a financial institution in trust for financial administration. A committee of leading local citizens takes responsibility for grantmaking and philanthropic administration of the funds. That donation is delivered with a "variance power," an

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[25] RICHARD W. POGUE, THE CLEVELAND FOUNDATION AT SEVENTY-FIVE: AN EVOLVING COMMUNITY RESOURCE 10 (1989). For useful resources on Frederick Goff and the early days of the American community foundation movement, see generally THE CLEVELAND FOUNDATION: A COMMUNITY TRUST (1914) [hereinafter THE CLEVELAND FOUNDATION (1914)]; THE CLEVELAND FOUNDATION: A COMMUNITY TRUST (1931) [hereinafter THE CLEVELAND FOUNDATION (1931)]; FREDERICK HARRIS GOFF: A MEMORIAL (Cleveland Trust Company, 1923); I.F. FREIBERGER, FREDERICK HARRIS GOFF (1858-1923): LAWYER, BANKER, CIVIC LEADER (1951); HOWARD, *supra* note 19; John Pierson, *Lending a Hand*, FOUND. NEWS, September/October 1989, at 18-22; Diana Tittle, *Cleveland's Best Idea*, FOUND. NEWS, September/October 1989, at 24-28; Hayes, *supra* note 23.

[26] Hayes, *supra* note 23, at 11.

[27] *Id.*

[28] POGUE, *supra* note 25, at 11 (quoting Frederick Goff writing in Collier's Magazine).

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agreement between the donor and the community trust. Such agreements empower the community trust to alter the beneficiaries or terms of the trust, if needed, without requiring the cumbersome process of judicial *cy pres*. Goff's concept of the variance power has served as the core legal doctrine underlying all community philanthropy throughout the United States.[29] Donors provide funds to a trust or foundation. The investment of these funds is the responsibility of a banking trustee or an investment committee of a community trust or foundation. Management and distribution for charitable purposes (either income or principal) are the joint responsibility of the community foundation or trust. The organization is "an independent medium — a distributing committee,"[30] as well as investment manager of the funds. The trust is not subject to *cy pres* control by the courts. Each donor could designate the charitable distribution of his or her donation, subject to agreement with the banking trustee and the community trust or foundation, "instructing the foundation to act for him [thereafter] in making such remedial adjustments as might become needed to keep the fund effectively employed in the unforeseen conditions of the future."[31] Thus, the strictures of the "dead hand" and the difficulties of reforming *cy pres* were avoided. Community trusts sidestepped the courts' unwillingness to alter the intention of a long dead testator, even when a trust's original purposes were long since resolved, impractical, or impossible to perform.

Goff's vision came to fruition in 1914 with the founding of the Cleveland Foundation.[32] America's first modern community philanthropy relied on the bank Goff headed, Cleveland Trust Company, as its trustee, and on a distribution committee of five members to make grants.[33] As originally envisioned by Goff, the variance power was broad indeed. It was also held in the bank trustee, because in Goff's original plan the notion of a distribution committee and the community foundation entity did not yet exist. Thus, in the original formulation, donors' wishes are observed "only insofar as the purposes indicated shall seem to the trustee [the Cleveland Trust Company] wise and most

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[29] *See* HOYT, *supra* note 8, at 4, 16-19.

[30] *See* Hayes, *supra* note 23, at 11-12.

[31] *Id.* at 12. The same result can be accomplished through a power of appointment.

[32] *See id.* at 11.

[33] COUNCIL ON FOUNDATIONS, *supra* note 8, at 1-2. In Cleveland, the distribution committee was named by the bank trustee and by public officials; in most other jurisdictions since a form of self-perpetuating distribution committees has been followed. The number of bank trustees would expand to five by the 1930s.

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widely beneficial."[34] In the months between formulation and establishment, Goff came to agree that a separate, non-banking entity should decide on the distribution of charitable funds. But the power to vary donors' wishes remained in the bank trustee, the Cleveland Trust Company.[35]

The reactions to Goff's new structure were quick and positive. As the Council on Foundations has noted, "[b]ankers, donors, community leaders and nonprofit organization heads quickly perceived Goff's creation as a brilliant addition to philanthropy. Word spread first through the banking community, and within five years community foundations were started in... Chicago, Boston, Milwaukee, Minneapolis, Rhode Island and Buffalo."[36] In later years, as Professor Hoyt points out, the U.S. Treasury Department, as well as Congress, came to understand the utility of these arrangements and "g[a]ve community foundations the unique advantage of being able to treat multiple trusts and corporations as part of the community foundation ('component funds') rather than as separate organizations."[37]

C. The Breadth of the American Philanthropic Imagination: Disinterring the Variance Power in Its Early Years

In 1921, two years before his death, Frederick Goff reviewed what he had wrought in a speech at the New York Association of Trust Companies:

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[34] POGUE, *supra* note 25, at 12 (quoting Goff's original plan for Cleveland Foundation).

[35] Today it is only faintly remembered that variance power, at its origination, lay with the financial trustee investing the charitable funds and not with the community foundation or trust deciding on appropriate charitable gifts. When the Foundation was formally established the variance power in place was similar: donors' wishes would be respected "in so far as the purposes indicated shall seem to the Trustee, under conditions as they may hereafter exist, wise and most widely beneficial, absolute discretion being vested in a majority of the then members of the Board of Directors of The Cleveland Trust Company to determine with respect thereto." Resolution Creating the [Cleveland] Foundation (Adopted by the Board of Directors of The Cleveland Trust Company, January 2, 1914), *in* THE CLEVELAND FOUNDATION (1914), *supra* note 25, at 22; Tittle, *supra* note 25, at 27.

[36] Council on Foundations, *supra* note 8, at 3. As Christopher Hoyt notes, acceptance of Goff's innovative structure was widespread:

> The multiple-trust community foundation became a model that was adopted in other cities in the 1920s and 1930s... The separation of the investment function from the disbursement function permits the trustee banks to do what they do best (make investments) and the community foundation to do what it does best (make grants). HOYT, *supra* note 8, at 3.

[37] *Id.* at 3-4.

> Community foundations aim to provide a flexible plan for administering charitable trusts. They are designed to lessen the evil of 'The Dead Hand' by making property dedicated to a specific charitable purpose available for other uses when the one designated by the donor becomes harmful or obsolete.
>
> Every lawyer, every trust officer, every citizen, should use his influence in persuading donors creating charitable endowments to vest broad powers in their trustees to disregard the originally expressed preference regarding the purposes to which income may be devoted, if in the course of years those purposes become obsolete or harmful.
>
> If the foundations can measurably fulfill the purposes for which they are organized, they offer a helpful agency near at hand for making philanthropy more effective and for cutting off as much as is harmful of the dead past from the living present and the unborn future. Through their operation we may anticipate some degree of relief from the withering, paralyzing, blight of the Dead Hand through the years when no intellect remains to apply reason and sympathy and discretion to the terms of antiquated fiats.[38]

The innovative new structure of community foundations, embodying the flexibility of the variance power, helped garner charitable donations in the 1920s as the new community foundation movement gained ground.[39] The 1920s further linked Frederick Goff and his vision of the early twentieth century with the Rockefeller family. The Rockefeller family's benefactions to the New York Community Trust set off the epic battle over variance power between the Community Service Society and the Community Trust. Moreover, the 1920s linked Goff with the New York Community Trust through Goff's former assistant, Ralph Hayes, who headed the Community Trust from the 1920s through 1967.[40]

Key philanthropic actors who had long resisted the strictures of *cy pres* endorsed the new community foundation movement in the 1920s as they sought more flexibility in their own philanthropy and encouraged it among others. Among the most important actors was John D. Rockefeller, Jr. (JDR Jr.), whose mother's trust, the Laura Spelman Rockefeller Memorial, became the primary trust at issue in *Community*

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[38] FREIBERGER, *supra* note 25, at 15.

[39] *See* COUNCIL ON FOUNDATIONS, *supra* note 8, at 1-3.

[40] *See* Hayes, *supra* note 23 for discussion of Goff.

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Trust.[41] By the 1920s, the Rockefellers were strong supporters of greater flexibility in philanthropy. As JDR Jr. wrote in an important letter to Hayes at the New York Community Trust in 1925:

> The trusts referred to in the minutes [Hayes sent] are generally for very specific and limited purposes. I am wondering whether your Board would think it wise, when possible, to suggest to those making trusts, that they either draw them on a broader basis or provide some means whereby after the trust has been used for a definite period of years for the specific purpose for which it is designated, the Trustees of the Community Trust shall thereafter be empowered to determine whether the need continues, and if not to what purposes the funds shall be subsequently devoted . . .
>
> As our experience in giving grows, we find ourselves more loth to impose conditions which continue for an unlimited period of years, and are incresingly [sic] leaving broad discretion to the successors of present trustees. In other words, if in these trusts above referred to and similar trusts, it were stipulated that the money should be for the specific purpose mentioned for a limited period of years or so long as in the judgment of the trustees of the Community Trust it was needed and could wisely be used for that purpose, and thereafter for such other or kindred purpose as the trustees might determine; [semicolon is in original] the purpose of the mind of the donor of the fund would be quite as well served, and the danger of the necessity arising of applying the fund to a purpose which had ceased to require it, would be avoided.
>
> Please pardon this suggestion. I make it merely for such consideration as you may think it desreves [sic].[42]

Ralph Hayes replied that, through the variance power, "the NYCT was empowered to do just as Mr. Rockefeller suggests."[43] But that response may have been too glib. Rockefeller's suggestion went beyond the variance power to encompass a time limit on designated gifts, after which the community trust would be empowered, even required, to consider other uses. Rockefeller seems to have understood early on the

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[41] *See infra* notes 44-45 and accompanying text.

[42] Letter from John D. Rockefeller, Jr., to Ralph Hayes, Executive Director, New York Community Trust (1925), Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 2886, 2887-88 (transcription errors retained and not corrected) [hereinafter Rockefeller Letter].

[43] *Id.* at 2888 (wording as printed in memorandum, not corrected).

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potential dangers of unlimited variance, the sense of entitlement that can grow within beneficiary organizations, and the benefits, at least for community needs, of a more limited arrangement.

Within three years, the emerging Rockefeller principles were embodied in Laura Spelman Rockefeller Memorial's trust gift to the New York Community Trust. The gift from John D. Rockefeller's widow was drawn up carefully over many months and was one of the most important gifts that the new Community Trust had received. It incorporated the Resolution and Declaration of Trust creating the New York Community Foundation, including the variance power. The trust gift also indicated a "desire" that twenty of 110 parts of the trust fund be devoted to two predecessors of what later became the Community Service Society.[44] But the Rockefeller trust indenture went still further in ways that seem clearly intended to reemphasize and further broaden the discretionary role of the Distribution Committee, echoing JDR Jr.'s letter to Ralph Hayes. The trust instrument stipulated:

> The Grantor desires . . . that the organizations named above . . . shall receive the net income of this trust fund . . . as long as these five organizations continue to exist and as long as, in the opinion of the Distribution Committee of the New York Community Trust, the income of this Trust is needed by them for carrying on their work, and the quality of their work does not appreciably deteriorate, or the necessity for or usefulness of their work is not substantially lessened under social conditions hereafter prevailing.
>
> [If any of those conditions occur] then in each such event the said Distribution Committee, acting pursuant to the powers contained in the said Resolution and Declaration, shall have authority to change the proportions of net income payable to the beneficiaries named herein, or to any one or more of them, or to substitute other beneficiaries engaged in similar work for the one or more of them . . .
>
> Every decision made by the said Distribution Committee acting under this Indenture shall be binding and conclusive upon all persons, corporations or organizations which may at any time be

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[44] 10/110 parts were designated for the New York Association for Improving the Condition of the Poor and 10/110 parts for the Charity Organization Society of the City of New York. Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 37. The Community Service Society was created by merger of these two organizations in 1939.

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beneficiaries of, or have any interest in, this Trust Fund.[45]

By this time, variance power at the New York Community Trust already rested with the Distribution Committee rather than with the banking trustees. This was part of a gradual shift of power from the investors and bankers to the grant makers. At the Cleveland Foundation, the right to exercise variance power rested with the bank trustee and Goff's home financial institution, the Cleveland Trust Company, until 1931. In that year, two additional banks were added to the trustee roster, a response to donors and banks that wanted to participate in the growth of the Cleveland Foundation and the Foundation's interest in diversifying support.[46] After 1931, variance power in the Cleveland Foundation rested with the citizens' Distribution Committee rather than the banks.[47]

Thus, within this complex and sensitive field encompassing donors, investment and banking trustees, grant-making committees of elite citizens and charitable recipients, power was gradually moving toward the grant-making committees at the community foundations and trusts. The Cleveland Foundation's 1931 revision to its variance power reflects this shift and comes reasonably close to the variance power as it is used today. The modern variance power is exercised by the community foundation, not by the investment trustee. The now familiar words "unnecessary, undesirable, impractical or impossible" are a prominent feature as grounds for varying the wishes of a donor. The Cleveland Foundation's provision also allowed variance when "said circumstances have so changed as to render said expressed desires no longer wise or beneficial." This breadth of language (and expanse of variance power)

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[45] *Id.* at 36, 52; *see id.* at 47-55 (reprinting full trust indenture); *id.* at 83-90 (New York Community Trust publication describing Laura Spelman Rockefeller Memorial). Six other wills followed in naming predecessors of or the Community Service Society as a designated beneficiary. The next was the Henry K.S. Williams Trust, by indenture dated 17 December 1929, that also incorporated the variance power through the Community Trust's Resolution and Declarations. Those that followed each specifically incorporated the variance power as well. They were the Linda A. Griffith Trust (1936 indenture), Frederica M. and Morton L. Adler Trust (1939), Aline Frank Trust (1953), Netta Frank Trust (1954), and Melanie Prince Goldman Trust (1959). The wills or indentures are reprinted in Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 283-86 (Griffith, 1936), 2587-99 (Williams, 1929), 2601-18 (Adler, 1939), 2619-25 (Aline Frank, 1953), 2626-28 (Netta Frank, 1954), and 2629-42 (Goldman, 1959). New York Community Trust memoranda on the trusts are also in the Record on Appeal, for example, Laura Spelman Rockefeller Memorial, at 2886-88; Adler Trust, at 2891.

[46] Resolution and Declaration of Trust Creating the Cleveland Foundation, Article II, *in* THE CLEVELAND FOUNDATION (1931), *supra* note 25, at 3-4.

[47] *Id.*

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may not find its way into most modern texts of the variance power, but disinterring it is useful to understand subsequent struggles over variance and community philanthropy.[48]

Although variance power was frequently employed in agreements between donors and the new community trusts and foundations, the power to vary donors' wishes was not frequently exercised in the early years of the American community philanthropy movement. Donations to the Cleveland Foundation, the New York Community Trust, and other community foundations and trusts sprouting up around the country were new and often relatively small.[49] In Cleveland, the donations were generally directed toward the reform studies and other projects recommended and organized by Frederick Goff and his successors. There were no grounds on which to consider them "unnecessary, undesirable, impractical or impossible," much less "no longer wise or beneficial." In its first decade the Cleveland Foundation dedicated itself to studies of municipal reform and revival in Cleveland. Several of those studies led to far reaching reforms in education, crime and punishment, higher education, and other important local issues.[50] After languishing for some time after Goff's death in 1923, the Foundation was revived in the 1930s and 1940s with the decision to allow investment trusteeships in banks beyond the Cleveland Trust Company,[51] and with significant private donations, all subject to the variance power, beginning in 1931.[52]

D. Early Interpretations of the Variance Power: Guggenheimer, Guaranty Trust, *Judicial Understanding of Variance Power Doctrine, and the Quest for "Absolute Discretion"*

Since 1914, the variance power has served to bridge an often complex and emotional gap between honoring the obsolete, eccentric, impractical,

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[48] Nor, under the broad Cleveland Foundation formulation, did variance power have to be exercised by unanimous vote of the Foundation's Distribution Committee. A four-fifths vote of the Committee was sufficient. *Id.* at 3-4.

