
Note

What “Being a Watchdog” Really Means: Removing the Attorney General from the Supervision of Charitable Trusts

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The Great Recession that followed the 2008 financial crisis has caused significant hardships to many realms of American society, not only economically, but also politically, psychologically, and socially.¹ The charitable sector is no exception.² For example, universities grappling with depleted endowments have sold assets, including charitable trusts, which once seemed off-limits or untouchable.³ Perhaps not surprisingly, these sales have generated litigation brought by protesters questioning their legality.⁴ These cases highlight the inconsis-

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1. Robert J. Samuelson, *The Great Stranglehold*, WASH. POST, July 12, 2010, at 15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103038.html>.

2. See Megan Loving, Comment, *An Arm and a Van Gogh: Selling Art Collections from Charitable Contributions for Capital Gain is a High Price to Pay*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 455, 455 (2009) (mentioning the financial struggle of institutions and universities in the recent recession).

3. See, e.g., Jennifer Brooks, *Fisk Says Its Survival Depends on Art Sale*, TENNESSEAN, Aug. 12, 2010, at Main News, available at 2010 WLNR 16052059 (reporting Fisk University's attempt to sell the “renowned modern art collection donated to Fisk half a century ago by artist Georgia O’Keeffe”); Richard Lacayo, *Brandeis’ Attempt to Turn Art into Assets*, TIME (Feb. 5, 2009), <http://www.time.com/time/printout/0,8816,1877265,00.html> (“Brandeis University . . . stunned both the academic and art worlds when it announced that it would shut down its Rose Art Museum and sell the collection.”).

4. See, e.g., *In re Fisk Univ.*, No. 05-2994-III, at 1 (Ch. Tenn., Sept. 14, 2010), available at <http://www.tennessean.com/assets/pdf/DN164021914.pdf> (discussing the attempt to keep the Stieglitz Art Collection at Fisk Universi-

encies among regulatory approaches taken by attorneys general, who traditionally monitor the governance of charitable trusts to ensure compliance with the donors' intents. For instance, the Minnesota Attorney General did not intervene when St. Olaf College sold WCAL, a radio station created by donors, to Minnesota Public Radio.⁵ On the other hand, the Tennessee Attorney General attempted, so far unsuccessfully, to take control of the Stieglitz Art Collection from Fisk University.⁶ The Attorney General continues to seek prevention of the University's sale of the collection—a gift from Georgia O'Keeffe that created a charitable trust—as the school hunts for a means of “digging out of its financial hole.”⁷

Theoretically, when overseeing charitable trusts attorneys general are restricted to considering the donors' intent or the public interest.⁸ But other forces are likely at work. For one, attorneys general are influenced by politics.⁹ Second, monitoring the administration of charitable trusts may not always be the top priority of attorneys general among the numerous other duties entrusted to their offices.¹⁰ Indeed, given the scope of duties vested to attorneys general, it is easy to see how charitable trusts would not be a primary concern.

ty); *In re* WCAL Charitable Trust, No. A09-703, 2009 WL 5092650, at *4 (Minn. Ct. App. Dec. 29, 2009) (discussing SaveWCAL's challenge of the sale of WCAL Radio).

5. Order at 5, *In re* Certain Gifts to St. Olaf Coll., No. CV-06-2518 (Minn. Dist. Ct. June 10, 2008) (noting the lack of action by the attorney general and the district court judge's declaration that he was “absolutely mystified as to why the State Attorney General did not become involved in a sale of trust assets”).

6. Brooks, *supra* note 3, *passim*.

7. Jennifer Brooks, *Judge Rejects State's Plan to Move Fisk Art*, TENNESSEAN (Sept. 15, 2010, 2:34 AM), <http://www.tennessean.com/article/20100915/NEWS01/9150359/judge-rejects-state-s-plan-to-move-Fisk-art>; see also Duane Marsteller, *Art Deal in Jeopardy*, TENNESSEAN, Jan. 7, 2012, at News, available at 2012 WLNR 447365 (explaining the continued efforts of the Tennessee Attorney General to prevent the sale).

8. See Evelyn Brody, *Whose Public? Parochialism & Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946–48 (2004) (discussing the challenges of monitoring fiduciaries and ensuring that charitable donations are spent “as represented to donors”).

9. Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 537–38 (1994) (noting that with the expansion of the “size and responsibilities of state attorneys general's offices” came a breed of attorneys general that were more interested “in getting votes and enhancing their own political careers” than in “protecting the citizens of their states” (citation omitted)).

10. See Brody, *supra* note 8 (pointing out the wide range of areas monitored by attorneys general).

Therefore, although the “responsibility for public supervision of charitable trusts traditionally has been delegated to the Attorney General,”¹¹ this Note argues that state attorneys general are not the most effective parties to govern charitable trusts. Part I explains the background and current structure of charitable trust law, and the role that attorneys general have traditionally played in the administration and disposition of charitable trusts. Part II addresses why this current structure has proved unworkable, as evidenced by the recent tumultuous sales of charitable trusts, the inconsistencies among attorneys general, and why attorneys general cannot always be effective watchdogs. This Part also addresses the shortcomings of proposed solutions to the supervision of charitable trusts. And finally, Part III proposes that an independent, self-funded, quasi-state agency should be vested with the authority to monitor charitable trusts. This Note concludes that oversight by an independent quasi-state agency reduces political influence on supervision and ensures that oversight of charitable trusts will remain a priority in order to protect the public interest each charitable trust serves.

I. CHARITABLE TRUSTS AND THE ROLE OF STATE ATTORNEYS GENERAL

This Part introduces the general law and development of charitable trusts, including the role of attorneys general in monitoring trusts created to promote the public interest.¹² It continues by setting the foundation for the argument that is developed in Part II of this Note—namely, that attorneys general have failed to supervise charitable trusts effectively. This Part concludes by explaining the effect of the current financial crisis on the charitable sector, noting it has only exacerbated the unresolved problems in charitable trust law.

11. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 330 (Pa. Commw. Ct. 2002).

12. See RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g (Tentative Draft No. 5, 2009) (noting that there may be a need for special interest standing because attorneys general lack sufficient means of enforcement); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 224 (2003) (“The object of charitable trusts is to benefit the community rather than private individuals.”); *About NAAG*, NAT’L ASS’N ATTORNEYS GEN., http://www.naag.org/about_naag.php (last visited June 4, 2012) (“As chief legal officers of the states, commonwealths, and territories of the United States, the Attorneys General serve as counselors to state government agencies and legislatures, and as representatives of the public interest.”).

A. THE LAW OF CHARITABLE TRUSTS

Charitable trusts are created for a variety of reasons, which include: “(a) the relief of poverty; (b) the advancement of knowledge or education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes that are beneficial to the community.”¹³ The trustee of a charitable trust, such as a university or a hospital, manages the trust in accordance with the trust’s public-interest purpose(s).¹⁴ The charitable trust document defines the purposes and objectives, as well as administrative procedures for managing the trust.¹⁵ The trustee is bound by the wishes of the donor and is barred from deviating from those specific purposes.¹⁶ Therefore, the trustee has fiduciary duties to honor the intent of the donor.¹⁷

Additionally, because charitable trusts benefit the community and do not have ascertainable beneficiaries, the trusts are

13. RESTATEMENT (THIRD) OF TRUSTS § 28 (2003); see Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL’Y 1, 15 n.77 (2009) (“[E]ducational institutions and hospitals represented approximately 70% of registered public charity resources.”).

14. See MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 133 (2004) (“A charitable trust is similar to a private trust in that a trustee holds and manages the property not for the benefit of specified individuals but for certain defined purposes that are considered to be of benefit to the public at large.”).

15. Fishman, *supra* note 12, at 225.

16. 15 AM. JUR. 2D *Charities* § 75 (2011) (“If a charitable organization accepts a bequest for a specific purpose, it is bound to use the bequest for the purpose specified and the trustees of the organization will be barred from using it for any other purpose.”); Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1756–57 (2003); see also John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 128 (2010) (“[D]onors impose restrictions in order (1) to support the donor’s belief in worthy charitable objectives and the causes best suited to accomplishing those objectives; (2) to constrain charitable management from straying from the donor’s own view of what are, or how to accomplish those charitable objectives; (3) to freeze in place the donor’s individual notions of appropriate but evolving public policy; and (4) quite simply, to exercise and enjoy a significant power that society has chosen to bestow on donors through the law of charitable gifts.”).

17. See, e.g., Helge, *supra* note 13, at 9 (“These fiduciary standards are the duty of care, the duty of loyalty, and the duty of obedience.”); Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion Over a Charitable Corporation’s Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 694 (2005) (“The trustee is subject to the fiduciary duties of loyalty . . . and care.”).

