Title

Clarifying Justice Marshall's contract-based constitutional analysis in *Trustees of Dartmouth College v. Woodward*, which confirmed that the *cy pres* power is a judicial prerogative.

Text

In prior postings we have considered how the plethora of hyper-technical legislative tweaks to and partial codifications of the principles-based law of trusts, such as the Uniform Trust Code and the Uniform Trust Decanting Act, are perversely rendering the law of trusts less uniform across the jurisdictions, as well as ever more hyper-technical, incoherent, and inaccessible to all but the initiated. For a detailed brief in support of the case against codifying aspects of equity doctrine see generally Chapter 1 of *Loring and Rounds: A Trustee's Handbook* (2021). We cannot forget that the institution of the trust itself is a creature of equity, not of legislation or executive order.

In this posting we consider a related matter, namely whether a state legislature may constitutionally, other than via a compensated taking, tamper with the particular terms of a trust that is already up and running. This is a topic that is taken up in §9.4.4 of *Loring and Rounds: A Trustee's Handbook* (2021). An enhanced post-publication version of the section is reproduced in its entirety in the Appendix immediately below.

Appendix

§9.4.4 In the United States Cy Pres is the Prerogative of the Judiciary [from *Loring and Rounds: A Trustee's Handbook* (2021), with enhancements]

> *The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts.*[361]
>
> *At common law in England, a prerogative power of cy pres, exercisable by the Crown in certain circumstances and without regard to the settlor's intent, developed in addition to the judicial power in the Chancellor. The prerogative power (or legislative counterpart) has not been recognized in the United States, although legislation may reasonably regulate the extent and exercise of the cy pres power of courts. The judicial power of cy pres has evolved in this country along lines generally similar to the equity power under English common law*.[362]

The *cy pres* doctrine is covered generally in §§8.15.28 and 9.4.3 of *Loring and Rounds: A Trustee's Handbook* (2021). In England judicial *cy pres* power was vested in the chancellor and prerogative *cy pres*

[361]UPC §7-201(a) [now withdrawn in deference to the Uniform Trust Code].

[362]Restatement (Third) of Trusts §67 cmt. a. For more on the difference between judicial *cy pres* and prerogative *cy pres*, prerogative *cy pres* possibly being "derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws," the reader is referred to Jackson v. Phillips, 96 Mass. 539, 575 (1867). *See also* 6 Scott & Ascher §39.5.1 (Judicial and Prerogative *Cy Pres*). In England, the king would exercise his prerogative *cy pres* power by indicating over his sign manual, *i.e.*, over his signature, "the disposition that he wished to be made of the property, and the chancellor would order that the disposition be made." 6 Scott & Ascher §39.5.1.

power in the king.[363] "Dispositions under the prerogative power seem to have occurred primarily in two classes of cases: first, those in which property was given for a purpose that was illegal but that, except for the illegality, would have been charitable; and, second, those in which property was given directly to charity, but without any indication of a specific charitable purpose and without any indication that a trustee was to administer the charity."[364] The king had no legal or equitable duty to consider donor intent in the exercise of his power to apply prerogative *cy pres*.[365] Thus, "[t]he exercise of the prerogative power by a biased, cynical, or whimsical king sometimes resulted in the devotion of property to purposes the settlor never would have approved and sometimes, indeed, to purposes contrary to the settlor's wishes."[366]

Suffice it to say, "the prerogative power has no place in American jurisprudence."[367] Only the judiciary may apply the doctrine of *cy pres* to charitable trusts, "[a]lthough the legislature can, of course, properly lay down rules governing charitable trusts."[369] Application of the *cy pres* doctrine is a function neither of the executive branch nor of the legislative.[370] Except pursuant to its right to take by eminent domain for just compensation, a legislature may not alter the terms of an *ongoing charitable corporation or trust with a lawful purpose that is capable of being carried out*. As to charitable corporations, the U.S. Supreme Court so held in the 1816 Dartmouth College Case.[371] The principles of the Dartmouth College Case have been held applicable to charitable trusts as well.[372] The New Hampshire legislature had attempted by statute to amend the charter of the charitable corporation known as Dartmouth College.[373] The Court found that the statute violated Article I, §10, of the U.S. Constitution providing that no state shall pass any law impairing the obligations of contracts.[374] The opinion of the court was delivered by Chief Justice John Marshall.