[49] Hayes, *supra* note 23, at 10.

[50] POGUE, *supra* note 25, at 14-15. The study on crime in Cleveland was led by Roscoe Pound and Felix Frankfurter, one of the first major studies of crime and punishment in a twentieth century American city. Goff's ideas appear to have been influenced by his association with the Rockefeller family and the 1913 establishment of the Rockefeller Foundation. That influence is somewhat ironic given that one of the trusts that would come under dispute in *New York Community Trust* was that of Laura Spelman Rockefeller, who had long Cleveland links herself. *See* Tittle, *supra* note 25, at 27.

[51] By 1931 trusteeships were permitted in three banks. THE CLEVELAND FOUNDATION (1931), *supra* note 25, at 2.

[52] POGUE, *supra* note 25, at 16.

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or impossible wishes of a dead donor, and the changing, flexible needs of modern communities. Originally, that bridge owed much to the power and breadth of Frederick Goff's vision and the sheer utility of his scheme: the variance power caught on around the United States as a means for protecting donor wishes while also protecting donations from obsolescence and grasping relatives. Later, as it applied to community foundations, the variance power became an important test for the public charity status of community philanthropies. Virtually every community trust or foundation has employed some form of the variance power. Yet in the 1980s and 1990s, a narrowing of understanding of variance began culminating in *Community Service Society v. New York Community Trust.* Today this narrowing threatens the breadth of the imagination embodied in the original notions of the variance power.

Variance power was first directly reviewed in 1995 with *Community Trust.*[53] The New York Surrogate's Court, however, discussed variance power as early as 1938, when it reviewed a trust gift to the New York Community Trust. When it reviewed the case *In the Matter of the Estate of Sydney Guggenheimer,*[54] the New York Surrogate's Court construed the will of a New York financier who very carefully restricted his charity. After providing for two sisters and a cousin, Guggenheimer bequeathed his residual estate to Chase Manhattan Bank as trustee for the New York Community Foundation. He directed that "net income from this trust fund shall be expended for the relief and assistance of worthy poor people. . . ." His bequest fully incorporated the Community Trust's variance power. But Guggenheimer seemed also to have perceived the New York Community Trust as a source of directed funds for his poorer relatives. He stipulated that, "in distributing such net income, preference shall be given to worthy poor people" with priority to some of his first cousins and their offspring, the first cousins and offspring of his parents, and then continue to New York-based orphans and the aged. The will barred payments to certain other named descendants.[55]

In reviewing this will, the court considered whether the gift was truly for private purposes, because gifts to relatives are not valid charitable

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[53] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712, 714-22 (N.Y. App. Div. 2000), *aff'd*, 751 N.E.2d 940 (N.Y. 2001).

[54] *In re* Estate of Sydney A. Guggenheimer, 5 N.Y.S.2d 137 (N.Y. Sur. 1938). The Surrogate's Court has jurisdiction over wills, estates, and related matters.

[55] Preference above all the cousins was given to "any descendant in distress of my uncles Leopold Henle and David Henle late of Philadelphia, Pennsylvania," and an absolute bar was constructed against any payments to "descendants of Samuel E. Bloch or my cousin Rosz Hirschfield Bloch, his wife, of New York City." *Id.* at 140-41.

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donations. Despite the inclusion of Guggenheimer's own relatives, the court held that the bequest was valid because of its "general purpose to perform a public charity."[56] In coming to this conclusion, however, the court recognized the flexibility granted to the Distribution Committee of the New York Community Trust. The court signaled judicial understanding of the variance power embedded in the Resolution and Declaration of Trust of the New York Community Trust.[57] That broad variance clause, noted the court, "makes a . . . distribution committee the ultimate judge of the use of the funds." The variance clause "is to be exercised in the last analysis for public charitable purposes. The entire resolution and declaration of trust is permeated with the idea of public charity and none of its text departs from the general aim of serving the public good."[58]

In one sense, the *Guggenheimer* court's vision of community philanthropy differs significantly from our conception of community philanthropy today. For the *Guggenheimer* court, a community trust may partly be the conduit of charity to the designated poorer relatives of a rich donor. A trust is also the donor of charity to the unrelated destitute, with decisions made by a distribution committee, all subject to the variance power.[59] Sixty years later, a similar sense of personalized decision making on grants and judgment on the merits of changes in social service and community organizations affected the New York Community Trust's exercise of its variance power. But *Guggenheimer* today stands for judicial understanding of, and acquiescence in, philanthropic variance as an indicia of the "public charitable" nature of the New York Community Trust's enterprise. *Guggenheimer* also recognizes and endorses the broad variance power with which the Trust was granted.[60]

The New York Surrogate's Court further discussed the variance power in the 1940s in another action involving the New York Community Trust.

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[56] The Court goes on: "[T]he suggestion that the trustee exercise a preference in favor of relatives or friends of the testator does not suffice to invalidate the gift. . . . The testator here has directed that the money 'shall be expended for the relief and assistance of worthy poor people'. . . . His plan is not invalidated by his inclusions or his exclusions. . . ." *Id.* at 144.

[57] *Id.* at 143.

[58] *Id.*

[59] *Id.*

[60] Other early decisions referring to the New York Community Trust are in accord. *See In re* James' Estate, 3 N.Y.S.2d 679 (N.Y. Sur. 1938); *see also Guggenheimer*, 5 N.Y.S.2d at 143 (referring to unreported Ulster County Surrogate decision).

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Guaranty Trust Company of New York v. New York Community Trust[61] spanned four years as courts sought to construe the will of Conrad Cantzen. Cantzen was a New York actor who appeared in productions on Broadway from 1913 to 1937 and in road companies for many years.[62] Cantzen sought to bequeath his estate worth $235,000 to Actors Equity and the Actors Fund "to help actors purchase shoes so they did not appear 'down at the heels' when auditioning." This designation reflected Cantzen's belief that "a good pair of shoes made a great first impression on casting directors."[63]

Mr. Cantzen's skill as an actor and his generosity to his colleagues far surpassed his lawyer's skills in writing a will. In 1936, he bequeathed his property to the Guaranty Trust Company "in trust however, for the uses and purposes and upon the terms contained in the resolution and declaration of trust creating the New York Community Trust."[64] That resolution and declaration of trust fully incorporated the standard variance power, granting it to the Community Trust.[65]

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[61] Guaranty Trust Co. v. N.Y. Cmty. Trust, 139 N.J. Eq. 144 (N.J. Ch. 1946), *aff'd*, Guaranty Trust Co. v. N.Y. Cmty. Trust, 141 N.J. Eq. 238 (N.J. Ch. 1948), *aff'd*, Guaranty Trust Co. v. N.Y. Cmty. Trust, 142 N.J. Eq. 726 (Ct. Err. App. N.J. 1948).

[62] Conrad Cantzen appeared on Broadway in some of the most prominent dramatic productions of his day. His credits include Ibsen's *An Enemy of the People* (1937), as well as the dramatic production of Pearl Buck's *The Good Earth* (1932) (also starring Claude Rains and Sydney Greenstreet), and other plays. For further information on Mr. Cantzen's Broadway career and credits, see *Internet Broadway Database, at* http://www.ibdb.com (last visited Mar. 13, 2003). For information on his road career, see Testimony of Robert Campbell, in the Trial Record, Guaranty Trust Co. v. N.Y. Cmty. Trust at 133-150.

[63] The Actors' Fund of America, Conrad Cantzen Shoe Fund, *at* http://www.actorsfund.org/human/social/cantzen.html (last visited Apr. 30, 2003). Cantzen noted poignantly in his will that "[m]any times I have been on my uppers and the thinner the soles of my shoes were the less courage I had to face the manager in looking for a job." Bill of Complaint, Trial Record, Guaranty Trust Co. v. N. Y. Cmty. Trust, at 5 [hereinafter Bill of Complaint]. Cantzen's generosity would inspire other philanthropists. *See Peter Copani's Legacy to the Performing Arts, at* http://www.petercopani.com/co00003.htm (last visited Mar. 13, 2003).

[64] Guaranty Trust Co. v. N.Y. Cmty. Trust, 141 N.J. Eq. 238, 240 (N.J. Ch. 1948).

[65] Exhibit B, Bill of Complaint, *supra* note 63, at 23-24:

> [A]ny such expressed desire of the maker [donor] shall be respected and observed, subject, however, in every case to the condition that if and whenever it shall appear to the Distribution Committee [of the New York Community Trust]... that circumstances have so changed since the execution of the instrument containing any gift, grant, devise or bequest as to render unnecessary, undesirable, impractical or impossible a literal compliance with the terms of such instrument, said Committee... may at any time or from time to time direct the application of such gift, grant, devise or bequest to such other public educational, charitable or benevolent purpose as, in their judgment, will most effectually accomplish the general purpose [of the New York Community

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So far so good. By this wording Cantzen created a designated fund in the New York Community Trust, with income distributable by the Trust's Distribution Committee in accordance with his wishes, and subject to the Trust's variance power should his "desire" prove "unnecessary, undesirable, impractical or impossible." But then Cantzen and his attorney veered off with both a specific bequest and a form of variance power that provoked serious interpretation problems. Cantzen's will stipulated:

> [H]owever . . . the net income thereof shall be applied . . . as shall be determined by the Actors Equity Association . . . and shall be applied through said association for the purpose of supplying footwear to present and future members of said association and of the chorus Equity and to all needy actors of the theatrical profession . . . for the people who cant buy shoes, even if they are not paid up members of Equity.[66]

Cantzen provided that if the fund failed to be used up each year for shoe purchases, the annual balance should go to the Actors Equity Association.[67] If his charitable purposes became "no longer appropriate or practicable," then "the purpose of said trust shall be as under the then existing circumstances the Actors Equity Association and the Actors Fund of America shall determine."[68] Only if the Actors Equity and the Actors Fund "cease to exist" does the New York Community Trust come back into this by now utterly confused picture.[69]

Guaranty Trust raised the problem of interpreting a variance power clause in a complex drafting context in which new doctrine appears to have been severely misunderstood by the drafting lawyers. The Community Trust argued that, however inartfully the will was drafted, it established the Community Trust as the beneficiary under Cantzen's will. As the beneficiary, the Community Trust maintained that it was empowered to follow Cantzen's desires or, under appropriate

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> Trust], without regard to and free from any specific restriction, limitation or direction contained in such instrument. *Id.*

[66] *Guaranty Trust*, 141 N.J. Eq. at 240 (wording, including spelling errors, as in original).

[67] *Id.*

[68] *Id.* at 241 (including wording as in original).

[69] "[T]hen it is my request that the N. York Community Trust in carrying out the purpose of this will shall confer with three of the then leading association's having for their object charitable purposes in which members of the Theatrical profession are beneficiaries, and thereafter determine the uses of said income." *Id.* (wording preserved as in the original text).

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conditions, to employ the Trust's variance power to alter the purposes of his bequest. All other language was merely "precatory and not mandatory."[70] In a separate statement provided with the Community Trust's bill of complaint, the Director of the Community Trust, Ralph Hayes, clearly spelled out the court's difficulties in clarifying the desires of the donor, the application of the variance power, and the priority of various claims.[71] Cantzen:

> adopts and incorporates in the will all of the terms and provisions of the Resolution and Declaration of Trust Creating The New York Community Trust and then appends some phraseology, which if construed as mandatory, would be at variance with the administrative procedure contained in the Resolution and Declaration so adopted and incorporated . . . Thus the question arises as to whether the will gives overlapping discretionary powers to the . . . Community Trust on the one hand and to the Actors' Equity Association and the Actors' Fund of America on the other.[72]

At trial, the Community Trust outlined its understanding of the variance power, perhaps for the first time in an American courtroom. The Trust noted that "in these various trusts [created at the New York Community Trust] it is usual for the grantor to express some desire as to how he wishes the income disposed of, to what charities, and so on."[73] The Trust also stated:

> But the . . . Community Trust under the resolution had the right, if it feels that the desire of the creator of the trust is not practicable, or conditions have been changed so as to make it impossible, why the distribution committee has the authority to distribute the income in its discretion as it feels will more closely come to the desires of the creator of the trust.[74]

The Community Trust's understanding of its variance power went far beyond circumstances of practicability or impossibility. Although "in all cases" the Trust "attempts to stay close to the purposes of the

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[70] *Id.* at 243.

[71] *See* New York Community Trust Memorandum Re Construction of Conrad Citizen Will, Exhibit C, Bill of Complaint, *supra* note 63, at 45-46.

[72] *Id.* The Community Trust evinced no strong desire to manage these funds, asking the court to relieve it of responsibility for the Cantzen fund should the court "find that the true construction of the will is other than as stated" by the Trust. *Id.* at 47-48.

[73] Testimony in Chancery Court, Trial Record, Guaranty Trust Co. v. N.Y. Cmty. Trust, *supra* note 6, at 131 (quoting Trust attorney Walton and attorneys for other parties).

[74] *Id.*

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donor. . .,"[75] it claimed "absolute discretion as to how it shall be distributed."[76]

Which was to govern — the Resolution and Declaration of Trust of the New York Community Trust that incorporated the Trust's distribution power and its own variance power, or the provision in the will specifying distribution power and variance decision making by Actors Equity and the Actors Fund? Guaranty Trust, arguing for Actors' Equity, the Actors' Fund, and Chorus Equity, noted that "a proper construction of [the] will would provide that [Guaranty Trust] should turn over all of the income to the Actors' Fund of America and that the . . . New York Community Trust should have no voice, jurisdiction or standing in the allocation or distribution of the income."[77]

In its January 1947 ruling, the New Jersey Court of Chancery held that Cantzen intended that the net income of the fund would be used to furnish shoes for needy actors through Actors' Equity and the Actors' Fund. The net income should be sent to those organizations rather than be subjected to distribution by the New York Community Trust, relieving the Trust of any responsibility for investment or distribution. But "[i]f that purpose proves impractical," the Actors' Equity and the Actors' Fund "are required to determine the next best purpose of the fund."[78] Only if these groups ceased to exist would the New York Community Trust play a role in the final direction of the fund and only after conferring with the leading theatrical associations as Mr. Cantzen stipulated.[79]

In *Guaranty Trust*, the New York Community Trust lost the skirmish for control over Cantzen's bequest. But that was not the Trust's real

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[75] *Id.*

[76] *Id.* at 131. Actors' Equity and the Actors' Fund characterized this statement as "a bold admission that should the . . . Committee desire, it could apply the trust fund in question for purposes not even remotely concerned with or affecting members of the theatrical profession — the very persons for whose benefit, it is clear from the will, the trust fund was established," but did not challenge its correctness. Nor did the court. Brief and Appendix of Defendants-Respondents the Actors' Fund of America, Actors' Equity Association, and Chorus Equity Association of America, Trial Record, Guaranty Trust Co. v. N.Y. Cmty. Trust at 21.

[77] Bill of Complaint, *supra* note 63, at 7. Guaranty argued that the provisions of the instrument giving the Community Trust control over the bequest are "conditioned . . . and take effect and become operative only" if Actors' Equity and the Actors' Fund cease to exist. *Id.* at 5; *see also* Contentions of the Actors' Equity Association and The Actors' Fund of America, Exhibit D, Bill of Complaint, *supra* note 63, at 49.

[78] Guaranty Trust Co. v. N.Y. Cmty. Trust, 139 N.J. Eq. 144, 166 (N.J. Ch. 1946).

[79] *Id.* This judgment was affirmed two years later, after the testator's family had joined the suit challenging the will, then reaffirmed later in 1948. Guaranty Trust Co. v. N.Y. Cmty. Trust, 141 N.J. Eq. 238 (N.J. Ch. 1948), *aff'd* 142 N.J. Eq. 726 (Ct. Err. App. N.J. 1948).