“not subject to the rule against perpetuities, and are therefore of unlimited duration.”¹⁸ Consequentially, it is only natural that at some point the donor’s restrictions on the charitable trust may become problematic or unworkable.¹⁹ In the event that this happens, the trustee can seek judicial approval through the *cy prè*s doctrine, which allows the courts to override “unlawful, impossible, or impracticable” restrictions.²⁰ It is presumed that by modifying or releasing donor restrictions the charitable trust will be “saved,” yet still follow the donor’s overall wishes.²¹ Although at first glance the *cy prè*s doctrine seems unobjectionable, problems may arise in deciphering donors’ intent.²²

Moreover, the longevity of charitable trusts does not only create problems when determining donor intent when the trust becomes unfeasible. Honoring donor intent—a strict standard of charitable trust law—in the face of economic and social changes also creates complexities in monitoring and preventing the misuse of charitable trusts. As explained in more detail be-

18. Fishman, *supra* note 12. Because charitable trusts are created to benefit the public interest, the justification for allowing the gift in spite of the rule against perpetuities is that the “funds are being devoted, or ultimately will be devoted, to a public purpose, and therefore the indefinite life of the charitable gift is an irrelevant consideration.” Robert J. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 UCLA L. REV. 1074, 1083 (1966). However, it has been proved that these charitable gifts can be mismanaged and wasted, and because the trust has a “life of its own” the mismanagement often goes “unnoticed and therefore unchecked.” *Id.* Although it is an interesting argument to apply the rule against perpetuities, or some version of the rule, to charitable trusts to avoid the litigation battles that have been experienced across the nation recently, see Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1186–87 (2007), this Note will argue that an effective watchdog will cure these issues, while still allowing donor’s wishes to be carried out well into the future. Restructuring trust law is unnecessary.

19. Eason, *supra* note 16, at 124–25 (stating that *cy prè*s is a mechanism to address these changing circumstances and objectives).

20. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); see also Eason, *supra* note 16, at 141–44 (elaborating on a trustee’s fiduciary duties and the use of the *cy prè*s doctrine).

21. See Brody, *supra* note 18, at 1236–39 (outlining the *cy prè*s doctrine); Eason, *supra* note 16, at 125 (noting that the *cy prè*s doctrine authorizes “modification of the donor’s restrictive mandates”).

22. Eason, *supra* note 16, at 125, 126 (describing the fact-specific inquiry involved in deciphering donor intent and the chilling effect the *cy prè*s doctrine can have on charitable giving).

low, the law of charitable trusts has struggled to find an adequate solution to the regulation of charitable trusts.²³

B. THE ROLE OF ATTORNEYS GENERAL IN SUPERVISING CHARITABLE TRUSTS

Attorneys general have a significant role in the supervision of charitable trusts. If the trustee of a charitable trust breaches his fiduciary duty,²⁴ state attorneys general have traditionally held the power to enforce the trusts, drawing on charitable trusts' purpose to benefit the public at large.²⁵ This role was inherited from English law and is "known as *parens patriae*."²⁶ The power allows the attorney general to bring suit to correct any abuses of the charitable trust, but it does not allow the attorney general to act as a "co-trustee of a charitable trust."²⁷ In some states this authority to enforce charitable trusts is statu-

23. See PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS pt. II, ch. 3, at 1 (Tentative Draft No. 1, 2007) (claiming that the law of charitable trusts contains only broad boundaries rather than specific guidance).

24. See Fishman, *supra* note 12, at 229–30 ("There are generally three main types of fiduciary breach: (1) of the duty of loyalty involving a misappropriation of an asset or something of value, (2) of the duty of care consisting of the negligent attention to the beneficiaries' needs or estate, [or, with charitable trusts, neglecting the public interest defined in the charitable trust instrument], and (3) of the duty of obedience, requiring compliance with the expressed purposes of the organization." (footnotes omitted)).

25. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 330 (Pa. Commw. Ct. 2002) ("[I]n every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented." (quoting *In re Pruner's Estate*, 136 A.2d 107, 110 (Pa. 1957))); MODEL PROT. OF CHARITABLE ASSETS ACT § 3 (2011), available at http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%20Finals/MPOCAA_PreStyleFinal_Jul11.pdf; Helge, *supra* note 13, at 11–13, 12 n.56 ("The state attorney general has the power to redress breaches of fiduciary duty, misappropriation of charitable funds, mismanagement of the charitable organization, and fraud in the solicitation of charitable funds."); Loving, *supra* note 2, at 460.

26. Brody, *supra* note 8, at 938; see also FREMONT-SMITH, *supra* note 14, at 32 ("With the decline of the use of commissions provided for in the Statute of Charitable Uses, it fell to the Attorney General, representing the Crown as *parens patriae* with a prerogative right, to protect all charitable trusts."). For a discussion on the development of the Attorney General's role in England and the incorporation of that role into the American legal system, see David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 134–45 (2000).

27. Jennifer L. Komoroski, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 WM. & MARY L. REV. 1769, 1784 (2004).

tory, and in the absence of statutory authority, attorneys general have enforcement power under common law.²⁸

Not every state gives exclusive authority to monitor charities to the attorney general. Some states have divided that regulatory authority among “the secretary of state, the insurance commissioner or another state agency” and the attorney general.²⁹ Some courts have also granted standing to private individuals to enforce the charitable trust if the individual can demonstrate a sufficient interest in the operation of the trust.³⁰ At the federal level, the Internal Revenue Service indirectly regulates the charitable sector through the federal income tax exemption for charitable organizations.³¹ Although other parties may play a role in trust enforcement, attorneys general remain “the most important state player[s].”³²

For centuries attorneys general have participated in the regulation of charitable trusts and partaken in *cy prè*s proceed-

28. Helge, *supra* note 13, at 12 n.58; William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452–53 (2006).

29. DAVID BIEMESDERFER & ANDRAS KOSARAS, COUNCIL ON FOUNDS., THE VALUE OF RELATIONSHIPS BETWEEN STATE CHARITY REGULATORS & PHILANTHROPY 14 (2006), available at <http://www.cof.org/files/Documents/Building%20Strong%20Ethical%20Foundations/06AGreportfull.pdf>; see also FREMONT-SMITH, *supra* note 14, at 364–70 (explaining that other agencies “are empowered to supervise at least some aspects of the administration of charities”); Brody, *supra* note 8, at 949 (“[D]epending on the industry in which it operates, a given nonprofit organization might also be regulated by such other agencies as the insurance commissioner, the department of health, education, or commerce, or the corporations commission.”).

30. See RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g (Tentative Draft No. 5, 2009) (summarizing cases that recognize standing of private individuals due to their special interest in a particular charitable trust); Helge, *supra* note 13, at 35–36 (observing that courts are allowing private parties to bring suits on behalf of charitable trusts on a more frequent basis); see also *infra* notes 67–71 and accompanying text. *But see* Brody, *supra* note 18, at 1187 (“Traditionally, private parties—including donors—have no legal authority to sue to enforce charitable duties.”).

31. See FREMONT-SMITH, *supra* note 14, at 56–62 (outlining the historical development of federal tax exemptions for charitable organizations); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 437–39 (1960) (discussing the general effect of federal tax law on charitable organizations). This Note will not focus on the regulatory role of the IRS in charitable trust governance because regulation at the state level is preferred.

32. Brody, *supra* note 8, at 943; see also Helge, *supra* note 13, at 13 (“[T]he effectiveness of state regulation of the charitable sector depends almost entirely on the manner in which the attorney general performs his enforcement function.”).

ings.³³ But it was not until the end of World War II that attorneys general prominently took action to enforce charitable trust law.³⁴ By the early 1950s, several states adopted laws requiring charitable trusts to register and report to the attorney general,³⁵ and in 1954 the National Conference of Commissioners on Uniform State Laws adopted a model act.³⁶ A number of states have adopted this Uniform Act or similar legislation³⁷ in order to improve the supervision of the charitable sector by the attorney general.³⁸ For those organizations required to act in accordance with this legislation,³⁹ the most significant provision in the Uniform Act requires charities to register with the

33. FREMONT-SMITH, *supra* note 14, at 54; Fishman, *supra* note 12, at 259 (analogizing to English law, from which the attorney general's power was adopted, and noting that "[e]ven before the enactment of the Statute of Charitable Uses in 1601, suits were brought by the attorney general to enforce charitable trusts.").

34. FREMONT-SMITH, *supra* note 14, at 54, 311.

35. *Id.* at 312 (noting that following the New Hampshire Charitable Trustees Act, Rhode Island, South Carolina, Ohio, and Massachusetts legislatures passed similar bills between 1950 and 1954); Karst, *supra* note 31, at 479 (stating that New Hampshire was the first state to require registration and reporting); *see, e.g.*, N.H. REV. STAT. ANN. § 7:28 (LexisNexis 1955) (requiring registration and reporting for New Hampshire charitable trusts).