The Court found two implied executed contracts: the implied contract between the Crown which had granted the charter and benefactors that the Crown would not alter the terms of the charter, a contract that survived the American revolution; and the implied executed contracts between the benefactors and the corporation that gifts would be administered in accordance with the terms of the charter.[375] For a charter amendment to be effective, it must be consented to by the corporation and approved by a court in the proper exercise of its *cy pres* power.[376] Prior to the *Dartmouth College* decision, it had been "uncertain" what construction the U.S. Supreme Court would give to the word "contracts" as employed in §10. "It was settled by that case that the word is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing out of agreements, express or implied, for which there is a valuable consideration."[1] Again, the principles of the Dartmouth College Case have been held applicable to charitable trusts.[377]

---

[363]*See* Chapter 1 of *Loring and Rounds: A Trustee's Handbook* (containing a list of all the Lord Chancellors since 1066).

[364]6 Scott & Ascher §39.5.1.

[365]6 Scott & Ascher §39.5.1.

[366]6 Scott & Ascher §39.5.1.

[367]6 Scott & Ascher §39.5.1. *See also* 6 Scott & Ascher §39.5.6.

[369]6 Scott & Ascher §39.5.6.

[370]*See generally* 4A Scott on Trusts §399.1.

[371]Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 4 Wheat. 518 (1819). *See generally* 6 Scott & Ascher §39.5.6.

[372]4A Scott on Trusts §399.5, n.7, and accompanying text; 5 Scott & Ascher §37.4.2.3; 6 Scott & Ascher §39.5.6.

[373]*See generally* 6 Scott & Ascher §39.5.6.

[374]*See generally* 6 Scott & Ascher §39.5.6.

[375]*See generally* 6 Scott & Ascher §39.5.6.

[376]*See generally* 4A Scott on Trusts §399.5; 6 Scott & Ascher §39.5.6.

[1] Cary Library v. Edward P. Bliss, 151 Mass. 364 (1890).

[377]4A Scott on Trusts §399.5, n.7, and accompanying text; 5 Scott & Ascher §37.4.2.3; 6 Scott & Ascher §39.5.6.

Massachusetts' highest court, in a 1978 advisory opinion on a proposal to legislatively *cy pres* the terms of a trust that had been established in Boston many years before by Benjamin Franklin, confirmed that, in general, the application of *cy pres* to alter charitable trusts is the exclusive domain of the judiciary.[2] That being the case, what the Massachusetts legislature was being asked to do would have violated the separation-of-powers provisions of the Massachusetts Constitution. No need then to test what was being proposed against the provisions of the U.S. Constitution, specifically the Contracts Clause. Here is the separation-of-powers language of Article 30 of the Declaration of Rights of the Constitution of the Commonwealth: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men." For the final chapter in the saga of the trust that had been established in Boston pursuant to the terms of Franklin's will, see Franklin Foundation. v. Attorney General (1993).[3].

It is critical that one conceptually separates any implied contractual activity surrounding the establishment of a trust from the trust itself. A trust, *qua* trust, is not a category of contact. Admittedly, the academic community has been revisiting the question of whether the trust is a branch of contract law or a branch of property law.[21] This debate—essentially a continuation of what was begun by Frederick W. Maitland, who argued the former, and Austin W. Scott, who argued the latter—presupposes only two private fundamental legal relationships: contract and property.[22] Note, however, that while Maitland may have come down on the side of contract, he did so with some ambivalence:

> For my own part if a foreign friend asked me to tell him in one word whether the right of the English Destinatär (the person for whom property is held in trust) is *dinglich* [a property interest] or *obligatorisch* [a personal claim], I should be inclined to say: "No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigenthum* [property]."[23]

The issue as framed, however, can never be resolved because the premise, it is suggested, is false. Our legal system does *not* have two private fundamental legal relationships of the consensual variety.[24] It has four, notwithstanding what the scholars may say: They are the agency, the contract, the bundle of legal rights and correlative duties known as property, and the trust. There are four because four are needed. No

---

[2] Opinion of the Justices to the House of Rep., 374 Mass. 843, 371 N.E.2d 1349 (1978).

[3] 416 Mass. 483, 623 N.E.2d 1109 (Mass. 1993).

[21] *See generally* George L. Gretton, *Trusts Without Equity*, 49 Int'l & Comp. L.Q. 599, 603–608 (2000).

[22] For the recent articulation of the contract argument, *see* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995); for the recent articulation of the property argument, *see* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998). *See also* 7 Scott & Ascher §46.4.2 ("In any event, the creation of a trust is not a contract but a disposition of the beneficial interest in the trust property"). *Cf.* 3 Scott & Ascher §13.1 (coming down on the side of those who argue that a trust beneficiary has a proprietary interest in the underlying trust property, not just a chose in action or claim against the trustee, but acknowledging that "the scholarly debate continues").