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goal. Hayes and his colleagues stood by their Resolution and Declaration of Trust and asked the court for a "true construction of the will." If the construction of the will conflicted with the Trust's Resolution and Declaration, including the variance power, the Trust did not want to control the funds.[80] Here, as in *Guggenheimer*, the Community Trust won implicit judicial recognition of its Resolution and Declaration of Trust, including the variance power. As the Chancery Court noted:

> [T]he New York Community Trust is a charitable foundation whose purpose is to encourage and promote gifts for educational, charitable and benevolent uses in accordance with the plan which . . . meets the changing needs for such gifts with flexibility in the power of distribution required by factors which constantly render trusts created for specific objects superfluous, and compliance with their terms unwise, impracticable or impossible . . . and . . . provides for the selection of the beneficiaries of such gifts when the principal purpose of the trust is found impracticable or impossible to be carried out, by an impartial committee of changing persons, chosen for their knowledge of the educational, charitable or benevolent needs of the times.[81]

While the *Guaranty Trust* court did not explicitly approve of the Community Trust's variance power, it clearly approved the conditional role of the Trust and its variance power should the will's other purposes, as written, have failed.[82]

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[80] New York Community Trust Memorandum, *supra* note 72, at 47-48.

[81] *Guaranty Trust*, 139 N.J. Eq. at 162-63.

[82] For very brief treatments of the *Guaranty Trust* case, see Robert J. Lynn, *The Questionable Testamentary Gift to Charity: A Suggested Approach to Judicial Decision*, 30 U. CHI. L. REV. 450, 467 (1962-63); F. Emerson Andrews, *Bounty from Beyond: How to Give the Most Good with Your Bequests*, HARPER'S, Aug. 1962, at 65.

There are few other early cases that help to clarify judicial understanding of the variance power. Four years after *Guaranty Trust*, in 1950, *In re James' Estate* required the New York Surrogate's Court to determine trusteeship when an original bank trustee administering a trust in accordance with the New York Community Trust's agreement merged with another bank. The specific issue was which institution should serve as trustee: the merged institution or another bank that had been designated as alternate trustee under the New York Community Trust Agreement. Although the variance power was not specifically at issue in this case, the court took notice of New Jersey's recognition of the New York Community Trust Agreement in *Guaranty Trust*, and specifically recognized the New York Community Trust Agreement, including the variance power, as the document governing this transaction. *In re* James' Estate, 99 N.Y.S.2d 514, 518 (N.Y. Sur. 1950).

Seventy years later, the Conrad Cantzen Shoe Fund of The Actors' Fund of America continues to work to support actors. Later broadened to include others working in the

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E. The Expansion of Community Trusts, Community Foundations, and Variance Power Use

After Frederick Goff and his colleagues established the Cleveland Foundation in 1914, foundations and trusts built on a similar model of multiple donations formed in New York and other major cities. Virtually all such institutions have employed the variance power.[83] At the end of the 1920s there were seventy-eight community trusts and foundations in the United States, "although only 41 had capital in the bank or any prospect of getting it."[84] As a counterweight to the restrictions of *cy pres*, the concept was taking off. As Goff's associate, New York Community Trust Director Ralph Hayes, noted in 1929 in an essay attacking *cy pres* and extolling the community trust idea,

> [t]here is no intricacy in it. It is young and elemental. But it challenges an evil that is older than the nation. It attempts to lay a specter that has haunted our courts of law and legislative chambers for centuries past. I cherish the belief that generations far removed from ours may call it good; that in days when the happenings of these times are only perhaps some half-forgotten paragraph of history, it may remain, a forthright instrument serving the interests of the living and preserving the memory of the dead.[85]

After a hiatus during the 1930s and World War II, a new and significant stage of community foundation growth occurred, particularly in the 1950s.[86] At each stage, community trusts and foundations seem always to have included variance power provisions in their initial documentation and resolutions.

Another stage of community trust and foundation growth began in the 1970s, after the adoption of the Tax Reform Act of 1969. Six years after

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entertainment arena, the Fund now assists entertainment industry union members, who are currently unemployed in the industry with the cost [now up to $80] of one new pair of shoes a year. The Actor's Fund of America, *Conrad Cantzen Shoe Fund*, at http://www.actorsfund.org/human/social/cantzen.html. The Fund is cited by the Writers Guild of America as one of the "resources writers can lean on during the rough times." Marsha Scarbrough, *A Writer's Guide to Surviving Hard Times*, WRITTEN BY, December 1999, *available at* http://www.wga.org/WrittenBy/1299/surviving.html.

[83] For a brief review of this growth, see COUNCIL ON FOUNDATIONS, *supra* note 8, at 1-6.

[84] *Id.* at 4 (citing report from AMERICAN BANKERS ASSOCIATION COMMITTEE FOR COMMUNITY TRUSTS).

[85] Ralph Hayes, *Frozen Funds*, in *Bench and Bar Appraise the Community Trust*, 1929 ANNUAL REPORT OF THE NEW YORK COMMUNITY TRUST, *reprinted as* Exhibit to Affidavit of Lorie M. Slutsky, Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 136.

[86] COUNCIL ON FOUNDATIONS, *supra* note 8, at 4.

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the adoption of the Tax Reform Act, there were approximately 215 community foundations and trusts in the United States, managing assets of over $1 billion.[87] Rapid expansion continued throughout the 1980s[88] and 1990s. In 1990, the Council on Foundations estimated that "309 community foundations now hold aggregate assets valued at more than $4 billion."[89] By 2000 the Foundation Center noted over 525 community foundations and trusts in the United States, managing assets of over $30 billion and making nearly $2 billion in grants each year.[90] Frederick Goff's vision of community foundations and trust was spreading, from its humble beginnings in a single bank and distribution committee in Cleveland, around the world. The variance power, however, with its roots in the United States, was making its way outside America only occasionally and in fragmented ways.[91]

While a formal survey of variance power provisions in all American community foundations and trusts has not yet been conducted, most seem to include some form of the variance power in their formation documents and contractual documentation. Variance power has been a traditional hallmark of community foundations. Since 1969, when variance power for community foundations and trusts was strengthened in American tax law, it has also become a prerequisite for the preferential regulatory treatment that most American community foundations and trusts enjoy.

F. Variance Power and Nonprofit Taxation

Variance power became a more significant and controversial feature of American charitable taxation law in the late 1960s. Community foundations and trusts had been generally recognized as early as 1921, when the definition of tax-exempt charities was broadened to include "any community chest, fund or foundation," and gifts to such

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[87] *Id.* at 3.

[88] For a picture from the late 1980s, see Sidney Whelan Jr., *Community Foundations Take Off*, TR. & EST., Aug. 1987, at 10.

[89] COUNCIL ON FOUNDATIONS, *supra* note 8, at 3.

[90] THE FOUNDATION CENTER, FOUNDATION GROWTH AND GIVING ESTIMATES 2001 at 8, *available at* http://fdncenter.org/research/trends_analysis/pdf/fgge02.pdf (last visited Apr. 17, 2003).

[91] In England, ironically the land where restrictive judicial *cy pres* had its start and remained limited for centuries, variance power did not take hold even though *cy pres* remained restricted and complex. Sidel discussions at National Council of Voluntary Organizations Research Conference (Nottingham, Sept. 2002).

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organizations were made tax deductible.[92] But the 1969 addition of a variance power requirement for community foundations added significant force to what had hitherto been a private arrangement between donor and community philanthropy.

In 1969, the Treasury required community trusts to have the variance power as a condition for public charity status. This requirement was a significant shift from the realm of private contractual arrangement to mandatory tax provision. It was a move intended to deal with a complex problem in the 1969 reorientation of the tax treatment of philanthropic institutions.[93] The nonprofit tax law shifts originated in congressional and public distrust of the managers of large private foundations. Congress divided charities into two categories: public charities, which received more favorable tax treatment, and private foundations, which became subject to less favorable treatment. The treatment of private foundations ranged from closer regulation of prohibited activities to an excise tax not applied to public charities.[94]

But what of community trusts? Were they to be considered private foundations or public charities? The growing community foundation sector argued for less onerous treatment as public charities. After "considerable negotiations with representatives of many community foundations, the [Treasury] issued regulations that treated a community foundation as a single entity with many component funds," that qualified the foundation, if it met a series of requirements, as a public charity.[95] This treatment had substantial benefits to both donors and community foundations and trusts. For the philanthropic institutions, public charity treatment meant less intrusive tax treatment. For donors giving to community foundations or trusts, public charity status meant that:

> a donor can treat a contribution to a separate trust or corporation,

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[92] COUNCIL ON FOUNDATIONS, *supra* note 8, at 20. This definition has been carried over into the modern provision at Treas. Reg. § 1.170A-9(e)(10) (as amended in 1986).

[93] For useful discussion of the tax regime applicable to private foundations and comparisons with the public charity context, see BETSY BUCHALTER ADLER, THE RULES OF THE ROAD: A GUIDE TO THE LAW OF CHARITIES IN THE UNITED STATES (2000); FRANCES HILL & BARBARA KIRSCHTEN, FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS (1994 with annual supplements). For the fascinating history of the Tax Reform Act of 1969 and its strong impact on American nonprofits, see ELEANOR L. BRILLIANT, PRIVATE CHARITY AND PUBLIC INQUIRY: A HISTORY OF THE FILER AND PETERSON COMMISSIONS (1999); THOMAS TROYER, THE 1969 PRIVATE FOUNDATION LAW: HISTORICAL PERSPECTIVE ON ITS ORIGINS AND UNDERPINNINGS (2000).

[94] *See supra* note 93.

[95] HOYT, *supra* note 8, at 14.

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> which could otherwise have been treated as an independent charity, as a contribution to a component part of a community foundation . . . Even though the trust or corporation holds legal title to the assets, it will not be required to file a separate tax return since its financial transactions will be included with those of the community foundation.[96]

In turn, single entity treatment for donations to community foundations and trusts meant that the philanthropic institution could include the donation as an element of "public support" necessary to pass the test for public charity status. As Christopher Hoyt explains,[97] if community foundations or trusts wish to be treated as a single entity under the tax regime,[98] they must "be commonly known as a community trust, fund, foundation or other similar name conveying the concept of a capital or endowment fund to support charitable activities [as defined in section 170 of the Code] in the community or area it serves";[99] "[a]ll funds of the [community foundation or trust] must be subject to a common governing instrument or a master trust or agency agreement";[100] and "[t]he organization must have a common governing body or distribution committee . . . which either directs or, in the case of a fund designated for specified beneficiaries, monitors the distribution of all of the funds exclusively for charitable purposes [as defined]."[101]

The governing body of a community foundation or trust must also seek a reasonable return on investments by "commit[ting] itself to obtain information and tak[ing] other appropriate steps with the view to seeing that each participating trustee, custodian, or agent . . . administers . . . [a] trust or fund [held by a community trust or foundation] in accordance with the terms of its governing instrument and accepted standards of fiduciary conduct to produce a reasonable return of net income (or appreciation where not inconsistent with the community trust's need for current income), with due regard to safety of principal, in furtherance of the exempt purposes of the community trust. . ."[102] The governing body also prepares financial reports "treating all of the funds which are held by the community trust, either directly or in component parts, as funds

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[96] *Id.*

[97] The best explanation of these complex rules is at HOYT, *supra* note 8, at 14-21; *see also* HILL & KIRSCHTEN, *supra* note 93, § 31.01, .03.

[98] The regulations are at Treas. Reg. § 1.170A-9(e)(11) (as amended in 1986).

[99] § 1.170A-9(e)(11)(iii) (as amended in 1986).

[100] § 1.170A-9(e)(11)(iv) (as amended in 1986).

[101] § 1.170A-9(e)(11)(v) (as amended in 1986).

[102] § 1.170A-9(e)(11)(v)(F) (as amended in 1986).

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of the organization."[103] A crucial aspect of this treatment is the variance power: "community foundations or trusts must exercise control over donated funds if those separate trusts or funds are to be considered a single entity rather than a collection of separate organizations, with the power to redirect those funds."[104]

Thus, in 1969, variance power in American community philanthropy experienced at least a partial transition from private agreement to public law. This migration and inclusion in federal tax regulations has strengthened the hand of community foundations and trusts in requiring donor acceptance of the variance power.[105]

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[103] § 1.170A-9(e)(11)(vi) (as amended in 1986).

[104] As embodied in the Treasury Regulations:

the governing body must have the power in the governing instrument, the instrument of transfer, the resolutions or by-laws of the governing body, a written agreement, or otherwise . . . (1) [t]o modify any restriction or condition on the distribution of funds for any specified charitable purposes or to specified charitable purposes or to specified organizations if in the sole judgment of the governing body (without the necessity of the approval of any participating trustee, custodian, or agent), such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served . . . § 1.170A-9(e)(11)(v)(B) (as amended in 1986).

For tax purposes, the variance power does not stop here. The governing body of a community foundation or trust must also have the power:

> (2) [t]o replace any participating trustee, custodian, or agent for breach of fiduciary duty under State law; and (3) [t]o replace any participating trustee, custodian, or agent for failure to produce a reasonable (as determined by the governing body) return of net income [as defined] over a reasonable period of time (as determined by the governing body). *Id.*

For the New York Community Trust's interpretation of these requirements, see Affidavit of Lorie M. Slutsky, Record on Appeal, Cmty. Serv. Soc'y v. New York Cmty. Trust, *supra* note 6, at 111-21. An additional regulation applies to trusts:

> In order to be treated as a component part of a community trust referred to in paragraph (e)(11) of this section (rather than as a separate trust or not-for-profit corporation or association) a trust or fund: (A) Must be created by a gift, bequest, legacy, devise, or other transfer to a community trust which is treated as a single entity under paragraph (e)(11) of this section; and (B) May not be directly or indirectly subjected by the transferor to any material restriction or condition (within the meaning of § 1.507-2(a)(8)) with respect to the transferred assets. § 1.170A-9(e)(11)(ii) (as amended in 1986).

[105] I am indebted to Frances Hill and Pat Cain for discussions of this section and improvements in it. The 1969 provisions did not add the variance power to tax law but strengthened its applicability and utility.

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G. Quarrie *and the Initial Interpretation of Variance Power After 1969*

Until *Community Service Society v. New York Community Trust* arose in the mid-1990s, cases construing the variance power of community trusts and foundations in the wake of the Tax Reform Act of 1969 were still quite rare. In 1978, in *Quarrie Charitable Fund v. Commissioner*, the U.S. Tax Court interpreted a variance clause in the charter of a charitable fund that was not a community foundation to determine whether that power gave the organization public charity or private foundation status.[106] Testator Quarrie had appointed a bank as trustee of his estate for the benefit of the Chicago Community Trust and several other charitable institutions in Chicago.[107] The charter of the fund he established vested variance power to alter the testator's instructions in the Northern Trust Company (and not the Chicago Community Trust), "[i]n the event that at some future date, any of the [designated] charitable uses... shall have become unnecessary, undesirable, impracticable, impossible or no longer adapted to the needs of the public."[108]

The Tax Court determined that the quasi-variance power possessed by the trustee conferred control in that trustee, bringing the "substitution of beneficiaries... within the trustee's control for all practical purposes."[109] It interpreted the terminology "unnecessary, undesirable, impracticable, impossible or no longer adapted to the needs of the public" in the trust instrument to require the original charitable fund (which had named Northern Trust as trustee) to be treated as a private foundation under section 501(c)(3) of the Internal Revenue Code. The charitable fund preferred treatment as a supporting organization, which would have been a preferred designation for tax purposes.

On appeal, the Seventh Circuit compared the variance power held by Northern Trust with similar variance powers held by the San Francisco Foundation, the Cleveland Foundation, and other community trusts.[110] None of these institutions are treated as private foundations.[111] The court distinguished these cases by the types of organizations involved:

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[106] Quarrie Charitable Fund v. Comm'r, 70 T.C. 182, 184 (1978).

[107] *Id.* at 183-84.

[108] *Id.* at 184. This designation is something of a return to the variance power as originally formulated by Frederick Goff, though in Goff and the Cleveland Foundation's case the power to exercise variance was shifted from the Cleveland Trust Company to the Cleveland Foundation in the early 1930s.