36. FREMONT-SMITH, *supra* note 14, at 54, 311–12 (explaining the adoption and approval by the House of Delegates of the American Bar Association, of the National Association of Attorneys General, and the Commissioners' draft of a Uniform Act for Supervision of Trustees for Charitable Purposes).

37. *Id.* at 312–13; Brody, *supra* note 8, at 951–52 & n.53 (“[T]welve states have some form of charity registration.”).

38. BIEMESDERFER, *supra* note 29, at 4 (noting that the Uniform Act has “several provisions intended to enhance the attorney general’s knowledge of the existence and administration of charities”); FREMONT-SMITH, *supra* note 14, at 54. “New York State has one of the most comprehensive notice and oversight schemes.” Brody, *supra* note 8, at 951–52. The Attorney General’s Charities Bureau manages all registration and annual reports, as well as responding to and investigating complaints about improper actions by charities. *See* N.Y. State Office of the Att’y Gen., *About the Charities Bureau*, CHARITIES NYS.COM, http://www.charitiesnys.com/about_new.jsp (last visited June 4, 2012). For the National Conference of Commissioners on Uniform State Laws’ recently developed model act on attorney general protection of charitable assets, see MODEL PROTECTION OF CHARITABLE ASSETS ACT (2011), *available at* http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%20Finals/MPOCAA_PreStyleFinal_Jul11.pdf.

39. *See* FREMONT-SMITH, *supra* note 14, at 315 (“[C]ertain charities are exempted from the filing requirements, most commonly religious organizations and governmental entities.”); Helge, *supra* note 13, at 14–15 (“Of these eleven jurisdictions, most exempt schools and hospitals . . . from the filing requirement.”).

attorney general upon creation or shortly thereafter and periodically report financial information.⁴⁰

To date only twelve states have adopted the Uniform Act or similar legislation to protect charitable trusts from breaches of the fiduciary duties of care and loyalty.⁴¹ But many more states have endowed their attorneys general with power to police charitable trusts that seek contributions through laws regulating charitable solicitation.⁴² In the 1940s, the increase of funds from the public to charitable organizations, coupled with “publicized scandals,” led to state legislation regulating the solicitation of charitable funds.⁴³ This regulatory power is often incorporated into the consumer protection duties of attorneys general, and is therefore generally better staffed and managed than the supervision by attorneys general over the fiduciary duties of trustees to the charitable trusts in honoring the intent of donors.⁴⁴

C. CRITICISMS OF THE REGULATION OF CHARITABLE TRUSTS

Even with these increased investigative powers, attorneys general have not curbed all instances of abuse and misuse of charitable trusts.⁴⁵ As mentioned above, recent litigation involving sales of charitable trusts demonstrates the unresolved issues within charitable trust law and the uncertainty involved in enforcing a trust in accordance with donors’ intent.⁴⁶ Schol-

40. FREMONT-SMITH, *supra* note 14, at 315.

41. *Id.* at 443.

42. *Id.* (explaining that “thirty-nine of the fifty states and the District of Columbia” have laws regulating “solicitations of funds for charitable purposes”); see STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 186 (Lynne M. Ross ed., 1990) [hereinafter STATE ATTORNEYS GENERAL] (explaining that the solicitation filing requirements stem from the fact that in the 1940s the number of charities increased, and as a result “fund raising became more sophisticated”). However, “[i]t should be emphasized that the regulation of charitable trusts and the regulation of charitable solicitations need not be mutually exclusive functions, even though in practice they are often treated that way.” *Id.*

43. STATE ATTORNEYS GENERAL, *supra* note 42.

44. FREMONT-SMITH, *supra* note 14, at 443.

45. See Fishman, *supra* note 12, at 263–64 (explaining that registration and reporting does not make the “attorney general an active or efficient monitor of nonprofit organization or improve charitable accountability” and most of this information is disregarded anyways).

46. See *supra* notes 4–7 and accompanying text; see also, e.g., THE ART OF THE STEAL (IFC Films 2010) (calling the “takeover” of the Barnes Foundation a “vast conspiracy” in which the attorney general was aware and even a party

ars have argued that changes in the regulatory authority must be made to improve accountability of the trustees.⁴⁷ Commentators have proposed supervisory organizations at the state and federal level, including committees that report to the attorney general or wholly separate entities.⁴⁸ The American Law Institute is currently working on a project on the governance of nonprofit organizations.⁴⁹ Chapter Six of the Principles of the Law of Nonprofit Organization will deal with supervision and enforcement, but the full scope of the project is expected to take several more years.⁵⁰ Similarly, the National Conference of Commissioners on Uniform State Law recently drafted a model act that states can adopt regarding attorneys general protection of charitable assets.⁵¹ The committee focused “on state attorneys general authority with regard to the protection of charitable assets, notice requirements, remedies, and principles to guide attorneys general in interstate and multi-state cases.”⁵² Although many scholars have addressed the problems that are embedded in charitable trust law, as explained in detail in Part II, a workable solution has yet to be found.

D. CHARITABLE TRUSTS IN UNCERTAIN TIMES

The unresolved issues in charitable trust law were exacerbated when the Great Recession hit. The charitable sector has

of the moving of the Barnes art collection to downtown Philadelphia, which was contrary to an explicit restriction by Barnes himself).

47. See, e.g., Brody, *supra* note 8, at 1035 (mentioning proposals for charities boards or supervisory commissions); Helge, *supra* note 13, at 1 (arguing in favor of a federal quasi-public agency to regulate charitable organizations).

48. Fishman, *supra* note 12, at 272, 287 (proposing a state advisory committee, which would operate under the attorney general to improve the investigation of wrongdoings and to develop the accountability of the charitable sector); Helge, *supra* note 13, at 1 (suggesting a “new, federal, quasi-public agency that would be the principal regulator of the charitable sector”); Karst, *supra* note 31, at 476–77 (proposing that a separate state-funded administrative agency hold the responsibility to regulate charities).

49. *Current Projects: Principles of the Law of Nonprofit Organizations*, A.L.I., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=3 (last visited June 4, 2012).

50. *Id.*

51. MODEL PROT. OF CHARITABLE ASSETS ACT (2011), available at http://www.uniformlaws.org/Shared/Docs/AM2011_Prestyle%20Finals/MPOCAA_PreStyleFinal_Jul11.pdf.

52. Memorandum from Stanley C. Kent to Connie T. Eyster, Statutory Revision Comm. Chair (Mar. 4, 2010), available at http://www.cobar.org/repository/Inside_Bar/TrustEstate/SRC/SRC%20UNIFORM%20ACTS%20REPORT-03-04-2010.pdf.

not been shielded from the economic downturn.⁵³ Although strict adherence to the donors' wishes is fundamental to charitable trust law and is supported by social and moral perspectives,⁵⁴ an economy in turmoil may provide a financial incentive to avoid this stringent requirement.⁵⁵ Yet without demonstrated compliance to the intent of donors, charitable giving, and creation of charitable trusts will be discouraged if donors' fear their wishes will not be honored.⁵⁶ Therefore, in situations where the conditions of a charitable trust become problematic, the intent of donors must be balanced against the public benefit, which is, after all, the overarching goal of charitable trusts.⁵⁷

II. THE DOWNFALLS OF ATTORNEYS GENERAL AS THE CHARITABLE TRUSTS' WATCHDOGS

This Part of the Note addresses the shortcoming of attorneys general as the overseers of charitable trusts and explores alternatives that could better balance donors' intent with the public benefit. Several elements contribute to the ineffectiveness of attorneys general, including: the variety of duties imposed on attorneys general that make charitable trusts a secondary concern; the practical concern of lacking funding in the

53. See GUIDESTAR, THE EFFECT OF THE ECONOMY ON THE NONPROFIT SECTOR 3 (2010) (showing a total decrease in contributions to nonprofit organizations in the first half of 2010 compared to the previous year); Noelle Barton & Holly Hall, *Donations Dropped 11% at Nation's Biggest Charities Last Year*, CHRON. PHILANTHROPY (Oct. 17, 2010), available at <http://philanthropy.com/article/A-Sharp-Donation-Drop-at-Big/125004/> (observing charitable giving has dropped significantly, and there are no signs that point to a recovery).

54. See Eisenstein, *supra* note 16, at 1757 ("Steadfast respect for donor intent has been justified by theories of private property, freedom of testation, and society's moral and legal obligation to the donor's largess.").

55. See, e.g., Brooks, *supra* note 3 (reporting that Fisk University chose to sell its donated collection of art out of financial necessity); Scott Jaschik, *Brandeis Will Keep Its Art*, INSIDE HIGHER ED (July 1, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/07/01/brandeis_settles_suits_by_agreeing_to_keep_its_art_collection (same at Brandeis University); see also Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 528 (2005) ("[I]f assets are held for narrow charitable purposes, redeployment within the charity can be impeded, perhaps even precipitating financial collapse.").