[23] Frederic William Maitland, Maitland Selected Essays 146 (H.D. Hazeltine ed., Cambridge Press 1936).

[24] There are also nonconsensual legal duties which, when breached, can constitute torts.

one is sufficiently elastic to encompass another without turning into the other.[25] These relationships are facets, however, of the single gem we loosely call the common law.[26]

The four private fundamental consensual legal relationships are profoundly different and profoundly interrelated.[27] The trust exhibits agency, property, contractual, and even corporate attributes, but is *sui generis*.[28] Contractual rights are themselves property rights. Contractual rights may be the subject of a trust.[29] The equitable interest in one trust may constitute the property of another. An agency may be gratuitous or associated with contractual obligations. The corporation, internally a statutory tangle of agencies, externally is merely property (a legal interest). And in the case of an incorporated mutual fund, it may actually be a trust.[30]

One commentator has focused not on the profound dearth of nuance of academia's efforts to demote the trust to a sub-set of the law of contracts but on the unsavory subversiveness of it all:

> Under the influence of law and economics theory, prominent scholars and reformers are rapidly dismantling the traditional legal and moral constraints on trustees. Trusts are becoming mere "contracts," and trust law nothing more than "default rules." "Efficiency" is triumphing over morality. In the law and economics universe of foresighted settlors, loyal trustees, informed beneficiaries, and sophisticated family and commercial creditors, trusting trustees may make sense. In the real world, however, it does not. A trust system that exalts trustee autonomy over accountability can and increasingly does impose significant human costs on all affected by trusts.[31]

---

[25]Attempting to squeeze a trust into the third-party beneficiary contract slot inevitably leaves too much hanging out, *e.g.*, the charitable trust or the private discretionary trust that calls for the shifting of property interests between and among generations of persons who at the time the contract is struck are unborn and unascertained. To doctor a third-party beneficiary contract into something that would be a satisfactory substitute for such high maintenance arrangements would merely transmogrify it into a trust. While a trust has the attributes of a contract, of property, of agency, and even of a corporation, it is now sui generis, regardless of its evolutionary origins. *See* Gibbons v. Anderson, 2019 Ark. App 193, n.3 (2019). As one commentator versed in the taxonomies of both the common law and the civil law has noted: "Trusts do, indeed, impinge deeply upon the law of obligations and the law of property, but they do not belong essentially to either." George L. Gretton, *Trusts Without Equity*, 49 Int'l & Comp. L.Q. 599, 614 (July 2000).

[26]For purposes of this section, the term *common law* encompasses the law of equity.

[27]*See generally* Charles E. Rounds, Jr., *The Case For a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together with a Model Fiduciary Relations Course Syllabus,* 18 Regent U. L. Rev. 251 (2005-2006); Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[28]*See* Gibbons v. Anderson, 2019 Ark. App 193 (2019) ("First, we point out that a trust agreement is not a contract."); Schoneberger v. Oelze, 208 Ariz. 591, 595, 96 P.3d 1078, 1082 (2004) (confirming that a trust is not a contract). *See generally* Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).

[29]*See, e.g.*, §9.8.7 of *Loring and Rounds: A Trustee's Handbook* (the Quistclose trust).

[30]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[31]Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 Minn. L. Rev. 602, 651 (2010). *See also* Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 526 (2010) ("The law governing

At least one prominent jurist, Dame Sonia Proudman, of the High Court of Justice of England and Wales (Chancery Division), who also does not buy the premise that conceptually the trust relationship is contract-based, was tasked with sorting out whether a certain deed of trust imposed unenforceable contract-based obligations on the University of London vis-à-vis the assets of the Warburg Library/Institute or whether those obligations are trust-based and therefore "enforceable" by the Attorney General.[32] She decided the latter. There is an implicit assumption in the decision that the trust relationship is *sui generis*. The Warburg case's backstory was the subject of an article in The New Yorker.[33]

fiduciary duty, however, came by its 'pulpit-thumping' roots honestly and those roots serve the 'institutional integrity' of the trust and its progeny.").

[32]*See* Univ. of London v. Prag, [2014] EWHC 3564 (Eng.).

[33]*See* Adam Gopnik, *In the Memory Ward: The Warburg is Britain's most eccentric and original library. Can it survive?*, The New Yorker, Mar. 16, 2015.