[109] *Id.* at 187.

[110] Quarrie Charitable Fund v. Comm'r, 603 F.2d 1274, 1280 (7th Cir. 1979).

[111] *Id.*

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> A power appropriately exercised by such publicly supported organizations [such as the community foundations] may reasonably be subject to strict control in an organization less responsive to the public... A Community Trust is in fact required to have the [variance] power to modify any restriction or condition on the distribution of funds for any specified charitable purposes or to specific organizations, if it finds that the restriction or condition has become 'unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community served' [citing Treasury regulation]. The language is essentially the same as that in the [trust designation in Quarrie]. But the power which enables a Community Trust to be responsive to the needs of its public constituency is neither necessary nor appropriate to the Community Trust's private donors. An organization other than a public charity or community trust which possesses such power is therefore defined as a private foundation, and subject to regulation and control.[112]

Thus, in a community foundation or trust, the variance power — recognized in *Quarrie* — helped to give the foundation or trust public charity status under Treasury regulations, excepting it from the stringencies of private foundation status. For purposes of the genealogy of the variance power, *Quarrie* stands for judicial recognition and implicit acquiescence in the strengthening of the variance power through its use in federal tax regulations and its shift from private arrangement to legal requirement.

H. The Buck *Trust and the Beginning of the Narrowing of Variance Power: The Emergence of the Variance/*Cy Pres *Coterminous Theory, and the Precursor to State Notice Claims*

By the 1980s the American community foundation sector was well established and efforts to narrow the exercise of variance power accelerated. The key early effort came in one of the most prominent and controversial cases to arise in the American nonprofit arena. *Buck v. Marin Community Foundation* involved the will of a wealthy San Franciscan, Beryl Buck, who left her estate (after individual bequests) to

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[112] *Id.* The court added somewhat acerbically:

> [t]he Trustee is... in the awkward position of finding in the Designation a particularly desirable degree of flexibility while arguing that the Designation gives him no special discretion. The Trustee can't have it both ways. The flexibility the Trustee desires secures for the Fund a degree of independence which is inconsistent with supporting organization status. *Id.* at 1281.

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be "used for exclusively non-profit charitable, religious or educational purposes in providing care for the needy in [the very wealthy] Marin County, California and for other non-profit charitable, religious or educational purposes in [that county]."[113] The trust was to be administered by a major local community philanthropy, the San Francisco Foundation.[114] Buck's San Francisco Foundation bequest, initially valued at about $7 million, had increased to about $400 million by 1984, after the oil company in which her assets were held had been sold to Shell. The San Francisco Foundation, a community foundation, did not want to limit grantmaking from the fund to the wealthy Marin County area. The Foundation requested judicial approval, under *cy pres*, to distribute grants throughout San Francisco's five counties that it served.[115]

Buck is important in the development of the American law of philanthropy and *cy pres*. It involved knotty issues of determining what Buck's specific and general charitable intent might have been if she had known that her estate would geometrically increase in value.[116] Thus, the San Francisco Foundation requested *cy pres* reformation of Buck's will, and California citizens and nonprofits sued the San Francisco Foundation to prevent the foundation from varying its grant distributions.[117] After extensive litigation, the San Francisco Foundation agreed to transfer responsibility for distribution of Buck monies to the new Marin Community Foundation. The foundation would focus on

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[113] Will of Beryl H. Buck, *quoted in In re* Estate of Buck, 21 U.S.F. L. REV. 691, 700-01 (1987); *also quoted in* Frederic D. Schrag, *Cy Pres Inexpediency and the Buck Trust*, 20 U.S.F. L. REV. 577, 584 (1986).

[114] Estate of Buck, 35 Cal. Rptr. 2d 442, 443 (Cal. App. 1994).

[115] The Buck trust case has stirred extensive commentary. Useful works include Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L. J. 1111 (1993); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400 (1998); Dominic J. Campisi, *Estate of Buck: Frustration Of a Charitable Purpose*, TR. & EST., Jan. 1985, at 70; Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the* Cy Pres *Doctrine*, 40 STAN. L. REV. 973 (1988); Ronald Hayes Malone et al., *The Buck Trust Trial — A Litigator's Perspective*, 21 U.S.F. L. REV. 585 (1987); Douglas J. Maloney, *The Aftermath*, 21 U.S.F. L. REV. 681 (1987); Schrag, *supra* note 113; John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F. L. REV. 641 (1987); Aaron Wildavsky, *Exchange Versus Grants: The Buck Case as a Struggle Between Equal Opportunity and Equal Results*, 22 U.S.F. L. REV. 841 (1988); Harvey Dale, The Buck Trust (Mar. 18, 1987) (unpublished manuscript, on file with author).

Useful reports by journalists include Douglas Bartholomew, *The Battle for the Buck*, L.A. TIMES MAG., Dec. 21, 1986, at 22; Katy Butler, *The Big Battle for the Buck Millions*, S.F. CHRON., Mar. 9, 1984, at A17.

[116] *See, e.g.*, Laird, *supra* note 115, at 980-82 (discussing Prof. John Simon's proposed testimony).

[117] *See* Dale, *supra* note 115.

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Marin County under arrangements that included a special master.

How is variance power implicated here? The San Francisco Foundation originally had two options — *cy pres* and variance power — in attempting to reform Buck's will. It appears that the San Francisco Foundation might have modified the distribution of Buck funds by trying to invoke its variance power and without asking for judicial approval. The San Francisco Foundation's variance power then allowed the Foundation to change the purposes of trust expenditures where the original purpose has "become unnecessary, undesirable, impracticable or impossible of fulfillment."[118] The Foundation could have attempted to decide internally that the Buck trust strictures were now "undesirable" or even "impracticable." Indeed, as one commentator has quoted a principal in the dispute, "the Foundation initially proposed to act on the basis of its own variance power under its Declaration of Trust. [Later it] decided to proceed on the basis of a formal *cy pres* petition."[119]

The *cy pres* option was chosen and the variance option rejected for several reasons. Invoking variance power within the San Francisco Foundation would have required unanimous approval by the Distribution Committee.[120] The Distribution Committee was not unanimous on the underlying substantive issue of whether and how to broaden grant distributions beyond Marin County. In addition, it appears that neither Buck nor her attorney may have known of the Foundation's variance power. The judge, for example, noted the knowledge problem and went even further: "[h]ad [Mrs. Buck's attorney] Mr. Cook known of such claimed power, he would not have recommended the Foundation as trustee."[121] Moreover, the original judicial decree probating Buck's will and establishing the trust at the San Francisco Foundation had noted that "the assets and income of the . . . Buck Foundation shall *always* be held and used" in Marin County.[122] Perhaps this gives further pause to the notion of applying variance in the face of a judicial probate decree even if all members of the Distribution Committee wished to do so. And perhaps more importantly, the

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[118] Resolution and Declaration of Trust Creating "The San Francisco Foundation," Section II (dated Nov. 14, 1984), *quoted in* Schrag, *supra* note 113, at 620 n.263.

[119] Declaration of Jay M. Cutler, Exhibit B at 24-25 n.11, Estate of Buck, No. 23259 (Cal. Sup. Ct., Marin County), *quoted in* Schrag, *supra* note 113, at 622 n.268.

[120] Schrag, *supra* note 113, at 621.

[121] In re *Estate of Buck*, 21 U.S.F. L. REV. 691, 696 (1987).

[122] Decree Establishing Trust, Distributing Assets thereto, and of Preliminary Distribution, Estate of Buck, No. 23259 (Cal. Super. Ct., Marin County), *quoted in* Schrag, *supra* note 113, at 621 n.266.

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Stipulation for Final Distribution executed by the Foundation, Buck's attorney, and Wells Fargo Bank after probate, and approved by the Attorney General, seems to give Mrs. Buck's will greater force than even the resolutions and declarations governing the San Francisco Foundation. The Stipulation provided that the Buck trust would "be governed by the rules, regulations, resolutions and declarations governing" the Foundation:

> provided always that such rules, regulations, resolutions and declarations are not inconsistent with the provisions of decedent's Will and any decree of final distribution directing that the distribution from The Leonard and Beryl Buck Foundation shall always be held and used for exclusively nonprofit, charitable, religious or educational purposes in providing care for the needy in Marin County . . . and for other nonprofit charitable, religious or educational purposes in Marin County . . . [123]

As the court put it, "the [San Francisco] Foundation agreed that the terms of the Will, including the 'Marin-only' clause would always take precedence over the Foundation's own 'rules, regulations, resolutions and declarations.'"[124] One view at the time was that this agreement estopped exercise of the variance power.[125]

But as Professor Harvey Dale and others have pointed out, before *cy pres* was chosen over variance by the San Francisco Foundation as the preferred method to reform Buck's will, variance was an option for the Foundation.[126] *Buck* is centrally important in the history and genealogy of the variance doctrine because of its treatment early in the dispute, particularly by the Attorney General of California.

The initial narrowing of variance power doctrine and discretion, hardly noticed at the time, was the position taken by the California Attorney General in *Buck*. The Attorney General strongly asserted that groups could exercise variance power only when and to the degree that judicial *cy pres* would be justifiable. The Attorney General put it more

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[123] Stipulation for Final Distribution, *quoted in Buck*, *supra* note 121, at 700.

[124] *Id.*

[125] It is conceivable that, either upon failing to reform and broaden the Buck Will, or without making that attempt, the San Francisco Foundation might have attempted to utilize its variance power to alter grant distributions and broaden them beyond Marin County. In particular, because the Buck Will specified that "income shall be expended not later than the year following the close of the year of receipt," Buck Will, *quoted in Buck*, *supra* note 121, at 698. It is conceivable that variance power might have been used to allow the San Francisco Foundation to relax the annual payout requirement.

[126] Dale, *supra* note 115, at 5-7.

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formally, both in a letter to the San Francisco Foundation's attorney intended to discourage "the Foundation's contemplated use of [the] variance power"[127] and in a trial brief:

> [O]ur research indicates that the independent variance power of community foundations recognized in their own charters and by some trust scholars has not been tested in the California courts, to our knowledge. It is our present view that use of the variance power in California should be carried out, if at all, in a manner consistent with well established California trust law doctrines. To invoke its power, the Foundation should present evidence of changed circumstances or impracticability that would justify modification of geographic restrictions in the trust . . .[128]

In the letter to the San Francisco Foundation's attorney, the California Attorney General went even further. The Attorney General asserted that variance could only be carried out in a *cy pres* proceeding. He stated that "any modification of this trust must necessarily and logically be founded upon evidence of a charitable income 'surplus,' which is a recognized basis for application of trust modification and *cy pres* under California trust law."[129]

This is far from Frederick Goff's vision for variance as an expansive and freer alternative to the strictures of *cy pres*. This was the modern origin of variance/*cy pres* coterminous theory. This notion limits variance power to circumstances in which judicial *cy pres* could be exercised — a substantial restriction on the variance power doctrine. It was and remains an unfortunate, misunderstood, even ironic narrowing of a doctrine that had arisen precisely because of the constricted, "dead hand" difficulties in finding *cy pres* relief under the strictures of that doctrine. Moreover, it seems to have affected the San Francisco

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[127] Letter from John K. Van de Kamp, Attorney General (per Carole Ritts Kornblum, Assistant Attorney General) to Stephen Bomse, Attorney for the San Francisco Foundation (Nov. 15, 1983), *reprinted as* Petitioner's [Community Service Society] Exhibit 139, Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 3524.

[128] Attorney General's Trial Brief Re: San Francisco Foundation's Petition for Modification of Terms of Trust, *quoted in* Schrag, *supra* note 121, at 621 n.266. The brief continues with the Attorney General requiring a standard of proof indistinguishable from that required under *cy pres*. The California Attorney General reiterated this view in a letter to the San Francisco Foundation's attorneys, *supra* note 127.

[129] Letter of John K. Van de Kamp, *supra* note 127, at 3525. As a *Buck* commentator later put it, the Attorney General asserted in its *Buck* intervention that "community foundations may exercise such 'variance power' only when judicial cy pres modification would also have been appropriate." Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 647 (1988).

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Foundation. At least one member of the Foundation's Distribution Committee believed that "the standard under the internal variance power was no different from that under traditional *cy pres*." Because "undesirability" of a disposition was not grounds under which to undertake "traditional" judicial *cy pres* reformation, "he could not vote to modify the Buck Trust . . . based on the term 'undesirable.'"[130] All this led to substantial caution within the Distribution Committee of the San Francisco Foundation. If, as some Committee members seemed to believe, variance power standards were coterminous with *cy pres* standards, then:

> even though [exercise of] its variance power did not require court approval, because of the significant public interest in the Buck Trust and the ongoing oversight proceedings initiated by the Attorney General, it made sense to seek court approval of the Foundation's action to air the basis for the decision and assure the people of Marin of continued significant funding for worthy projects in that county.[131]

No party asked the California court to rule on variance power, and it did not. But the California Attorney General's view seems consistent with the later views of other state officials, particularly in New York. Those officials have sought to limit the exercise of variance by linking its use to, and perhaps narrowing the power to make it consistent and coterminous with, the exercise of *cy pres*. But variance power is not private *cy pres*, and it may not be treated as coterminous with a *cy pres* request. It originated as a private, trust-based doctrine precisely because of the strictures, the "dead hand" inefficiencies of judicial *cy pres* by substituting private agreement between the parties that allowed the alteration of charitable trusts. For the California Attorney General and, arguably the New York Attorney General, to consider variance power as appropriately applicable "only when judicial *cy pres* modification would also have been appropriate" is a misreading of the history of variance power. The California Attorney General's variance/*cy pres* "coterminous" theory was not directly challenged in *Buck*. It would come to life again a decade later in New York. It would also be extended, by the New York State Attorney General, who argued that variance power also requires notice to the Attorney General and, by

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[130] Trial Brief of San Francisco Foundation at 43-44, *quoted in* Schrag, *supra* note 113, at 621 n.266.

[131] *Id.*

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implication, an opportunity for the Attorney General to evaluate, respond to, and challenge the variance power exercise.[132]

II. THE MODERN CHALLENGE TO THE VARIANCE POWER

A. Community Service Society v. New York Community Trust

By the 1990s community foundations and trusts — pools of funds donated by, in most cases, local philanthropists — had begun to remake the American philanthropic landscape and to remold traditional relationships between individual donors and charitable causes. By the late 1990s there were more than 560 community foundations and funds in the United States with assets of over $30 billion — an increase of nearly half since 1990 and nearly 75 percent over 1980.[133] Variance power remained widely used in agreements between donors and community foundations and trusts. Despite a long history of judicial interpretation of the *cy pres* doctrine,[134] there were no judicial decisions that focused squarely on the variance power and its scope, standard for exercise, and the standard for judicial review, until the lengthy and complex litigation in *Community Service Society v. New York Community Trust.*

In 1928, as discussed in Part I, the Laura Spelman Rockefeller Memorial initiated a trust at the New York Community Trust for the benefit of two respected New York City social service agencies. The agencies, each founded in the nineteenth century, later merged to form the Community Service Society ("CSS"), a private, charitable, highly respected New York social services agency that has served the city's poor since 1939.[135] Between the 1930s and the 1950s six other donors made similar designated gifts, also naming CSS as a designated organizational beneficiary. In each case, the gifts were subject to the Trust's Resolution

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[132] *See infra* notes 161-66 and accompanying text.

[133] The Foundation Center, Foundation Growth and Giving Estimates, 2001 Preview 8, *available at* http://fdncenter.org/research/trends_analysis/pdf/fgge02.pdf (last visited Mar. 10, 2003).

[134] *See supra* Part I.

[135] As the initial judgment in *Community Service Society* makes clear, [t]he work of CSS, by all accounts, is, and always has been, widely respected by the NYCT and the philanthropic community. *In re* Cmty. Serv. Soc'y, Record on Appeal, 17-14, 17-15 (October 15, 1999) (initial judgment by New York Surrogate Eve Preminger) [hereinafter Surrogate Judgment]. It is not clear that that statement holds entirely true for the period in the early 1970s when CSS was undergoing shifts and the Community Trust suspended and then revoked quasi-automatic grant payments from the Laura Spelman Rockefeller and other trusts.