56. Eisenstein, *supra* note 16, at 1758.

57. Fishman, *supra* note 12; see also Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 39 (1993) ("[State governments] would have to balance the vital societal interest in promoting charitable work, with the intertwined need to maintain public confidence in, and financial support of, that work by ensuring honest and competent management.").

offices of attorneys general; and the innate political nature of being an elected official, which subjects attorneys general to improper political pressures. Specific examples from the Barnes Foundation and WCAL transactions illustrate the type of powerful political actors involved in these dealings, leading to the susceptibility of attorneys general failing to enforce charitable trusts. Additionally, this Part criticizes proposals, as briefly mentioned above, that would create an organization that reports to the state attorney general because such an organization would not remove political influences. Shortcomings of proposals that would create a separate, yet state-funded agency are also examined in this Part. As a final point, this Part will argue a federal agency would not adequately respond to the public interests at a state level.

A. LACK OF MOTIVATION, TIME, RESOURCES, AND POLITICAL INFLUENCE DIMINISH THE ABILITY OF ATTORNEYS GENERAL TO ENFORCE CHARITABLE TRUSTS

Attorneys general have shown to be ineffective watchdogs to curb exploitation of charitable trusts.⁵⁸ One reason for this ineffectiveness is a lack of motivation and time, which can be attributed to the numerous duties that are imposed on attorneys general.⁵⁹ Secondly, offices of the attorneys general generally lack adequate resources, such as funding and staff, needed to successfully oversee charitable trusts.⁶⁰ A third reason is that since the state attorney general is an “inherently political creature” the “incentives of this nearly universally elective office impel the incumbent to ignore cases that are politically dangerous and to jump into matters that are politically irresistible but implicate only ‘business’ decisions of charity managers.”⁶¹ As explained below, these foundational issues seem to be embedded in the offices of the attorneys general, and in order to

58. See Brody, *supra* note 8, at 947 (explaining that “only a few state attorneys general have been active in a realm firmly committed to state regulation and enforcement” of the “monitoring and oversight of charities”); Fishman, *supra* note 12, at 268 (“It has long been demonstrated that the state attorney general offices have neither the person-power, nor sometimes the will, to monitor nonprofits effectively.”); see also PRINCIPLES OF THE LAW OF NONPROFIT ORGS. pt. II, ch. 3, at 2 (Tentative Draft No. 1, 2007) (“It has seemed acceptable for charities to be governed casually, if not ceremonially, by their boards, allowing too much reign to management . . .”).

59. See Patton, *supra* note 26, at 165 (noting the “impossibly overwhelming case load” for which attorneys general are responsible).

60. Brody, *supra* note 8, at 939; Patton, *supra* note 26, at 166.

61. Brody, *supra* note 8, at 947–48.

avoid these problems the charitable-trust-supervisory role should be removed from attorneys general.

1. Attorneys General Lack the Interest, Motivation, and Time to Supervise Charitable Trusts

The offices of attorneys general lack the incentive necessary to effectively supervise charitable trusts. The habitual long list of duties of attorneys general—ranging from antitrust enforcement to the supervision of charitable trusts (at the bottom of the list)—stem from their role as the “chief legal officers of the states, commonwealths, and territories of the United States”⁶² Among all these obligations, regulation of the charitable sector comprises only a “small subset of the state attorney general’s larger role as a consumer protector.”⁶³ And the primary focus within that subset is the even smaller subset of charitable solicitations.⁶⁴ The degree of focus on the solicitation of charitable funds does not enable attorneys general to “detect breaches of fiduciary duties by charity managers,” and because charitable trusts generally do not “solicit funds from the public, their operations go virtually unchecked.”⁶⁵ Therefore, with respect to trustees’ violations of charitable trusts—fiduciary breaches—attorneys general are, as one scholar put it, “inactive, ineffective, understaffed, overwhelmed, or some combination of these.”⁶⁶

62. *About NAAG*, *supra* note 12 (“Typical powers of the Attorneys General, while varying from one jurisdiction to the next due to statutory and constitutional mandates, now include the authority to: institute civil suits; represent state agencies; defend and/or challenge the constitutionality of legislative or administrative actions; enforce open meetings and records laws; revoke corporate charters; enforce antitrust prohibitions against monopolistic enterprises; and enforce air, water pollution, and hazardous waste laws. In a majority of states, handle criminal appeals and serious state-wide criminal prosecutions; intervene in public utility rate cases; and enforce the provisions of charitable trusts.”); *see also* Brody, *supra* note 8, at 946 & nn.33–36 (“In recent years, state attorneys general have dramatically expanded their role in areas ranging from public health to antitrust to Wall Street.”).

63. Helge, *supra* note 13, at 24.

64. *See* FREMONT-SMITH, *supra* note 14, at 443 (observing that oversight of the solicitation of charitable funds “is far better staffed and managed in most states than the efforts to police fiduciary duties”); Helge, *supra* note 13, at 24 (“[S]tate attorneys general view their ‘biggest problem’ in the charitable sector as deceptive charitable solicitations.”).

65. Helge, *supra* note 13, at 24–25.

66. FREMONT-SMITH, *supra* note 14, at 443 (quoting Harvey P. Dale, Norman A. Sugarman Memorial Lecture: Diversity, Accountability, and Compliance in the Nonprofit Sector (Mar. 20, 1991)); *see also* Fishman, *supra* note

The judiciary has noticed this lack of enthusiasm to enforce charitable trusts. Courts have allowed private parties to bring suit to enforce the trust.⁶⁷ Courts have not usually granted standing to the general public because of the fear that fiduciaries, faced with constant harassment from litigation, would find it impossible and impractical to manage charitable funds.⁶⁸ Instead the interested private party would have to try to persuade the attorney general into filing suit.⁶⁹ However, attorneys general have reasons not to enforce the trust, such as lack of resources and political incentives. Additionally, private parties who are interested in the charitable trust are more likely to avidly pursue enforcement of the donors' wishes as compared to attorneys general.⁷⁰ Therefore, the courts developed the rule that an individual could bring a lawsuit when the attorney general failed to do so if the private party could demonstrate a special benefit or interest in the trust.⁷¹

As an example of private-party action, a group called "SaveWCAL" sued to intervene in the controversial sale of St. Olaf College's radio station WCAL.⁷² Interestingly, the Minnesota Attorney General failed to act even after determining that WCAL was in fact a charitable trust.⁷³ The Attorney General was apparently uncertain about what "course of action [to take] to prevent or to cure a breach of trust."⁷⁴ During a hearing in the litigation the Deputy Attorney General stated that the "Attorney General was anticipating that St. Olaf would petition the court on 'how it intends to use' the sale proceeds . . ."⁷⁵ The judge replied: "What if they don't? I can't go out and force them

12, at 262 ("Staffing problems and a relative lack of interest in monitoring nonprofits make attorney general oversight more theoretical than deterrent.").

67. Helge, *supra* note 13, at 36.

68. FREMONT-SMITH, *supra* note 14, at 324–25.

69. *Id.* at 325.

70. Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1431 (1998).

71. See Appellant's Brief and Appendix at 20, *In re WCAL Charitable Trust*, No. A09-703 (Minn. Ct. App. Dec. 29, 2009) ("When the Attorney General fails to protect the public interest, the law allows a person with sufficient interest who understands the purpose and the operation of the trust to do so . . ."); FREMONT-SMITH, *supra* note 14, at 328 ("The general rule is that a person must be able to show that he is entitled to a benefit from the trust beyond the benefit to which members of the public in general are entitled." (citing RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. b (1959))).

72. *In re WCAL Charitable Trust*, 2009 WL 5092650, at *1.

73. Appellant's Brief and Appendix, *supra* note 71, at 18.

74. *Id.* at 19.

75. *Id.*

to.”⁷⁶ This demonstrates that at times private parties are forced to act and that attorneys general are reluctant to act when they would be caught in the middle of a controversy.

In contrast with the inaction of the Minnesota Attorney General, the Tennessee Attorney General swooped in when Fisk University intended to sell the Stieglitz Art Collection.⁷⁷ Unfortunately, the Attorney General could only develop half-measures to forestall the art sale.⁷⁸ Tennessee trial and appellate courts concluded that the Attorney General’s “temporary fix” was insufficient.⁷⁹ Through further appeals processes, the Tennessee Attorney General is still attempting to prevent the sale.⁸⁰ Although Tennessee’s Attorney General is actively attempting to prevent the sale of the charitable trust, his attempts have proven unsuccessful in protecting the intent of the donor to keep the art at Fisk University.⁸¹

States have recognized the difficulties faced by attorneys general in monitoring charitable trusts. To assist attorneys general in overcoming difficulties in their supervisor role—similar to those that the Minnesota and Tennessee Attorneys General experienced—a number of states have a charity bureau or separate division within the attorney general’s office.⁸² However these bureaus are not any more active or passionate about enforcing charitable trusts than attorneys general themselves.⁸³

Comparable to charity bureaus within the offices of the attorneys general, some scholars have proposed advisory commissions that enforce charitable trusts and operate under the su-

76. *Id.*

77. See Press Release, Office of the Tenn. Att’y Gen., Attorney General Files for Potential Temporary Stieglitz Collection Display Arrangement (Sept. 10, 2010), available at <http://www.tn.gov/attorneygeneral/press/2010/story/pr10-33.pdf>.

78. See *In re Fisk Univ.*, No. 05-2994-III, at 1–2 (Tenn. Ch. Ct. Sept. 14, 2010), available at <http://www.tennessean.com/assets/pdf/DN164021914.PDF>.

79. *Id.* at 2.

80. See Marsteller, *supra* note 7.

81. See *In re Fisk Univ.*, No. 05-2994-III, at 5 (allowing a sale that would keep the art at Fisk University only half the time); Marsteller, *supra* note 7 (noting that this ruling was upheld on appeal); Jennifer Brooks, *Fisk, AG Unhappy With Art Ruling*, TENNESSEAN, Nov. 5, 2010, at Main News (discussing the 2010 ruling).

82. STATE ATTORNEYS GENERAL, *supra* note 42, at 183; see, e.g., CHARITIES NYS.COM, http://www.charitiesnys.com/about_new.jsp (last visited June 4, 2012).

83. Fishman, *supra* note 12, at 268.

pervision of the attorney general.⁸⁴ Although advisory commissions have qualities that would improve the current regulation of charitable trusts, the potential downfalls prove it unworkable. First and foremost, the ultimate ability to determine charitable trust mismanagement and prosecution would be left to attorneys general, thus not avoiding the intrinsic problems associated with their offices.⁸⁵ Furthermore, just as attorneys general are motivated by political goals,⁸⁶ seemingly neutral actors may have other objectives in mind than serving the intended public purpose of the charitable trust. Additionally, politically influential individuals support commissions and thus those powerful parties could influence the neutrality of the advisory commission.⁸⁷

These concerns can be analogized to apprehensions about presidential advisory commissions. Presidential advisory commissions have been described as unfavorable because they allow the President to avoid his responsibilities, are not more motivated or effective than the President, are in fact controlled by the White House, and the commission's suggestions are ultimately ignored when action actually is taken.⁸⁸ Therefore, it is unlikely that advisory commissions under the control of attorneys general would solve the issues of uninterested and inactive supervision.

In sum, the time and focus that attorneys general typically devote to charitable trusts has contributed to their ineffectiveness as charitable trust watchdogs. Even though courts have recognized the problems associated with an inactive regulator by increasingly granting standing to private parties to enforce charitable trusts, private suits have repercussions of their own.⁸⁹ Additionally, separate divisions within the offices of the attorneys general, which were created to support the supervi-

84. See, e.g., *id.* at 272.

85. See Helge, *supra* note 13, at 59–60 (“[R]elying on the attorney general to prosecute wrongdoings found by the commission invokes all of the previously discussed financial, institutional, political, and agency constraints.”).

86. For a discussion of how politics affects decisionmaking in the offices of attorneys general, see *infra* Part II.A.3.

87. THOMAS R. WOLANIN, PRESIDENTIAL ADVISORY COMMISSIONS 141 (1975) (“[T]hose who advocate that commissions be created are generally politically sophisticated, influential people . . .”).

88. *Id.* at 3.

89. See generally Brody, *supra* note 18, at 189 (explaining that courts have “not been consistent in the legal theory they apply, and they sometimes do not apply their chosen legal theory accurately” to questions of standing and the spillover effect of these judicial decisions).

sion by attorneys general, have not shown to cure the lack of attention given to charitable trusts. Although the multiple duties vested to the offices of the attorneys general can explain part of this indifference for charitable trusts, the lack of resources and political pressure also adds to the disappointment of attorneys general in curbing the abuse of charitable trusts.

2. Lack of Resources in the Offices of Attorneys General

Attorneys general also lack the resources needed to enforce charitable trusts. Because there is typically a large volume of charitable trusts in each state, attorneys general need to be equipped with adequate resources, including information, time, staff, and funding, to investigate and prosecute charitable wrongdoings.⁹⁰ However, as discussed above, the charitable sector is usually only a subset of the consumer protections obligations of the attorneys general.⁹¹ Additionally, because of the financial crisis state budgets likely will not allow extra funding to be allocated to monitoring charitable trusts.⁹² “As a practical matter, then, only abuses that (1) involve high dollar amounts, (2) receive media attention and notoriety, or (3) involve particularly reprehensible behavior, are subject to the attorney general’s scrutiny.”⁹³ The thousands of other charitable trusts and organizations are left with no oversight.⁹⁴

Insufficient information regarding charitable trusts plays a role in attorneys general neglecting the exploitation of the trusts.⁹⁵ Only a handful of states have enacted some sort of registration and reporting with the attorneys general for charitable organizations, including charitable trusts.⁹⁶ Since the majority of states do not require reporting that identifies fiduciary breaches (but instead focuses on charitable solicitation), abuses

90. Patton, *supra* note 26, at 166.

91. Helge, *supra* note 13, at 24.

92. See ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION’S IMPACT 1 (Jan. 9, 2012), <http://www.cbpp.org/files/9-8-08sfp.pdf> (explaining how budget shortfalls have prompted lawmakers to make deep cuts in critical public services).

93. Patton, *supra* note 26, at 166.

94. *Id.*

95. See Helge, *supra* note 13, at 15 (“[T]he forty jurisdictions that do not require annual reporting from non-soliciting charities do not receive any information, and thus cannot discern breaches of fiduciary duties . . .”).

96. See Brody, *supra* note 8, at 951–52 & n.53.

of charitable trusts,⁹⁷ which do not always solicit funds from the public, will escape detection by the attorneys general.

Moreover, organizations that constitute the majority of the revenue for the charitable sector are exempt from the registering and reporting requirements.⁹⁸ Exempt institutions include “churches and other religious organization[s], educational institutions, and hospitals and organizations that annually raise less than a particular amount.”⁹⁹ Only eleven states require reporting for nonsoliciting charities and organizations, such as universities and hospitals that compose seventy percent of charitable resources.¹⁰⁰ Attorneys general are unable to fulfill their duty to oversee charitable trusts that they may not even know exist. As a result a substantial number of fiduciary breaches will go unnoticed, not only because attorneys general are more focused on corrupt solicitation, but also because of the lack of information supplied to attorneys general regarding the management of the trusts.¹⁰¹

This lack of information, coupled with the many other obligations imposed on attorneys general, disincentivizes attorneys general to recognize and curb abuses of charitable trusts, and is only exacerbated by states’ lack of monetary resources.¹⁰² The United States is currently recovering from its largest recession since the 1930s.¹⁰³ Because of this financial crisis the states are suffering huge budget deficits that compel substantial reduction in services.¹⁰⁴ With no end in sight, significant public services will likely continue to struggle with funding shortages for years.¹⁰⁵ This lack of funding, for example, does not permit attorneys general to staff their offices adequately, leading to in-

97. FREMONT-SMITH, *supra* note 14, at 443.

98. *See id.* at 315.

99. STATE ATTORNEYS GENERAL, *supra* note 42, at 187.

100. *See Helge, supra* note 13, at 14–15, 15 n.77.

101. *See id.* at 15 (suggesting that a lack of reporting makes it difficult to “discern breaches of fiduciary duties from a substantial majority of charitable organizations”).

102. *Id.* at 14 n.74; Komoroski, *supra* note 27,.

103. *See MCNICHOL ET AL., supra* note 92 (noting the recession that began in 2007 has caused the largest collapse in state revenues on record); Samuelson, *supra* note 1.

104. MCNICHOL ET AL., *supra* note 92; David Von Drehle, *The Other Financial Crisis*, TIME, June 28, 2010, at 22 (describing state budget deficits).

105. MCNICHOL ET AL., *supra* note 92.

adequate review of the reported information.¹⁰⁶ This shortage of resources only adds to the lack of accountability in the charitable sector.¹⁰⁷

3. Attorneys General Need the Vote

Although “attorneys general almost universally lack sufficient resources to effectively oversee and enforce charitable gifts,”¹⁰⁸ the laxity cannot be attributed solely to the lack of resources.¹⁰⁹ The fact that attorneys general are elected officials¹¹⁰ may also affect the motives of attorneys general to intervene on abuses of charitable trusts.¹¹¹ Attorneys general are the second most prevalent statewide-elected office, next to governors.¹¹² Since attorneys general are surrounded by the media and politics,¹¹³ it is not surprising that attorneys general will ignore the transactions that could hurt them politically, yet prosecute those that are politically favorable.¹¹⁴

106. See FREMONT-SMITH, *supra* note 14, at 445 (explaining that the “few active programs in existence operate with limited staff and inadequate financial resources”); Fishman, *supra* note 12, at 262–63.