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and Declaration of Trust that included variance power.[136] When Rockefeller and the others made their gifts, they and the New York Community Trust signed a trust agreement, which provided that the Community Trust would deliver the income from her invested gift to the designated beneficiaries. In all cases the gifts were subject to the Trust Resolution, which stipulated the circumstances under which the Community Trust might vary the disposition of that gift. In the words of the Trust Resolution:

> [A]ny such expressed desire of the donor shall be respected and observed, subject, however, in every case to the condition that if and whenever it shall appear to the Distribution Committee [of the NYCT] . . . that circumstances have so changed since the execution of the instrument containing any gift, grant, devise or bequest as to render unnecessary, undesirable, impractical or impossible a literal compliance with the terms of such instrument, such Committee may at any time or from time to time direct the application of such gift, grant, devise or bequest to such other public educational, charitable or benevolent purpose as, in their judgment, will most effectually accomplish the general purpose . . . without regard to and free from any specific restriction, limitation or direction contained in such instrument.[137]

The trust instrument executed by Laura Spelman Rockefeller also reaffirmed the discretion provided to the Community Trust's Distribution Committee. It noted that "[e]very decision made by the . . . Distribution Committee . . . shall be binding and conclusive upon all persons, corporations or organizations which may at any time be beneficiaries of, or have any interest in, this Trust Fund."[138] Other language, discussed in Part I, further emphasizes the discretion granted to the Community Trust's Distribution Committee.

For several decades, until the early 1970s, this process worked smoothly. Bank trustees invested monies from the Laura Spelman Rockefeller Memorial and the other designated trusts. Income from the designated funds' investments was directed by the Trust to CSS in support of its programs. The situation changed drastically in 1970 when the Community Trust initiated a review of its disbursements to

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[136] See *supra* notes 40-41 and accompanying text for further information on the Laura Spelman Rockefeller Memorial and other trusts.

[137] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712, 714 (N.Y. App. Div. 2000); *see* Surrogate Judgment, *supra* note 135, at 17-3 – 17-4 (citing and quoting variance power).

[138] Surrogate Judgment, *supra* note 135, at 17-5.

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designated beneficiaries such as the Society. It then suspended and ultimately terminated the Society's designated payments in September 1971.[139] Between the 1970s and the 1990s, the Community Trust made discretionary grants out of the Rockefeller and other trusts. In 1993, after a bank statement meant for the Community Trust that contained a reference to a designated fund for the Community Service Society was mistakenly sent to the Society, the Society inquired, negotiated, and then sued the Community Trust for over two decades of payments as designated beneficiary under the multiple trusts. The Surrogate's Court for New York County, the court with jurisdiction over trust actions, heard the case at the trial level. The Appellate Division of the New York Supreme Court presided over the case on appeal.[140]

At trial there was energetic dispute over the reasons for the Community Trust's suspension and later termination of designated payments under the Rockefeller and other trusts to the Community Service Society. CSS claimed that the Community Trust initiated its review of payments to the Society "to eliminate as much as possible the designated funds and expand Community Trust's discretion with regard to the distribution of funds."[141] Not surprisingly, the Community Trust rejected that explanation of the motivation for its review, as did the New York Surrogate.[142] The Community Trust instead claimed, "the impetus

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[139] *Id.* at 17-6 – 17-9.

[140] The terms Surrogate, New York Surrogate, and trial judge used below refer to the trial court level; the terms Appellate Division and appellate court refer to the appeal stage. Other useful reports on the case, most published in the early stages, include John Clymer, *Community Foundations and the Variance Power*, 26 ACTEC [American College of Trust and Estate Counsel] NOTES 217, 217-20 (Winter 2000); Ronald Volkmer, *Administration of Charitable Trusts*, 28 EST. PLAN. 133 (2001); Karen W. Arenson, *A Matter of Trust: Two Titans of Charity Battle Over Millions*, N.Y. TIMES, Oct. 30, 1995, at B1; Tamar Lewin, *A Charity Wins Its Argument with a Trust, But Is Still Denied the Money*, N.Y. TIMES, Sept. 22, 2000, at B3; Brigid McMenamin, *Donor's Intent*, FORBES MAG., May 15, 2000, at 78; Anthony Ramirez, *Social Services Group Wins Suit Over Contributions to Charity*, N.Y. TIMES, Oct. 22, 1999, at B6; David Rohde, *Battle Between 2 Charities Holds National Implications*, N.Y. TIMES, Mar. 21, 2000, at B4; Grant Williams, *Lawsuit in New York Could Affect Earmarked Funds at 550 Community Foundations*, CHRON. OF PHILANTHROPY, Apr. 20, 2000, at 26. The New York Attorney General's position is outlined in William Josephson, *Recent Developments in Charities Law Enforcement*, 225 N.Y. L. J. 33 (2001).

[141] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 714.

[142] Surrogate Preminger wrote, "CSS's suggestion that the review was motivated by [Community Trust Executive Director] Mr. West's desire to free designated funds of their restrictions is without support in the record." Surrogate Judgment, *supra* note 135, at 17-6 n.4. That assertion is perhaps overdrawn. In the text of her opinion, Surrogate Preminger notes that "Mr. West was known to prefer discretionary funds to funds that designated beneficiaries." *Id.* at 17-6. And there is some support, however fragmentary, in the voluminous record of this dispute for the notion that the Community Trust sought to

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for the review was the Tax Reform Act of 1969, which made clear that charitable foundations where the donors exercised inordinate control over the distribution of monies ran the risk of losing tax-exempt status."[143] The Surrogate accepted the Community Trust's version of these events, perhaps more readily than the appellate court, which indicated some doubt as to the Community Trust's version of the motivation for its review.[144] For the Surrogate, the Trust's principal argument for termination "was that the uncertainty caused by CSS's changed operating methods justified termination of funding... argu[ing] that uncertainty alone may constitute undesirability and thus serve as a basis for exercising the variance power."[145]

At this time, in 1970 and 1971, the Community Service Society, deeply affected by the social movements of the late 1960s, was conducting its own review of its programs to serve poor New Yorkers. In January 1971, the Society's Study Committee issued a report that, when later implemented, "change[d] how services were provided. Instead of requiring individuals in need of assistance to make an appointment to come to one of its four offices, it was decided to move operations into community groups... such as transient hotels, hospital and housing projects... [A]ssistance would no longer always be directly provided by CSS, but could be channeled through existing community-based organizations." In the words of the appellate court, "CSS was to be

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convert funds designated for particular organizations to general funds available for grantmaking by the Distribution Committee. Surrogate Preminger is likely correct in her next statement: "In fact, review of designated funds was probably long overdue." *Id.* at 17-6 n.4. Perhaps the question is what motivated Herbert West to initiate that appropriate review.

[143] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 714.

[144] *Id.*

> "While the impact of the Tax Reform Act of 1969 was purportedly the subject of much speculation at meetings of the Trust's Distribution Committee between 1970 and 1977," wrote the appellate court, "there does not appear to be anything in the record which confirms that the Trust ever was threatened by the Internal Revenue Service with the loss of tax-exempt status, or that the IRS determined that the amount of donor-designated funds had to remain below a certain percentage." *Id.* at 714-15.

For the Surrogate, however, the Tax Reform Act of 1969, which "required a community foundation to have a variance power and to use it when appropriate in order to retain its tax favored status as a public charity... prompted the NYCT to conduct its first large scale review of designated funds, which resulted in the exercise of the variance power with respect to 25-30 percent of the NYCT's designated funds." Surrogate Judgment, *supra* note 135, at 17-6.

[145] Surrogate Judgment, *supra* note 135, at 17-12.

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transformed from a social services agency to one sharing power with community-based organizations."[146]

In the early 1970s, traditional, elite New York philanthropy was not yet accustomed to working with community-based approaches, especially approaches that focused on empowerment of communities.[147] While it was fiercely disputed the extent to which the Society's change of direction prompted the Community Trust's suspension and variance termination, the Trust's actions did occur after an internal review by the Community Trust of its own grantmaking policies, a *New York Times* article on the changes underway at CSS,[148] the CSS self-review and strategic planning process, and the Trust's review of CSS.[149] The Community Trust suspended further payments to CSS in March 1971 "pending clarification of its new role, and how it contrasts with the operations which interested various founders."[150] The Community Trust's anxiety about CSS's new roles in working with community-based organizations, was at times stated obliquely: "Designated payments to Community Service Society will be temporarily deferred until the program changes of the Society have been learned and the Committee is assured that the Society is still in a position to use these

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[146] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 715. The Surrogate notes that the General Director of CSS called this a "Copernican Revolution," and cites the title of the *New York Times* article on the shifts at CSS, an article that appears to have affected perceptions at the Community Trust: "Social Work Unit Changing Tactics — Community Service Society Ends Aid for Individuals — Plans Wider Role." Surrogate Judgment, *supra* note 135, at 17-7.

[147] Was the New York Community Trust of 1970-71 an elite organization? Recall that Frederick Goff's vision was of a "committee of leading citizens" to determine the grants to be made, and representation and diversity beyond elites was not part of Goff's notion. The Distribution Committee of the New York Community Trust in 1970-71 included a clearly elite group of attorneys, bankers, and social leaders.

[148] *See supra* note 146.

[149] In the voluminous papers, briefs, depositions, and testimony accompanying this important case it is not entirely clear which of these events were causative, which important, which subsidiary, and which coincidental in the Trust's decision-making process. It was not entirely clear to the New York appellate court when Trust personnel reviewed the CSS internal study, for example, but the court seems to have believed that the Trust's "initial suspension of grants [to CSS] had apparently been based upon [the] article in the *New York Times*, describing the proposed changes at CSS as a 'Copernican revolution.'" *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 715. When the key NYCT employee reviewed the CSS study and prepared a report (in April 1971, several weeks after the Trust's Distribution Committee had decided to suspend grants to CSS), she wrote that "[f]rom this document [the CSS study] *it appears unlikely that we could continue to make grants to CSS based on its direct service to individuals. But, if these funds were discretionary rather than designated, we would most likely make grants to CSS based on its excellent program and projects.*" *Id.* at 716 (emphasis in original).

[150] *Id.* at 715 [quoting report adopted by Distribution Committee].

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funds in a manner intended by their donors."[151]

In September 1971, the Community Trust "formally revoked" the designated grants program of the Rockefeller and five other original gifts at a meeting of its Distribution Committee, on the grounds that they were "undesirable,"[152] "in the light of changed conditions, 'particularly how current conditions relate to those existing at the time of the donor's request.'"[153] The Distribution Committee converted these trusts into "semi-designated fund[s] for the improvement of health and welfare in New York City."[154] Grants to CSS continued until at least 1995, but, "they apparently were discretionary, and in response to proposals submitted by CSS."[155] The Community Trust claimed that the decision to exercise its variance power in September 1971 had been clearly communicated at the time to CSS's Executive Director and Board chair. CSS denied that such communication had taken place. CSS asserted that until it was alerted to the contrary by Chemical Bank in 1993, it believed that the grants it had received in the intervening twenty-two years had come from the six trusts dating back to the 1920s.

In 1995, CSS filed suit seeking to compel an accounting of funds invested and distributed from the six trusts between 1928 and 1995, and directing distribution of income from the designated funds to CSS. The case initially came before the New York Surrogate, Eve Preminger. In October 1999, the Surrogate ruled that the Community Trust had abused its variance power, and directed an accounting for the period from 1989 to 1999.[156] This opinion was the first to rule squarely on the validity and standard of review for the variance power. The appellate court substantially relied upon the Surrogate's opinion, so it bears close discussion here. After reviewing the status and structure of the New York Community Trust, the Surrogate embarks vigorously on a direct examination of the variance power for the first time in American jurisprudence. She begins with a ringing if implicit critique of the coterminous theory of *Buck*, distinguishing variance from *cy pres*:

> The variance power is a defining element of the community foundation. Its purpose is to provide donors the opportunity to designate a specific charitable beneficiary or purpose and at the

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[151] *Id.*

[152] Surrogate Judgment, *supra* note 135, at 17-9.

[153] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 715.

[154] *Id.* at 716.

[155] *Id.*

[156] *See* Surrogate Judgment, *supra* note 135, at 17-16, 17-17.

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> same time free them from "the grip of the dead hand," to ensure that their funds will remain effectively deployed regardless of changing circumstances. The variance power is broader than the doctrine of *cy pres*, which permits courts to salvage an ineffective charitable bequest only where achievement of the original purpose of the fund is impracticable or impossible and only by re-allocation of the funds in a manner that accomplishes the donor's general charitable purpose . . . .
>
> The variance power is thought to be superior to *cy pres* because it vests discretion in a board of experts selected to represent a broad range of charitable interests rather than in courts which may have no expertise . . . Additionally, the variance power is broader than *cy pres* in that exercise of the variance power frees a fund of any restriction, allowing the community foundation to redirect it to a wholly different purpose, whereas *cy pres* requires substantial adherence to the donor's original purpose . . .[157]

The Surrogate noted that this case required consideration of "the standard that governs a community foundation's exercise of its variance power," as well as "the scope of a community foundation's discretion in applying such standard." Beginning with the general principle underlying variance power, the Surrogate noted that consideration of that standard and discretion "should reflect a policy that maximizes the utility of community foundations to provide donors with the option of making their own choices of beneficiaries, while preserving the efficacy of their gifts should later circumstances undermine that choice . . ."[158] But the Surrogate went further, noting that variance power means little unless the agreement between donor and philanthropy allowed "deference to the expertise of the community foundation" and a concomitant "restraint" on the part of courts and judges in "substituting

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[157] *Id.* at 17-4 (citations omitted). The Surrogate also recited the mandate of variance power in federal tax law, and the various ways in which a community foundation or trust must possess and use it:

> Tax law requires community foundations to possess the variance power in order to qualify for the favorable tax status afforded to such organizations. The governing body of the organization must be granted the sole discretion to exercise the variance power (26 C.F.R. § 1.170A-[9][e][11]). The community foundation is required to commit itself to exercise of the variance power, and to exercise the variance power where it has grounds to do so, or place at risk its tax-exempt status ." *Id.* at 17-5.

[158] *Id.* at 17-10.

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its own judgment for that of the foundation . . . "[159] And then the Surrogate speaks once again on the problem of variance power and *cy pres*, noting the breadth of variance vis-à-vis *cy pres* in strong terms:

> [T]he variance power must be broad enough to give undesirability a meaning independent of impossibility, impracticability or lack of necessity. To hold otherwise would reduce the variance power to little more than a non-judicial *cy pres* authority, exercisable only in the most extreme circumstances. This would destroy the principal benefit of community foundations: flexibility to redeploy ineffectively allocated charitable assets in situations other than those where the identified charitable purposes is literally impossible or impracticable.[160]

Yet there are limits to that flexibility, and here the distinction between variance and *cy pres* rapidly begins to fade. In the words of the Surrogate:

> the standard that governs exercise of the variance power cannot be so flexible nor the latitude of the Distribution Committee in interpreting it so expansive as to permit wholesale reshuffling of the charitable funds without reason. Discretion of this degree would be inconsistent with donors' designation of particular charitable beneficiaries or purposes. Defining the scope of discretion so broadly that it can ignore donors' designations would discourage rather than encourage use of community foundations.[161]

The Surrogate said that"[b]alancing these considerations" resulted in a test that is far from the original understanding of variance power and the discretion provided to the distribution committees of community foundations and trusts: "[A] finding of undesirability, impracticality, impossibility or lack of necessity sufficient to exercise the variance power must be grounded in a change of circumstance that negatively affects the designated charity to such a degree that it would be likely to prompt a donor of the fund to re-direct it."[162] And the community foundation or trust cannot merely state that such conditions exist.[163] Exercise of the variance power can be upheld only where "identifiable negative details . . . support the determination of undesirability, impracticality,

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[159] *Id.*

[160] *Id.*

[161] *Id.* at 17-10 – 17-11.