107. See Blasko et al., *supra* note 57, at 38–39; Helge, *supra* note 13, at 20–21; Komoroski, *supra* note 27.

108. Loving, *supra* note 2, at 460.

109. Brody, *supra* note 8, at 952–53.

110. STATE ATTORNEYS GENERAL, *supra* note 42, at 15; NAT’L ASSOC. OF ATTORNEYS GEN., http://www.naag.org/about_naag.php (last visited June 4, 2012) (“The Attorney General is popularly elected in 43 states . . . and is appointed by the governor in five states.”).

111. Brody, *supra* note 8, at 975 (“The typical state legal regime and political pressures produce the twin weaknesses of the charitable sector: the lack of energy and initiative on the part of many nonprofit managers, and the lack of resources and zeal in enforcing the public’s interest on the part of many charity regulators.”).

112. STATE ATTORNEYS GENERAL, *supra* note 42, at 15.

113. See Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1018 (1987) (detailing how the attorney general operates in the world of politics and media).

114. Brody, *supra* note 8, at 947–48 (“The incentives of this nearly universally elective office impel the incumbent to ignore cases that are politically dangerous and to jump into matters that are politically irresistible but implicate only ‘business’ decisions of charity managers.”). Additionally, outside actors can influence the political campaigns of attorneys general. EMILY GOTTLIEB & AMY WIDMAN, CTR. FOR JUSTICE & DEMOCRACY, STATE ATTORNEYS GENERAL: THE PEOPLE’S CHAMPION 1 (2008), available at http://www.ctriallawyers.org/_docs/public/CJD_State_Attorneys_General.pdf (demonstrating influence on attorneys general by arguing “insurance, tobacco, pharmaceutical and other industries . . . have launched unfair, misleading assaults against state Attorneys General, even to the point of manipulating state elections to defeat popular pro-consumer candidates for state Attorneys General”).

As recognized by scholars, the controversial case *In re Milton Hershey School Trust*¹¹⁵ demonstrates how political pressures on attorneys general can dictate the officials' actions.¹¹⁶ In 2001, the Milton Hershey School, which was founded in 1909 by Milton Hershey and his wife for the benefit of orphan children,¹¹⁷ became financially challenged.¹¹⁸ The trustees became concerned about the stability of the School Trust and, after meeting with the Pennsylvania Attorney General, who had expressed similar concerns, understood that they could sell their interest in the trust.¹¹⁹ After public disagreement over the sale, the Attorney General, who apparently had a change of heart (or more likely, because he was running for governor)¹²⁰ brought suit to stop the sale.¹²¹ Some have alleged that this course of action was designed to protect the Attorney General's political goals.¹²² Similarly, if the Attorney General had been running for reelection, instead of running for governor as in this case, he would have had the same political pressures to please the public because he needs the vote.

Similarly, political considerations—although not the only factor—led Walter F. Mondale, then Minnesota Attorney General, to continue the investigation his predecessor, Miles Lord, began of the Sister Kenny Institute, a Minneapolis-based charitable foundation developed to benefit polio research.¹²³ Mondale uncovered a “cesspool” in which “millions of dollars were being siphoned off for the benefit of one or two officers” of the organization.¹²⁴ In his autobiography, Mondale explains that since he was going to be up for election he thought the Sister Kenny Institute investigation would establish him with Minnesotan vot-

115. 807 A.2d 324 (Pa. Commw. Ct. 2002).

116. Brody, *supra* note 8, at 984–99. However, these circumstances are unusual in that here political influences actually acted to protect the trust, versus the more common result of destruction of the trust.

117. *In re Milton Hershey Sch. Trust*, 807 A.2d at 328.

118. *See id.* at 329; Brody, *supra* note 8, at 989–90.

119. Brody, *supra* note 8, at 990–91.

120. *See id.* at 946 (“Political cynics believe that ‘A.G.’ stands not for ‘attorney general’ but for ‘aspiring governor.’”).

121. *Id.* at 989–91.

122. The attorney general's opponent in the governor's race was not shy in pointing out that “[i]t was Fisher's office who told the Hershey board they should sell in the first place.” *Id.* at 998 n.302.

123. WALTER F. MONDALE WITH DAVID HAGE, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 15 (2010).

124. *Id.*

ers.¹²⁵ Mondale was influenced by political considerations to get his foot in the door in order to carry out his programs and policies.¹²⁶ This will always be a practical concern for elected officials, because unless they are elected they will not have the opportunity to carry out their policies.

Thus, although these cases demonstrate the unusual circumstance—where political influences actually acted to protect the trust, compared to the more common result of destruction of the trust—they further demonstrate political incentives acting on attorneys general decisions to invoke their enforcement power or remain “passive law office[s].”¹²⁷

Political influences on an attorney general’s motive either to step in and enforce the trust or turn a blind eye are further heightened by the fact that in some of these complex dealings there are powerful actors within the state seeking the unauthorized deviations from the charitable trust’s purpose.¹²⁸ The WCAL and the Barnes Foundation cases illustrate these powerful influences.

WCAL was a radio station created from charitable donations, and St. Olaf College was the trustee of this charitable trust. By 2004 WCAL was broadcasting to more than 80,000 listeners “classical music, public-affairs programs, and religious services” that echoed “the intellectual, spiritual, and cultural traditions of St. Olaf.”¹²⁹ Even though WCAL was serving its intended mission,¹³⁰ St. Olaf was questioning the value the radio station contributed to the educational institution.¹³¹ When Minnesota Public Radio (MPR) made a multi-million dollar of-

125. *Id.*

126. *Id.* Mondale’s investigation of the Sister Kennedy Institute was “correct and legal, not just the efforts of a young political hotshot.” *Id.* at 18. In fact, Mondale realized that as attorney general, he was the “trustee of charitable trusts” and was the “master of these disputes.” *Id.*

127. *See id.* at 20 (describing how Mondale changed the role of Attorney General in Minnesota).

128. *See, e.g.,* SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT, & POLITICAL MANIPULATION AT AMERICA’S LARGEST CHARITABLE TRUST* 279–81 (2006) (detailing the Attorney General’s refusal to continue investigation); MONDALE WITH HAGE, *supra* note 123, at 16 (noting the Sister Kenny “board included distinguished people from the Twin Cities business and civic community . . . [s]o it was a terrible shock when the public and the foundation’s board learned that some of its leaders were corrupt”).

129. *In re WCAL Charitable Trust*, No. A09-703, 2009 WL 5092650, at *1–2 (Minn. Ct. App. Dec. 29, 2009).

130. *See id.* at *1. St. Olaf was also required to show that the radio station benefited the public interest in order to be licensed by the FCC. *Id.*

131. Appellant’s Brief and Appendix, *supra* note 71, at 11.

fer to St. Olaf to buy the broadcasting license and all the associated assets, St. Olaf willingly accepted.¹³² Neither St. Olaf nor MPR notified the Minnesota Attorney General of the sale nor sought judicial approval.¹³³ Furthermore, the directors of WCAL, which the Federal Communications Commission required to ensure that the public was permitted to “participate in significant policy decisions,” were not included in this decision and learned of the offer four days after St. Olaf’s acceptance.¹³⁴ It was SaveWCAL, a corporation created to preserve WCAL, which disclosed the sale to the Attorney General, who then failed to take any action to prevent the transaction.¹³⁵

The potential peril for an attorney general or other elected official who opposes a major media company was demonstrated during the MPR campaign for financing for the transaction. MPR first turned to the Housing & Redevelopment Authority (HRA) to issue tax-exempt bonds for the acquisition.¹³⁶ When the HRA denied the application, MPR publicly criticized the individual HRA commissioners who voted against its application.¹³⁷ Although MPR then successfully applied to another public authority to obtain the bonds,¹³⁸ only SaveWCAL challenged this final sale.¹³⁹ It is reasonable to assume that an elected politician would avoid taking action in controversial transactions, such as the sale of WCAL, in order to evade politically endangering his or her reputation.

132. *In re WCAL Charitable Trust*, 2009 WL 5092650, at *2; Appellant’s Brief & Appendix, *supra* note 71, at 11–12.

133. *In re WCAL Charitable Trust*, 2009 WL 5092650, at *2.

134. *Id.*

135. *Id.* at *3.

136. See Petition to Redress Breach of Trust at 11–12, *In re WCAL Charitable Trust*, No. 66-CV-083602, 2009 WL 6767286 (Minn. Dist. Ct. Feb. 25, 2009) (discussing MPR’s attempt to secure bond financing from HRA).

137. See Exhibit DDD at 2, *In re WCAL Charitable Trust*, No. 66-CV-083602, 2009 WL 6767286 (demonstrating MPR’s use of its website to target commissioners who voted against the resolution). Mondale explains a similar experience, stating: “[a]fter all the publicity on the Sister Kenny Case, I was starting to take some hits in the political arena from people who accused me of becoming a tyrant operating out of the attorney general’s office.” MONDALE WITH HAGE, *supra* note 123, at 18.