[162] *Id.* at 17-11.

[163] *See id.*

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impossibility or lack of necessity which would be likely to cause the donor to withdraw her support."[164]

In the Surrogate's view, this seemingly high and specific standard — "identifiable negative details," and the donor as the sole reference point for the variance test — was mandated by the very difference between variance and traditional judicial *cy pres*. Here the differences between variance and *cy pres* do not confer more discretion on variance exercise, but indeed less. For in the view of the court, the more drastic remedy, variance, requires an even higher standard: variance involves "termination of a [designated] perpetual gift," not merely "general judgments about discretionary distributions." Variance involves "redirection to a field not necessarily contemplated by the donor," rather than *cy pres*'s required shifting to a charitable area close to the original intent.[165] And variance, unlike *cy pres*, does not involve court decision (until now), but is exercised only by a distribution committee or similar body. Here, despite the private, contractual nature of variance, the original understanding of the variance power and the discretion it was intended to give to community foundations and trusts, and the agreement by the parties' that the discretion of a distribution committee carries the day, the very flexibility and discretion that the parties have agreed upon is used to justify higher and more specific standards governing the exercise of the power granted by the parties' agreement.

If that donor-based change of circumstances/identifiable negative details standard is used, the Surrogate opined, "maximum deference should be accorded the community foundation's determination of whether the standard has been met" under an "abuse of discretion" standard familiar from trust law. Under that standard, a court "may not substitute its own judgment," but a court "will intervene" "if... the fiduciary abuses his discretion by acting dishonestly or with improper motive, by failing to use his or her judgment, or by acting beyond the bounds of a reasonable judgment."[166] But judging a severe standard by a traditional measure was of little help to the Community Trust. In this case, according to the Surrogate, the Community Trust "misconstrue[d] the scope of [its] authority and applie[d] the incorrect standard."[167]

Applying that new standard for exercise of the variance power and its review, the Surrogate ruled that the Community Trust's "principal

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[164] *Id.* (emphasis added).

[165] *Id.* at 17-11.

[166] *Id.* at 17-11 - 17-12.

[167] *Id.* at 17-15.

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argument" for termination — "the uncertainty caused by CSS's changed operating methods" — was insufficient under its standard to meet the definition of "undesirable" necessary to exercise variance. Uncertainty does not equate to undesirability. And the standard announced by the Surrogate "identifiable negative details . . . which would be likely to cause the donor to withdraw her support" — was, in her view, not supported by a mere sense of uncertainty.[168] Given other Community Trust actions supportive of CSS, the Distribution Committee's termination decision was "inconsistent with the contention that the changes at CSS were undesirable." The Surrogate ordered the Community Trust to provide an accounting for the period 1989 to 1999.[169]

The Surrogate also found that Community Trust's notice of its changing policies to CSS "fell short of conveying to CSS notice of a complete termination of its interests (1996 op.)."[170] She also noted that additional transactions and communications, many favorable to CSS, "muddied the message of an otherwise clear repudiation."[171] Thus, there

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[168] *Id.* at 17-11. The Surrogate notes the implications of accepting "uncertainty" as a basis for "undesirability" and thus exercise of variance power:

> A conclusion that uncertainty about the effect of change could justify exercise of the variance power would eliminate the obligation of the Distribution Committee to evaluate the consequences of the change. This would be a direct violation of the Resolution which requires not only a change in circumstances but one that renders continuation of distributions unnecessary, undesirable, impractical or impossible. It would also undermine the utility of community foundations. Instead of promoting flexibility and creativity, the variance power would discourage beneficiaries, through fear of losing funding, from making changes, and from healthy experimentation. *Id.* at 17-13.

[169] The Surrogate also noted that other possible reasons for the use of variance power in 1971, "such as unionization of CSS's caseworkers, its operating deficit, its large endowment, and the increase in government 'welfare spending,' through 'Great Society' programs" would not have satisfied the "undesirability" standard she had delineated, nor did the special clause in the Rockefeller trust emphasizing the discretion of the Distribution Committee serve to allow its actions. *Id.* at 17-14 - 17-15.

[170] *Id.* at 17-15.

[171] *Id.* at 17-16. "[T]he substantial discretionary grants received by CSS after exercise of the variance power, its reinstated entitlement under one trust and unchallenged continuation under another, demonstrates that CSS was justified in understanding that its new position, while not as good as its prior status, was preferential to that of other charities." *Id.* CSS even claims that other Community Trust actions may have been intended to avoid raising the question of quasi-automatic payments, perhaps in an attempt to maintain ambiguity about the situation: "On a number of occasions NYCT has orally requested that CSS withdraw its grant proposals, rather than rejecting CSS's grant requests in writing. In retrospect, I now realize that NYCT may have done this to avoid having any unambiguous record of rejecting a CSS request for funds." Affidavit of David R. Jones, President and Chief Executive Officer of CSS, *in* Record of Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 5, at 198, 205.

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was no effective repudiation, and the statute of limitations did not begin to run in 1971, which would have barred this action after 1977 under New York's six-year time bar for trust actions. Instead, the statute of limitations began to run in 1995, when the action was commenced, and thus the six years prior to the commencement of the proceedings were includable in the accounting.[172]

The New York Community Trust was understandably upset by the Surrogate's holding. The combination of the relatively strict standard for exercise of the variance power, the Surrogate's view that the Community Trust had failed to meet that standard, and the decision that the dispute was not time-barred because of ambiguity in the Trust's supposed repudiation, added up to a defeat for the New York Community Trust.[173] The accounting, if upheld, might have required payment of millions of dollars to the Community Service Society.[174] The Community Trust appealed on all three issues: the order to judicially account and settle the six trusts; the ruling that the statute of limitations did not bar CSS's claims within six years prior to the beginning of the 1995 proceedings; and the finding that laches did not bar the claims.[175] CSS was pleased with the ruling that Community Trust had wrongfully exercised its variance power and the order for accounting and settlement. Nevertheless, CSS cross-appealed on the statute of limitations issue in order to backdate its claims more than six years before the commencement of the proceedings. The Attorney General appealed against the six year statute of limitations period for trust accountings, and called for the appellate court to require notice to the Attorney General when a charitable trust exercises its variance power under the Attorney General's *parens patriae* power to supervise charitable organizations.[176]

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[172] Nor was laches a defense for the Community Trust because, "such neglect or omission to assert a right . . . [that] operates as a bar in a court of equity" did not apply where, "the beneficiary [CSS] is unaware of the fiduciary's repudiation." Surrogate Judgment, *supra* note 135, at 17-16.

[173] The Community Trust tried to put the best face on its loss at the trial court level, though it "warn[ed] that Preminger's decision could greatly restrict the freedom of community foundations to decide how bequests are spent." *Legal Battle May Have Consequences for Community Foundation*, 6 PHILANTHROPY NEWS DIG., Mar. 21, 2000, *available at* http://fdncenter.org/pnd/archives/20000321/003249.html (citing David Rohde, *Battle Between 2 Charities Holds National Implications*, N.Y. TIMES, Mar. 21, 2000, at B4).

[174] Brigid McMenamin, *Donor's Intent*, FORBES MAG., May 15, 2000, at 78.

[175] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712, 718 (N.Y. App. Div. 2000).

[176] *Id.* at 722.

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The appellate court endorsed the standard for reviewing exercise of variance power articulated by the Surrogate as "an equitable and definable standard."[177] The appellate court agreed with the Surrogate that the New York Community Trust had abused its variance power to convert the six trusts from designated funds in favor of the Community Service Society to broader field-of-interest funds. The court reiterated that the trusts clearly "intended that CSS receive specific distributions." It rejected Community Trust's claim that a change in circumstances and the policy directions at the Community Service Society made the trust designation "undesirable" under the terms of the wills:

> Community Trust, arguably unhappy with mandated allocations, claims that the change in CSS's approach from being a direct provider [of services] to one affiliated with community organizations was an "undesirable" change in circumstances. That distinction . . . appears . . . virtually meaningless, since there is no claim that CSS has retreated from its overriding purpose of servicing the needy. As a result, the Surrogate reasonably found that Community Trust abused its discretion, since there is no showing that CSS has deviated from its primary purpose.[178]

The appellate court also upheld the Surrogate's substantive "identifiable negative details" standard for judging the exercise of variance powers in "undesirability" cases. But in doing so the court restated the restrictive test in arguably even stronger and more restrictive language:

> The Surrogate's conclusion, that exercise of the variance power should be limited to those situations *where "identifiable negative details" may be offered to substantiate the "undesirability" of continued payments*, appears to be an equitable and definable standard. Thus, in a given case, if it were shown that *the designated charity, for whatever reason, was no longer carrying out its stated purpose, then a finding of undesirability might be made.* Here, however, while designated funding of community-based approaches might be undesirable from the Trust's viewpoint, it cannot be said that such

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[177] *Id.* at 720. The court also rejected the Community Trust's "claim that the Surrogate rewrote . . . the variance power . . . by adding a new requirement that community foundations must make a finding before exercis[e]," and rejected the Trust's contention that "the Surrogate substituted her judgment for that of the Distribution Committee." *Id.* at 719-20.

[178] *Id.* at 719.

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> an *approach compromises the intention of the trust creators, which is the determinative factor.* Consequently, the Surrogate crafted an equitable and workable standard.[179]

Although the appellate court upheld the Surrogate's ruling on the Community Trust's misuse of variance power, the court disagreed with the Surrogate's finding that Community Trust's "repudiation was not absolute, particularly in view of the continuing grants received by CSS."[180] Utilizing the record of contacts between the Community Trust and CSS, the understandings of CSS's then General Director, and a history of over twenty years of grant applications after 1971, the appellate court ruled that "Community Trust's repudiation of the designated payments, which constituted any and all interest it had as the beneficiary of the trusts in issue, had clearly been conveyed to it."[181] Having determined that Community Trust's notice of repudiation to CSS after exercise of the variance power was effective in 1971, the New York state six year statute of limitations would begin to run at that time, time-barring the action initiated in 1995.[182]

Thus, the result on appeal was mixed: the Surrogate's standard for exercise and review of variance power was upheld, albeit with additional wording that may further restrict the scope of community foundations and trusts to exercise variance in later cases. But CSS was found to have had non-ambiguous notice of Community Trust's 1971 variance action and repudiation, time-barring its claims. Notably, the appellate court declined to follow the Surrogate's lead in comparing variance power to *cy pres*, or in partly basing her decision on the differences between the two doctrines.[183]

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[179] *Id.* at 720 (emphasis added).

[180] *Id.* at 721.

[181] *Id.*

[182] "[A]ll of its claims are time barred, since there does not appear to be any reason to distinguish between the more recent claims, and those in the prior years. Either CSS had notice of the repudiation or it did not. Since it clearly did, its claims, like those of the Salvation Army, should be dismissed." *Id.* at 721-22.

[183] The New York Court of Appeals declined further review. Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 727 N.Y.S.2d 692 (N.Y. 2001).

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III. THE VARIANCE POWER AND AMERICAN PHILANTHROPY AFTER *NEW YORK COMMUNITY TRUST*

A. The Variance Power in a New World: Narrowing Variance Toward Cy Pres

In American law we could expect the multiple issues of variance power and philanthropy in *Community Service Society v. New York Community Trust* to be worked out through litigation on other variance power cases: parsing the words of the Surrogate's and appellate court's judgments, applying the Surrogate's standard as upheld and embellished by the appellate court to other fact situations. The time, expense, and publicity of the case seem to have surprised many who watched this epic battle and may well discourage future variance struggles. If that is the case, then the trial and appellate court decisions in *Community Trust* may stand as the sole direct treatments of variance exercise, discretion, and review by the courts for some time to come. But there are also troublesome elements to these decisions, elements that conflict with an historical and doctrinal understanding of the variance power.

B. Problems in the Judgments in Community Trust

The New York Surrogate's opinion both clarified and muddied the already murky waters of variance exercise. While the "identifiable negative details" standard may be a reasonable criterion for judging variance exercise, it requires substantial judicial inquiry and review into the specifics of a variance decision. Such inquiry raises knotty problems of proof and judgment, especially many years after the variance decision was made and the principals outlined their reasons for it. The Surrogate partly complicated the situation with hints of other standards. In addition to "identifiable negative details" as required for variance exercise, the Surrogate questions whether some of the circumstances raised by CSS, such as unionization, "did," or might "have been expected to, have any meaningful impact on the long-term future of CSS" and rejects that notion. But in raising the question the court utilizes a different test or subtest. Is "impact on the long-term future" of the recipient organization of actions that organization has taken another ground for potential variance exercise? The required evidence of "identifiable negative details?" One of a possible range of proof of "identifiable negative details?"

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Similarly, in treating the Community Trust's claim at trial that CSS's "large endowment and the increase in government welfare spending through 'Great Society' programs and otherwise" might form an appropriate basis for exercise of the variance power, the Surrogate queries rejects the idea that the endowment and enhanced spending "justif[y] a conclusion that CSS had no need for the funds held for its benefit at the NYCT."[184] Is a community foundation's judgment that a designated beneficiary "has no need for the funds held for its benefit" sufficient or even significant in an appropriate decisional process on variance exercise? If the Surrogate is implying that it is, is this a required element of a test for "identifiable negative details," or a contributory factor, or are we further muddying the waters by bringing in the variance ground of "unnecessary" into a discussion of "undesirable?"

There are also problems in the appellate court's decision. The court clearly endorses the Surrogate's "identifiable negative details" standard for reasonable exercise of variance, calling it both "equitable and definable" and "equitable and workable." But in explicating the Surrogate's standards, other words are also used. In that language there are hints of even more restrictive standards, even higher hurdles, for community foundations and trusts to exercise variance power. For example, undesirability may be found if it "were shown that the designated charity, for whatever reason, was no longer carrying out its stated purpose." Is that one example of a situation in which undesirability might be found, or the primary situation, or the only potential situation? If the latter, then a designated charity must be shown to be "no longer carrying out its stated purpose" for the variance power to be exercised, perhaps further narrowing the range of cases in which variance could be exercised and upheld. The appellate court also notes that the Surrogate's standard "cannot be said [to] compromise the intention of the trust creators, which is the determinative factor."[185] If the "intention of the trust creator" is now the primary criterion upon which to judge variance exercise by a community foundation or trust, then this is a substantial departure from the intent of variance power. This is closer to a return to the strictures of *cy pres* and related standards.

Despite the Surrogate's intention not to "reduce the variance power to little more than a non-judicial *cy pres* authority, exercisable only in the most extreme circumstances," a restrictive and narrow standard for exercise of variance now arguably applies to community foundations

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[184] Surrogate Judgment, *supra* note 135, at 17-14.

[185] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 720.

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and trusts, at least in New York, after *Community Trust*. Rather than fully differentiate variance from *cy pres* — a differentiation to be applauded, especially after the California Attorney General's attempt to portray them as largely coterminous in *Buck* — the New York judgments try to justify a restrictive approach to variance because it is broader in its impacts and more private in its decision making than *cy pres*. In the words of the courts, variance "frees a fund of any restriction, allowing the community foundation to redirect it to a wholly different purpose," while *cy pres* merely "requires substantial adherence to the donor's original purpose." *Cy pres* involves a judge in its exercise while variance does not. A "typical trust arrangement involves general judgments about discretionary distributions by a fiduciary selected by the donor. The variance power, however, contemplates extreme action, termination of a perpetual gift, and its redirection to a field not necessarily considered by the donor."

This logic holds the dubious advantage of not directly endorsing or applying the California Attorney General's coterminous theory of Buck. The notion that variance power can only be justified and exercised when it meets one of the traditional criteria for *cy pres*. However initially appealing, the decisions turn the history and logic of the variance power on its head. Variance power was created and implemented as the simpler private alternative to *cy pres*, one that was fully intended to convey broad discretion in the distribution committees of community foundations and trusts. But because of that history and the fact that variance allows fiduciaries to redirect to new or very different uses, a restrictive test has been imported through these decisions. That restrictive test handcuffs the usage of a doctrine that was intended to privatize and free these arrangements from the strictures of obscure and difficult judicial tests, and was intended to take the variance process out of the morass of judicial resolution and delegate it to the discretion of carefully chosen distribution committees. After Community Trust, exercise of the variance power is now arguably subject to some of the worst of *cy pres* — excessively detailed judicial review, based on a severe standard.

Perhaps most compelling is that *cy pres* demands a return to the mind of the testator, a process that variance was intended to dispel in favor of broad discretion in the community foundations and trusts. "[A] change of circumstance that negatively affects the designated charity to such a degree that it would be likely to prompt a donor of the fund to re-direct it," provable only by "identifiable negative details . . . which would be likely to cause the donor to withdraw her support," embellished by a

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judgment that "the designated charity . . . was no longer carrying out its stated purpose" and "compromise[s] the intention of the trust creators, which is the determinative factor"[186] leaves little to the discretion of the distribution committees that was at the heart of variance, and returns us more closely to the "dead hand" of detailed *cy pres* examination.

A further important question remaining after *Community Trust* is whether payments to a designated beneficiary may be "suspended," rather than terminated if the suspending community foundation or trust does not exercise the variance power. In *Community Trust,* the Trust first "suspended" grant payments to the Community Service Society in March 1971, then formally exercised the variance power and terminated quasi-automatic designated payments to CSS in September 1971. A technical — but by no means esoteric — issue that this raises is the authority of a community foundation or trust to suspend rather than terminate the designated grant payments in the absence of exercise of the variance power. The New York Surrogate noted this problem directly:

> Whether the Distribution Committee had authority to suspend distributions due to a designated beneficiary against whom it had not exercised the variance power is open to question. The power to terminate might be deemed to include the lesser drastic power to suspend. On the other hand, allowing suspension without any obligation on the part of the Distribution Committee to justify the suspension would be an extraordinary power not mentioned in the Resolution or other instruments.[187]

This is likely to be a more important question than it appears. No surveys appear to have been conducted on the exercise of the variance power by community trusts or foundations. At least one knowledgeable observer of the community foundation sector, however, believes that the formal or informal exercise of variance power is more common than is generally understood.[188] It is then logical to assume that the "lesser drastic" suspension of distribution to a designated beneficiary might be even more common. Such suspensions may later result in resumed payments, may be formalized through exercise of the variance power toward termination and redirection of grant funds, or may merely

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[186] *Id.* (verb tense amended).

[187] Surrogate Judgment, *supra* note 135, at 17-8 n.5. The Surrogate also noted that the dispute did not require this issue to be answered.

[188] Discussion with Prof. Christopher Hoyt, University of Missouri, Kansas City Law School (Aug. 2002).

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morph into termination of designated grants and redirection of funds.[189] But in exercise of variance power community, foundation resolutions and declarations generally require the distribution committee or similar body formally to act, to decide, and to justify to their own satisfaction. In the suspension context, there appears to be no such requirement, nor would the common wording of the variance power seem to cover and permit such action without a formal variance exercise.

In this sense, a variance clause is both an authorization of action and a limitation. The authority for suspension in the absence of variance exercise may need to be found elsewhere, if it is to be found at all. That may be possible. In certain cases, agreements between settlors of trusts and community foundations or trusts may embody language that empowers the distribution committee or a similar body to go beyond the variance context. The trust document signed by the Laura Spelman Rockefeller Memorial, for example, affirmed the discretion provided to the Community Trust's distribution committee in wording that went well beyond the variance of grants to designated beneficiaries. It noted that "[e]very decision made by the . . . Distribution Committee . . . shall be binding and conclusive upon all persons, corporations or organizations which may at any time be beneficiaries of, or have any interest in, this Trust Fund."[190] The Community Trust court did not deal effectively or directly with this wording. Whether such extra-variance discretionary clauses would be sufficient to justify suspension of grants to designated beneficiaries in the absence of exercise of the variance power remains an open question.

C. The Variance Power in a New World: The Role of State Executive Authorities in the Exercise of Variance

The state Attorney General's intervention in *Community Service Society v. New York Community Trust* was the least noticed element in the dispute. Acting for the "ultimate charitable beneficiaries"— the people of the state of New York — the Attorney General argued that the court "should impose an affirmative requirement for effective notice to the Attorney General, to ensure that the basic fairness inherent in judicial *cy*

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[189] Including conceivably redirection of grant funds toward non-designated grants to organizations that were previously designated beneficiaries, as occurred between New York Community Trust and the Community Service Society. This process, of course, tilts the dynamic of philanthropic power even more toward the community foundation or trust and away from previously designated beneficiaries, and the variance power is the tool for the shift in philanthropic power.

[190] Surrogate Judgment, *supra* note 135, at 17-5.

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pres proceedings is not absent from the unilateral variance power's extrajudicial alternative."[191] The Attorney General cited its inherent powers for the supervision of New York non-profit corporations and trusts in support of its request for crafting of a notice requirement prior to the exercise of variance.

The appellate court declined to require that the Attorney General be notified when a community foundation decides to exercise variance power:

> Community Trust explicitly possessed the variance power pursuant to . . . the Trust Declaration. While nothing prevented it from notifying the Attorney General, there is no requirement at law to do so. Furthermore, while unnamed individuals might ultimately be the beneficiaries of the funds channeled to CSS by Community Trust, the fact remains that the designated recipient under the trusts at issue was CSS, to which Community Trust gave notice. In the absence of specific requirement, this Court declines to impose one. . . . The Attorney General's request that this Court craft a notice requirement would be better directed to the Legislature.[192]

Here was an area of nonprofit monitoring and regulation that a renewed form of state executive activism was seeking to fill.[193] The New York Attorney General's approach parallels that of the California Attorney General in *Buck*: a close watch over variance-related activities partly animated by the discretion that variance clauses give to distribution committees. At its root, this is a problem of philanthropic power and an issue of trust and procedure. If philanthropies have become so powerful, and the discretion they seek to exercise over

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[191] Brief of Cross-Appellant New York state Attorney General on Behalf of Unnamed Ultimate Charitable Beneficiaries at 28, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712 (N.Y. App. Div. 2000) [hereinafter Attorney General Brief].

[192] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 722.

[193] *See* Mark Sidel, *The Nonprofit Sector and the New State Activism*, 100 MICH. L. REV. 1312 (2002) (reviewing NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR (2001)). An important new dispute that the Michigan article does not discuss because it arose quite recently is the Pennsylvania Attorney General's intervention in the planned sale of a substantial portion of the Hershey company by the Milton Hershey School Trust, which owns a considerable portion of the Hershey company. *See* Shelly Branch, *Hershey Foods is Considering a Plan to Put Itself Up for Sale*, WALL ST. J., July 25, 2002, at A1. The Pennsylvania Attorney General sought and obtained a restraining order halting the sale, and eventually, the Hershey sale was abandoned. *See* Mark Sidel, The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy (Mar. 25, 2003) (unpublished manuscript, on file with author); Attorney General, Public Protection Division, *at* http://www.attorneygeneral.gov/ppd/charity/filed_docs.cfm (last visited Apr. 14, 2003).

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variance so broad, then there is a significant fear of arbitrary action or action based on what may later be regarded as unreasonable premises. Thus variance, one answer to the arbitrariness and paralysis of the "dead hand" in the early twentieth century, is now perceived as having the potential to spark the same sort of arbitrary behavior eight decades later. In the early twentieth century, variance and distribution committees stepped into this morass to provide some rational, proceduralist actors and processes to sort out the need and intent in the philanthropic world. Today, as philanthropies accrete increasing power, the strength of the courts and of attorneys general is posited as the rational, proceduralist alternative to the arbitrary, self-interested, close-minded (to their critics) positions of distribution committees. Variance is thus transformed from the solution to irrational, arbitrary judicial paralysis into the very symbol of a new arbitrariness, requiring judges and attorneys general to supply some more neutral process.

Nor should we be succored by the call for "notice" to an attorney general. After all, the argument might run, "notice" does not mean authority or a role for the attorney general in the variance process. That position may be naïve. Attorneys general seeking judicial or legislature acquiescence to a notice requirement preceding the exercise of variance power are doing that so that they can be part of the process, either informally through pressure on philanthropic organizations considering variance (as in *Buck*), or through formal processes on behalf of a state's citizens after notice has been written into the requirements for variance. Although the New York appellate court rejected judicial imposition of a notice requirement in *Community Trust*, inviting an approach to the state legislature, the issue is now on the agenda for philanthropic reform. Combined with the narrow test for acceptable variance articulated in *Community Trust*, we have now come virtually full circle: from a situation in which variance was a matter of philanthropic discretion conforming to the visions of its originators, variance is now subject (at least in New York) to strong judicial review based on restrictive criteria, and potentially to state executive review as well, should the New York or other attorneys general pursue notice proposals before later courts and state legislatures.

D. A Position of Superior Power and Status: Philanthropic Power, Social Change, Class and the Exercise of Variance

The judicial opinions in the *Community Service Society v. New York Community Trust* dispute largely ignore the sensitive problems of philanthropic power, class, and the responses of community

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philanthropy to social change. Community philanthropy resides in the middle ground between charitable donors and organizational recipients, many active in community-based activities, some active at the grassroots level. Frederick Goff intended his innovative structure, including the variance power, to enable philanthropic giving to expand among the wealthy and to expand downward into the middle class. His approach, as well as the growth of private foundations, clearly succeeded in expanding philanthropic giving among America's wealthy.

As a result, in the 1920s and 1930s, most community foundation and trust donors were wealthy individuals and families. At least through the 1970s and 1980s, the organizations through which they mediated part of their largess, the burgeoning American community philanthropy sector, were dominated by a local social and economic elite.[194]

A sense of social class permeates *Community Service Society v. New York Community Trust.*[195] First, there are hints in the case of a subtle but important transformation in the relationship between community foundations and the wealthy who funded them in the early decades. Originally, community foundations sought and encouraged designated gifts, serving in a largely subsidiary role as the fiscal servants of wealthy givers. That is clear in *Estate of Guggenheimer*, where the New York Community Trust is instructed by a donor and authorized by a court, in effect, to distribute funds through a charitable mechanism to named poorer relatives of the testator as priorities in the order of charitable

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[194] *See supra* note 123 and accompanying text. On elite philanthropy, see THOMAS KESSNER & ARIEL ROSENBLUM, PHILANTHROPY AND AMERICAN HISTORY: THE ELITE EXPERIENCE, 1890-1940 (n.d.); BARRY D. KARL AND STANLEY N. KATZ, *Foundations and Ruling Class Elites*, DAEDALUS 1987 116(I): 1-40; TERESA ODENDAHL, CHARITY BEGINS AT HOME: GENEROSITY AND SELF-INTEREST AMONG THE PHILANTHROPIC ELITE (1990); FRANCINE OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY (1997). For an interpretation of philanthropy, elite and class in the "new" philanthropic era, see Eleanor Brown, Wealth, Taxes and the New Philanthropists, paper presented at the USC Forum on Philanthropy, Public Policy and the Economy (Jan. 19-20 2000), *available at* http://www.usc.edu/schools/sppd/philanthropy/research-papers/RP2-brown.pdf. For interesting studies of elite philanthropy in historical perspective, see Steven M. Beaudoin, *'Without Belonging to Public Service': Charities, the State, and Civil Society in Third Republic Bordeaux, 1870-1914*, 31 J. SOC. HIST. 671 (1998); Peter Shapely, *Charity, Status and Leadership: Charitable Image and the Manchester Man*, 22 J. SOC. HIST. 157 (1998). On community foundations, see three reports from the National Committee for Responsive Philanthropy, *Community Foundations: Unrealized Potential for the Disadvantaged* (1989); *Community Foundations and the Disenfranchised: Summary Report on Ten Top Community Foundations' Responsiveness to Low Income and Other Historically Disenfranchised Groups in American Society* (1994); *Community Foundations and Citizen Empowerment: Limited Support for Democratic Renewal* (1994).

[195] Interestingly, however, the lawyers seem to take care not to address the issues of class directly.

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grantmaking, the broader public coming a distant second. But in more important ways the subordinate relationship of community foundation to wealthy donors infuses the first decades of American community philanthropy. In those first decades the establishment of designated funds for particular charities was encouraged, a structure that gives charitable power to donors and little to the community philanthropy, absent exercise of variance.

There are hints of this history in *Community Trust*. The New York Surrogate indicates that, in the years before 1968 or 1969, when Goff associate Ralph Hayes ran the New York Community Trust, "the establishment of designated funds as opposed to discretionary funds was encouraged . . ."[196] Beginning in the 1970s, however, community foundations and trusts began to try to accrete grant-making power by gradually increasing the proportion of undesignated, discretionary funds over which the community trust or foundation would make grant decisions. In the understated words of the New York Surrogate, Herbert West, who succeeded Ralph Hayes at the New York Community Trust, "was known to prefer discretionary funds to funds that designated beneficiaries."[197] The appellate court, for example, noted CSS's view that "[Community Trust Director] West was the champion of the elimination of designated funding in favor of a more unfettered approach."[198] Moreover, the Trust "desire[d] to eliminate as much as possible the designated funds and expand Community Trust's discretion with regard to the distribution of funds."[199] West put it with somewhat more reserve in a memorandum recounting a discussion with the Chairman of the Board of Trustees of CSS in May 1971, carefully putting the preference in institutional rather than personal terms: "I explained our problem of a high proportion of designated funds and the apparent intent of the Distribution Committee to discontinue the automatic sending of checks after a number of years."[200]

There are many potential reasons for this gradual shift from a preference for designated funds to a preference for more flexible arrangements. Designated funds established twenty, thirty, or forty

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[196] Surrogate Judgment, *supra* note 135, at 17-6.

[197] *Id.*

[198] Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, 713 N.Y.S.2d 712, 716 (N.Y. App. Div. 2000).

[199] *Id.* at 714. Community Trust disputes these characterizations, claiming the Tax Reform Act of 1969 as the "impetus" for the early 1970s review of designated funds. *Id.*

[200] Petitioner's Exhibit 50, *in* Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 2825 (Memorandum from Herbert West re Luncheon with Robert Mulreany, May 12, 1971).

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years ago became impracticable to implement, if not impossible, sometimes unnecessary and even undesirable, and variance was formulated to manage such transitions. Thus, in some cases, at least in the 1960s and early 1970s, community foundations were exercising variance power to accrete grantmaking and administrative power to the philanthropy, and in the case of designated funds, away from the wealthy who created them, many long since dead. It may be that these were precisely the situations that variance was formulated to manage, but in retrospect, at least from the perspective of Community Service Society and perhaps others, this period appeared one of accretion of power utilizing variance as the method.

There is also a sense of political conflict and social class at work in relationships with grant recipients. As the appellate court notes, "Community Trust reviewed its contributions to CSS and took note that CSS was to be transformed from a social services agency to one sharing power with community-based organizations"[201] — the "Copernican revolution" discussed in the *New York Times* article of which the Community Trust was so keenly aware. The parties intensely disputed the degree to which CSS's shift from a more traditional, case-based, individual-oriented charity to a community-based organization exploring more systemic approaches and sharing power with community groups influenced the Community Trust's suspension and ultimate termination through variance exercise. But there can be little doubt of the wariness and suspicion with which the New York Community Trust viewed the shifts at the Community Service Society toward shared power with communities, a wariness and suspicion that infused many elite philanthropic organizations in the late 1960s and early 1970s.[202]

These hints of philanthropic power and its gradual accretion by community foundations and trusts vis-à-vis wealthy founders, and the

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[201] *Cmty. Serv. Soc'y*, 713 N.Y.S.2d at 715.