138. Petition to Redress Breach of Trust, *supra* note 136, at 12 (noting that the St. Paul Port Authority voted to issue tax-exempt bonds to finance the transaction); Nicole Garrison-Sprenger, *MPR Gets \$11.5M in Financing from St. Paul Port Authority*, MINNEAPOLIS ST. PAUL BUSS. J. (Sept. 28, 2005, 9:31 AM), <http://www.bizjournals.com/twincities/stories/2005/09/26/daily25.html>.

139. See *In re WCAL Charitable Trust*, 2009 WL 5092650, at *1–4.

As with the WCAL radio station, influential actors were interested in the Barnes Foundation.¹⁴⁰ The Barnes Foundation was a charitable trust developed by Dr. Albert Barnes composed of “some of the world’s finest examples of post-impressionist and early modern works”¹⁴¹ Because Barnes intended to use the Foundation for educational purposes, not as an art museum, he placed strict restrictions on the Foundation, including a provision that the collection should never be moved from its original location in Merion, Pennsylvania.¹⁴² However, after the death of Barnes, the Foundation struggled to prevent bankruptcy.¹⁴³ To save the Foundation, the board of directors, after pressure from the Pennsylvania Governor and Attorney General,¹⁴⁴ agreed to expand its board in consideration for financial assistance from other nonprofit organizations.¹⁴⁵

Shortly thereafter, the expanded board successfully brought a petition to the court in a *cy prè*s hearing asking permission to move the Barnes to Philadelphia because it was financially impossible to keep the Barnes collection in the current location.¹⁴⁶ When the “Friends of the Barnes,” composed partly of former students, petitioned the court to reopen the proceedings regarding the move, the petition was dismissed holding the petitioners did not have standing.¹⁴⁷ Opponents of the move argue that the expanded Board never wanted to preserve the Barnes Foundation in Merion and that there was no one to stand up against these powerful political forces, such as

140. THE ART OF THE STEAL, *supra* note 46 (“The name of the game is, if you’re gonna leave your paintings somewhere, don’t let there be a politician within 500 yards.”).

141. FAQs, BARNES FOUND., <http://www.barnesfoundation.org/about/faq> (last visited June 4, 2012).

142. Eisenstein, *supra* note 16, at 1747, 1749–51; THE ART OF THE STEAL, *supra* note 46. Another motivating factor for Dr. Barnes’s desired location for the Foundation was his animosity toward the Philadelphia elite. *Id.*

143. Eisenstein, *supra* note 16, at 1752.

144. THE ART OF THE STEAL, *supra* note 46 (presenting Pennsylvania Attorney General Mike Fisher, stating that “I had to explain to them that . . . the attorney general’s office would have to take some action involving them that might have to change the complexion of the board”).

145. Eisenstein, *supra* note 16, at 1752–53; THE ART OF THE STEAL, *supra* note 46.

146. THE ART OF THE STEAL, *supra* note 46.

147. *In re Barnes Found.*, 871 A.2d 792, 793–94 (Pa. 2005); Jason Edward Kaufman, *Barnes Foundation Wins Ruling to Move to City Centre: Court Dismisses Petitions From Two Organisations Hoping to Keep the Collection in Merion County*, ART NEWSPAPER, June 1, 2008, <http://www.theartnewspaper.com/article.asp?id=8571>.

the Pennsylvania Governor, Attorney General, and the heads of the influential nonprofit organizations involved in the transaction.¹⁴⁸

Therefore, to avoid controversial and daunting litigation—similar to the legal battles that took place in the WCAL and Barnes Foundation cases—and the overwhelming issues that plague the offices of the attorneys general, such as the lack of motivation by attorneys general diligently to monitor charitable trusts and the insufficient resources allocated to most of the offices of attorneys general, some have suggested supervision of charitable trusts should be independent from the attorneys general.¹⁴⁹ An organization with the exclusive power to monitor and enforce charitable trusts would allow potential fiduciary breaches to be detected and avoided. Although political influences and ulterior motives cannot be completely removed in matters regarding public interest, such motives would be less persuasive to an independent party not seeking election.

B. A STATE AGENCY IS BETTER SUITED TO CURB CHARITABLE TRUST ABUSES VERSUS AN AGENCY AT THE FEDERAL LEVEL

Although independence from attorneys general seems to be ideal, scholars have questioned if supervision of charitable trusts should remain at the state level or move to the federal level.¹⁵⁰ Because only twelve states subject nonsolicitation charitable trusts to registration and reporting requirements, and there are regulatory variations among those states, scholars have expressed concerns about forum-shopping in an effort to avoid strict regulations.¹⁵¹ Recognizing forum-shopping problems, in the 1980s the National Association of Attorneys General and the National Association of State Charity Officials began working with the IRS to improve information gathering,¹⁵² and thus avoid forum-shopping incentives.

Although federal regulation may diminish forum-shopping concerns, federal regulation of charitable trusts would not adequately detect and defer fiduciary breaches of charitable trusts. Recently, one commentator proposed creating a new self-funded

148. THE ART OF THE STEAL, *supra* note 46.

149. See *e.g.*, Karst, *supra* note 31, at 476–77.

150. Fishman, *supra* note 12, at 268; Helge, *supra* note 13, at 54.

151. FREMONT-SMITH, *supra* note 14, at 55 (“[W]ide discrepancies in the regulatory climate encouraged forum-shopping and facilitated evasion of regulation, limiting the ability of these states to correct many abuses.”).

152. *Id.*

federal agency.¹⁵³ In effect, the proposed agency would replace the IRS's obligations of regulating federal tax laws for charitable organizations, including those that are exempt.¹⁵⁴ In essence, this proposed solution would be focused on the charitable status of organizations for tax purposes.¹⁵⁵ Although this proposal seems to solve charities' wrongful manipulation of potential tax-exempt status¹⁵⁶—crucially without the assistance of government funding—it does not seem to adequately solve deviations of donors' intent in charitable trusts. For example, as described above with the Barnes Foundation, the Foundation still serves the public interest by moving to Philadelphia and therefore still maintains its charitable tax status; however, housing the collection in Philadelphia was explicitly against Barnes' intent for his art.¹⁵⁷ Thus, it is unlikely that a federal agency focused on the tax status of charitable trusts would prevent fiduciary breaches or mismanagement of the trusts.

Additionally, concerns about inconsistencies between the states regulation schemas fostering forum-shopping¹⁵⁸ may not be such a large fear for charitable trusts. Many charitable trusts are created in local areas to serve interests that are near and dear to the donors' hearts.¹⁵⁹ A state regulatory agency would be better equipped to understand, evaluate, and address the public interest being served in that particular area.¹⁶⁰ Federal supervisors are too far removed from the localized concerns of the charitable trusts.¹⁶¹ Furthermore, the IRS tax regulations that have improved reporting would not be altered if a regulator agency was at the state level versus the federal level. A state agency and the IRS could form a relationship to share information and monitoring, as the National Association of Attorneys General and the National Association of State Charity

153. Helge, *supra* note 13, at 70.

154. *Id.* at 68–81.

155. *Id.* at 76–79.

156. *Id.* at 79–81.

157. See THE ART OF THE STEAL, *supra* note 46.

158. FREMONT-SMITH, *supra* note 14, at 444.

159. See Karst, *supra* note 31, at 482 (“[I]t should be noted that there are some real values to be maintained in keeping charities and their control close to the communities from which they spring, and which they seek to serve.”).

160. See *id.* (identifying states as regulatory laboratories best able to serve local interests).

161. *Cf. id.* (arguing that federal intervention is justified only after state experimentation has demonstrated the ideal model).

Officials did in the 1980s,¹⁶² to prevent any possible forum-shopping incentives. Thus, an independent, self-sustaining, state agency with the power to enforce charitable trusts would be ideal.

III. CREATING AN EFFECTIVE WATCHDOG OF CHARITABLE TRUSTS

In order to effectively supervise charitable trusts, self-funded, independent, quasi-state agencies need to be developed. These non-governmental agencies would be independent from, and replace, state attorneys general as the watchdogs of charitable trusts. These agencies would be responsible for the information collecting, evaluating, and prosecution of charitable trust abuses.¹⁶³ Each agency would be composed of a board of directors with members that would be invested in the public interest, but would not have any direct attachments to the particular trusts.¹⁶⁴ This Part explains the responsibilities and formation of these agencies.