[202] In its filings CSS went further, claiming that in the early 1970s "NYCT — from its position of superior power and status — strongly cautioned CSS against bringing a law suit, and in the same time period created a situation of divided loyalty by having one of its own senior officers serve as a director and ultimately chairman of CSS. . ." Petitioner's [Community Service Society] Memorandum of Law in Opposition to Respondent's Motion to Dismiss the Petition and for Summary Judgment, Mar. 8, 1996, *in* Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 311, 341. For its part, a NYCT witness noted the Trust's concern over shifts at CSS. "[T]he fact and the words which stand out in my memory are the process of going from a one-on-one procedure to a community-based procedure by CSS was quite revolutionary." *Id.* at 3429 (Testimony of William Parsons, Esq.).

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suspicion with which at least this leading community trust viewed one result of the social movements of the 1960s, may escape those uninitiated or unfamiliar with the ways in which philanthropic organizations, particularly community foundations and trusts, gather power in the broad middle ground between donors and recipients. But in this process, variance became the tool of both the accretion of philanthropic power and the expression of political conflict and social class toward recipients moving forward within a progressive framework of community-based activities founded in community power. Variance enabled the taking of authority from long-dead wealthy donors and its accretion to the community trust. Variance also enabled the withdrawal from recipient charities that were beginning to take a more openly community-based approach to American social problems.[203]

Is this a perversion of the aims of the variance power? In one view, it might ironically be termed a corruption of "the intention of the . . . creators," Frederick Goff and his elite colleagues, who conceptualized and implemented the variance power in the founding of American community philanthropy as a flexible method of responding to changing community needs. From that perspective it seems reasonably clear that a community philanthropy should not have the unfettered discretion to apply variance power to gifts that are designated for particular organizations or fields merely because it wishes to convert designated gifts into funds that provide the philanthropy with more power and flexibility over philanthropic funds and grants. Nor should a community philanthropy have unfettered discretion to apply variance power with respect to designated organizations that continue to

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[203] For discussions of social class in American philanthropy, see, among other sources that might be cited, SALLY COVINGTON, COMMUNITY FOUNDATIONS AND CITIZEN EMPOWERMENT: LIMITED SUPPORT FOR DEMOCRATIC RENEWAL *(1994);* Robert Bothwell, Foundation Funding of Grassroots Organizations (COMM-ORG: The On-line Conference on Community Organizing and Development, Working Papers) (September 2000), *available at* http://comm-org.utoledo.edu/papers2001/bothwell.htm (last visited Apr. 9, 2003); Emmett D. Carson, The Roles of Indigenous and Institutional Philanthropy in Advancing Social Justice, *in* CHARLES T. CLODFELTER & THOMAS EHRLICH, *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* (1999); JOINT AFFINITY GROUPS, DIVERSITY PRACTICES IN FOUNDATIONS: FINDINGS FROM A NATIONAL STUDY (2001), *available at* http://www.hiponline.org/diversity.pdf; S. A. Ostrander, *Charitable Foundations, Social Movements and Social Justice Funding, in* JOHN H. STANFIELD II, THE NONPROFIT SECTOR AND SOCIAL JUSTICE *(1994); see also* AN AGILE SERVANT: COMMUNITY LEADERSHIP BY COMMUNITY FOUNDATIONS (Richard Magat ed., 1989).

Some research is underway in England on the relationship between class and giving, particularly with respect to community foundations. For a brief report, see Liza Ramrayka, *Ringing the Changes,* GUARDIAN, *at* http://society.guardian.co.uk/charityfinance/ (last visited Apr. 30, 2003).

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undertake its stated purposes but innovate and respond to community needs, even pressures, in ways that appear new, frightening, and foreign to community foundations and trusts.

IV. THE FUTURE OF THE VARIANCE POWER

As the role of class in the Community Service Society/New York Community Trust dispute is analyzed, it must be reaffirmed that American community philanthropy must also have the "flexibility to redeploy . . . allocated charitable assets"[204] in creative ways that encourage addressing social problems. That is a key basis for the establishment and growth of America's community philanthropy sector. Variance power is the imperfect tool available to help guarantee the vibrancy and innovation of this arena and the communities it serves, usually with skill, commitment, and openness. If that is the case, if our community foundations and trusts are to continue to enjoy the broad authority to exercise and apply the variance power that comports with Frederick Goff's vision, they must take steps with donors, with charitable recipients, and with the general public to solidify the relationships of trust and understanding that will enable them to retain the broad power and discretion they should have.

Donors must have a better explanation and understanding of variance power and its uses if variance power is to withstand future challenges; to continue to retain discretion and flexibility in the face of judicial and state executive attempts to regulate and monitor it; and to develop as an admirable instrument for fostering innovation, experimentation and engagement with social change and community needs. Mistrust can only be fostered when, as in *Buck*, it appears that a significant donor has no inkling of variance power held by a community foundation and the senior state regulator is highly suspicious of the possibility of its exercise.[205] Or as in *Community Service Society v. New York Community Trust*, when it appeared, at least to a community-based charitable recipient, that variance exercise was used as a tool to accrete philanthropic power to a community trust and to disengage from new community-based approaches rather than supporting social innovation.

This is a difficult time for those discussions. Stronger communication between community foundations and their donors on the flexible variance power is particularly sensitive at a time of intense competition

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[204] Surrogate Judgment, *supra* note 135, at 17-10.

[205] *See supra* notes 113 - 132 and accompanying text.

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for donor funds. This is an era when many donors, imbued by an entrepreneurial spirit of the 1980s and 1990s, are mistrustful of philanthropic intermediaries and seek more control over selection of charitable recipients, including in some instances the right to name relatives or others who may continue to advise on charitable distributions after the donor's death.[206] Commercial donor-advised funds, led by Fidelity and other instruments, are clamoring for donor attention and funds, and seem to indicate to donors that they can provide donors with more control over their grantmaking.[207] But in the midst of philanthropic expansion there is a significant mistrust of philanthropic intermediaries, and that is helping to fuel the alternative vehicles for American philanthropy. American community philanthropy, already having shed a portion of its tinge of high social class interests,[208] will need to re-explain itself to a broader array of donors. Many of those will be mistrustful of philanthropic power, a power that relies upon variance in the case of community foundations. Today, they are as likely to view variance with suspicion than as a flexible method around unwieldy and restrictive judicial *cy pres* processes.[209] And so, despite rapid asset growth rates in community

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[206] Debra E. Blum, *Donors Increasingly Use Legal Contracts to Stipulate Demands on Charities*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 9; Debra E. Blum, *Ties That Bind*, CHRON. PHILANTHROPY, Mar. 21, 2002, at 7. For a private foundation perspective on these important developments, see Susan V. Berresford, *American Philanthropic Values and the Future of Philanthropy*, Remarks at the New York Regional Association of Grantmakers (May 11, 1999), *available at* http://www.fordfound.org/news/view_reflection_detail.cfm?reflection_index=8 (last visited Mar. 10, 2003). Another commentator says that "[t]he frenzied calls for charitable organizations to do exactly what donors want is undermining the ability of nonprofit groups to make wise choices about how to care for the needy and carry out projects that benefit the common good." Mark M. Murphy, *Donor Demands are Hurting Charity*, CHRON. PHILANTHROPY, July 25, 2002, at 47.

[207] On the commercial donor-advised phenomenon and the challenge to community foundations, see Emmett D. Carson, *Community Foundations Facing Crossroads*, CHRON. PHILANTHROPY, May 16, 2002, at 39. The rapid rise of donor-advised fund is documented in *Assets of Donor-Advised Funds Totaled $12.3 Billion Last Year, Survey Finds*, CHRON. PHILANTHROPY, May 30, 2002, at 8. On newer approaches to philanthropy, including strategic and venture philanthropy, a good starting point is the work of the Morino Institute, at http://www.morino.org (last visited Mar. 14, 2003).

[208] Perhaps more specifically, there can be little doubt that the Distribution Committee of the New York Community Trust is now considerably more diverse and representative of the communities it serves, in ethnic and gender terms, than in 1971, when the designated payments to Community Service Society were suspended and then terminated. Whether it is more diverse and representative in economic terms is an issue that perhaps only the New York Community Trust can address. *See* N.Y. Community Trust, *at* http://www.nycommunitytrust.org (last visited Mar. 14, 2003).

[209] Although the earlier rationales for variance may no longer resonate with many modern donors, community foundations continue to use them, perhaps in the absence of

foundations,[210] the time to grapple with philanthropic mistrust should not be put off.

The accretion of assets and philanthropic power to intermediaries such as community foundations and now commercial donor-advised funds is both a boon and a source of anxiety for organizational recipients. It is a boon in that increasing assets to all kinds of philanthropic intermediaries results in stronger financial support to charitable organizations. It is a source of concern, especially in the case of designated funds, because variance is the enemy of perpetual grants, and many sophisticated charitable recipients understand that. Variance is, of course, especially problematic for organizations that perceive themselves, or are perceived by mainstream philanthropic organizations, as especially innovative or explicitly progressive in their outlook and programs.

Yet charitable recipients have a crucial stake in the continued vitality of a flexible, innovative variance power and in the community philanthropies that variance serves. It may be considerably better for variance to be exercised by more diverse, understanding, progressive distribution committees gradually more representative of the diversity of the communities they serve, than for funds to be designated for organizations through a commercial fund (such as Fidelity), perhaps then to fall victim to redirection by such a fund, divorced from local priorities and representation, when the donor dies.[211] And so community foundations and the organizations they serve and partner with must come to a better understanding of variance power and exercise. Community philanthropies, local charitable services, and other

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alternatives. The New York Community Trust notes of designated funds, for example:

> If the charity goes out of business, changes its mission, or should our board determine that circumstances have changed so as to 'render unnecessary, undesirable, impractical, or impossible continued support,' we'll redirect funds to other charities without losing time or depleting the fund by expensive court proceedings. This authority of our board, called the variance power, is an attractive feature to donors who have established funds in perpetuity and donors who have set up funds for narrow purposes but understand that the future is unpredictable. A committee of our board will carefully review the facts before recommending any change to the full board. *See* N.Y. Community Trust, *at* http://www.nycommunitytrust.org/newsite/03_infodonors/3.1.3_desigfindex.html, (last visited Mar. 14, 2003).

[210] FOUNDATION CENTER, FOUNDATION GROWTH AND GIVING ESTIMATES (2002), *available at* http://www.fdncenter.org/research/trends_analysis/pdf/fgge02.pdf (last visited Apr. 9, 2003).

[211] Or when the representatives named by the donor pass from the scene, if the donor-advised fund allows, or the designated organization becomes unavailable to receive funds for one of a number of reasons.

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organizations are linked in service, linked by history and commitment and experience, to their communities far more closely than their occasional differences, however fierce, might signal.

Both before and in the wake of *Community Trust*, some community foundations have more vigorously considered or even established clearer processes for discussion and exercise of variance. This is despite the perception that was strongly fortified for some in *Community Trust*, that these processes were based on untested perceptions, class biases, social conservatism, resistance to change, and accretion of assets and philanthropic power. It is ironic that the New York Community Trust is likely always to have had considerably more detailed and thoughtful variance processes in place than most American community philanthropies. But the New York Community Trust now signals the victory of process over subjective impression in the exercise of the variance power, noting that "[a] committee of our board will carefully review the facts before recommending any change to the full board."[212] The procedures by which a board committee will consider variance are not spelled out, and in some cases they would usefully be detailed for an audience of donors, prospective donors, and grant recipients.

But in this short phrase is perhaps the beginning of a solution for the variance power, severely battered by *Community Trust*. Originally, variance represented the victory of proceduralism, careful process, consideration by an eminent committee, and rational philanthropic choice in the face of the hidebound, irrational, close-minded inflexibility of judicial *cy pres* dominated by the determinations of a single judge based on outmoded criteria. In the decades before *New York Community Trust*, and erupting in that dispute, variance power had come to represent a withdrawal from careful procedural consideration, but instead a biased, impressionistic process of substantial alteration that served the expansion of philanthropic power and the defense of particular social views. And that in turn led to other forces — judicial and executive primary among them — occasionally willing to challenge community foundations for the monitoring, regulatory, and approval roles in variance issues.

For a more thorough solution to the problem of variance power it is useful to return to the problem of *cy pres*. Variance continues to be analogized to *cy pres*, and variance continues to be narrowed toward the

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[212] *See* THE NEW YORK COMMUNITY TRUST, DESIGNATED FUNDS, *at* http://www.nycommunitytrust.org/newsite/03_infodonors/3.1.3_desigf.html (last visited Apr. 30, 2003).

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more restrictive doctrine of *cy pres*, a process that began with *Buck* and has perhaps accelerated with *Community Trust*. The analogy (and the problem) stems from the perpetual concept of variance, the notion that a fund may always be designated until variance is undertaken. When that variance occurs seventy years after the designation was made, courts and attorneys general may view such exercise with substantial suspicion, and may be more likely to attempt to narrow its exercise into the channels of *cy pres*. Long-term variance and its exercise after decades may well be difficult to sustain in the face of intensive examination by charitable recipients, courts, state regulators, and perhaps increasingly community foundations themselves.

John D. Rockefeller, Jr., saw this well before others. As early as the 1930s, he implicitly recognized the dangers of perpetual variance, and the suspicion that could come to envelop it. And his solution then is well worth recalling. As Rockefeller wrote to the New York Community Trust:

> I am wondering whether your Board would think it wise, when possible, to suggest to those making trusts, that they either draw them on a broader basis or provide some means whereby after the trust has been used for a definite number of years . . . the Trustees . . . shall thereafter be empowered to determine whether the need continues, or if not to what purposes the funds shall be subsequently devoted . . .[213]

Forestalling *Community Trust* problems in significant future cases will certainly require the dialogue discussed above.[214] But it may also require

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[213] Rockefeller continued:

> As our experience in giving grows, we find ourselves more loth to impose conditions which continue for an unlimited period of years, and are incresingly [sic] leaving broad discretion to the successors of present trustees. In other words, if in these trusts above referred to and similar trusts, it were stipulated that the money should be for the specific purpose mentioned for a limited period of years or so long as in the judgment of the trustees of the Community Trust it was needed and could wisely be used for that purpose, and thereafter for such other or kindred purpose as the trustees might determine; the purpose of the mind of the donor of the fund would be quite as well served, and the danger of the necessity had ceased to require it, would be avoided. John D. Rockefeller Jr., Letter to Ralph Hayes, *in* Record on Appeal, Cmty. Serv. Soc'y v. N.Y. Cmty. Trust, *supra* note 6, at 2887-89.

[214] The result in *Community Service Society* may be somewhat ameliorated in future instances because the Treasury's community foundation regulations, *supra* notes 92 - 105, apply to trusts, and some community foundations have only a minority of assets in their trust arms, attempting to attract donations to their nonprofit corporate arms instead. My

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a new approach to variance, in which community foundations agree with donors on a shorter variance power of perhaps ten, twenty, thirty or forty years. After a time-limited variance power under which the community foundation would have broad discretion as to exercise and redistribution, the community foundation would affirmatively review the designation at the end of the variance time period. At that point the community foundation would have two options, either of which should be sufficient to maintain variance power in the community foundation under federal tax law. The community foundation would be required to reconsider the purposes of the fund and community needs and redirect the fund accordingly, or the fund might be automatically redesignated as a "field-of-interest" fund or a general endowment for grantmaking by the community foundation.

In this framework, the community foundation would take the active step toward differentiating variance from *cy pres*, rather than letting variance linger so long that its exercise invites judicial and state restriction as a highly limited "quasi-*cy pres*" action. Moreover, by directly agreeing with donors upon reconsideration of the purposes and direction of a donated fund after a specific period of time, such a process should discourage judicial and state action against what is now viewed as the arbitrariness of variance action, inviting responses and standards as applied in *Community Trust*. Such a framework, which maintains variance power in the community foundation, should also pose no challenge to the variance power requirement of federal tax law necessary for public charity and single entity treatment. Variance power can reacquire its historic status in American philanthropy only if community philanthropies understand the challenge before them and work with the donors and community organizations that they serve toward that goal, both through dialogue and through serious consideration of variance reform.

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