A. RESPONSIBILITIES TO MONITOR REGISTRATION AND REPORTING

These quasi-state agencies would assume the obligations of the state attorneys general to regulate charitable trusts and to serve the public interest. As a result, the agencies would be responsible for all the duties associated with the role of attorneys general as charitable trust watchdogs.¹⁶⁵ Additionally, the agencies would be responsible for maintaining detailed records of all charitable trusts in the state. Following the lead of the New York Charities Bureau's registration and reporting scheme, charitable trusts would be required to register the

162. FREMONT-SMITH, *supra* note 14, at 55.

163. Helge, *supra* note 13, at 64 (explaining the enforcement model as granting "the regulatory body . . . authority to promulgate rules, investigate breaches of these rules, and bring enforcement actions for wrongdoings").

164. *But see id.* at 71 (arguing that "inclusion of the charitable sector's voice in its oversight is vital to the effectiveness of the sector's regulation").

165. The legislature has the power to take duties away from the attorney general, thus the legislature would vest the quasi-state agency with the attorney general's regulatory obligations regarding charitable trusts. *See Clayton, supra* note 9, at 528 ("There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such authority he typically may exercise all such authority as the public interest requires." (quoting *Florida ex rel Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976))).

trust with the state agency and supply annual reporting.¹⁶⁶ Registration would include not only the trust's financial information, but also the trust instrument explaining the purpose and restrictions imposed on the trust.¹⁶⁷ In order to account for all charitable trusts, organizations like universities and hospitals would not be exempt from the registration and reporting requirements.¹⁶⁸ Non-solicitation charities would also be required to comply with the registration and reporting. Moreover, contrary to most of the current practices of attorneys general,¹⁶⁹ the solicitation of charitable funds would not be the agency's primary concern because the majority of charitable trusts do not solicit public funding.¹⁷⁰ Although this may cause consternation for potential mistreatment of funds that are solicited for charitable purposes, that fear can be displaced by maintaining the attorney general as the regulator for solicitation of charitable funds.¹⁷¹ In the unusual event that a charitable trust solicits funds, the quasi-state agency would collaborate with the attorney general to effectively monitor potential abuses of both fiduciary obligations and solicitation.¹⁷²

166. See Brody, *supra* note 8, at 951–52, 952 n.54. However, unlike the New York Charities Bureau, the proposed agencies would not operate under the state attorney general.

167. See, e.g., MINN. STAT. ANN. § 317A.111 (West 2011) (establishing corporate registration requirements under Minnesota law); PROTECTION OF CHARITABLE ASSETS ACT § 5 (Tentative Draft 2011), available at http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011feb_draft.pdf (identifying information to be held in an attorney general's registry under model code); N.Y. State Office of the Att'y Gen., *FAQs—Registration*, CHARITIES NYS.COM, http://www.charitiesnys.com/faqs_reg_new.jsp (last visited June 4, 2012) (listing registration requirements for New York charities).

168. *But see* PROTECTION OF CHARITABLE ASSETS ACT § 5 (Tentative Draft 2011), available at http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011feb_draft.pdf (creating a category of exemptions from registration requirements).

169. FREMONT-SMITH, *supra* note 14, at 443 (explaining that attorneys general focus most of their attention and resources on the solicitation of charitable funds).

170. See *id.* at 375 (explaining that the 1960 Karst proposal has not been adopted by states because the focus has shifted to federal government and IRS enforcement solutions and because of problems with state regulation of Internet solicitation).

171. See STATE ATTORNEYS GENERAL, *supra* note 42 (suggesting that in practice the regulation of charitable trusts and the regulation of charitable solicitation are often mutually exclusive).

172. Thus the attorney general, partnered with the IRS, would still be responsible for enforcing proper charitable solicitation and the agency would be responsible for enforcing the restrictions set forth in the charitable trust document and ensuring that the trust served the purpose it was intended to serve.

The agencies would have the responsibility to methodically review the registration and reports and evaluate if any further investigation is needed to prevent abuse or mismanagement.¹⁷³ Since this would be the agency's sole duty, the issue of this obligation becoming a secondary concern would be obsolete.¹⁷⁴ Following an enforcement model of regulation, the agency would be authorized by the state legislature to enforce a charitable trust if the trustee breached a fiduciary duty.¹⁷⁵ An enforcement model of regulation would cure the problems that underlay commissions or bureaus that operate under an advisory model of regulation.¹⁷⁶ In addition, because of the quality of information provided to the agency and the effective review of that information, the agency would be better equipped to propose successful solutions if a charitable trust became impossible or impractical. Thus, if absolutely necessary, in a *cy pres* hearing the agency could recommend plausible modifications to the restrictions of the charitable trust without completely overrunning the intent of donors.

B. DEVELOPING THE BOARD OF DIRECTORS

The success of the agency would stem from the construction of the board of directors. The volunteer board would be composed of individuals who have a strong interest and experience in the charitable sector.¹⁷⁷ The set number of board members would vary from state to state depending on the demand for charitable trust regulation. States with more charitable trusts would require an agency with more personnel to support

173. See Fishman, *supra* note 12, at 273. Similar to elements of the Uniform Law Commission's ongoing project to draft a model act on attorney general protection of charitable assets, the agency could conduct an investigation if "a law or legal duty concerning the use or management of charitable assets has been violated." PROTECTION OF CHARITABLE ASSETS ACT § 4 (Tentative Draft 2011), available at http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011feb_draft.pdf.

174. Furthermore, nonprofit organizations and charities have become increasingly large, complex, and pervasive, and having a separate state agency to monitor the sector is reasonable. See THE ART OF THE STEAL, *supra* note 46.

175. See Clayton, *supra* note 9, at 528 (illustrating how state legislatures can empower agencies to act in lieu of the attorney general). But see Fishman, *supra* note 12, at 273-74 (advocating for the assistant attorney general to initiate actions against breaches of duty).

176. See Helge, *supra* note 13, at 60 (identifying lack of uniformity, cost, politicization, and agency restraints as reasons the advisory model fails).

177. See Fishman, *supra* note 12, at 273 (illustrating an ideal mixture of individuals to constitute charitable commissioners).

the demand.¹⁷⁸ The members of the charitable trust agency's board would be appointed by the governor and the state supreme court—similar to the boards created by the Minnesota legislature, such as the Lessard-Sams Outdoor Heritage Council and the Minnesota State Art Board.¹⁷⁹

Nomination by seemingly neutral actors, such as justices of the state supreme court, would not ensure noncorrupt behavior. For example, the Bishop Estate trust—a charitable trust created by Princess Bernice Pauahi Bishop, one of the largest landowners and the richest woman in the Hawaiian kingdom, to erect and maintain the Kamehameha Schools to benefit the children of the Hawaiian Islands—involved corrupt Hawaii Supreme Court justices taking millions of dollars from the trust for personal gain.¹⁸⁰ Additionally, appointment by an elected official is similar to advisory commissions,¹⁸¹ which are supervised by that official and therefore still subject to political influences. Although not all politics would be removed, to curb these potential conflicts the attorney general would not supervise the enforcement agency. Furthermore, appointment would at least remove the direct political influences that are inherent with elected officials.¹⁸² In a further effort to prevent outside influences affecting the board members' neutrality, if a conflict of interest arose the affected board member would be required to remove him or herself from the monitoring of that particular charitable trust.¹⁸³

C. FULLY SELF-FUNDED

The charitable trust agencies would be completely self-funded, unlike the Minnesota boards mentioned above, which

178. See FREMONT-SMITH, *supra* note 14, at 444–45 (noting that certain states have thousands of charities supervised by attorneys general with “limited staff and inadequate financial resources”).

179. See Fishman, *supra* note 12, at 273; *Lessard-Sams Outdoor Heritage Council Members*, LESSARD-SAMS OUTDOOR HERITAGE COUNCIL, <http://www.lsohc.leg.mn/Member/index.html> (last visited June 4, 2012) (identifying the twelve members of the Lessard-Sams Outdoor Heritage Council); *Board Members*, MINN. ST. ARTS BOARD, <http://www.arts.state.mn.us/contact/board.htm> (last visited June 4, 2012) (identifying the members and officers of the Minnesota State Arts Board).

180. KING & ROTH, *supra* note 128, at 211–14.

181. See WOLANIN, *supra* note 87.

182. Brody, *supra* note 8, at 984.

183. See, e.g., MINN. STAT. ANN. § 317A.255 (West 2011) (establishing standards for legitimate and illegitimate conflicts of interest for the director of a trust).

are funded by a portion of the state's sale tax.¹⁸⁴ In order to fully fund the agencies, a fee would be assessed at the time of initial registration and annually thereafter.¹⁸⁵ Because the organizations that traditionally have been exempt from registration and reporting would also be required to comply with the requirements, the organization's income and assets would be considered when determining the registration and annual reporting fees, so not to make it financially unattainable for a charitable trust to be formed.¹⁸⁶ However, the registration and reporting fees would have to be assessed to cover all investigative and enforcement procedures, which could potentially cause high annual fees leading to a disincentive to form a charitable trust. Additionally, although the board of directors would be filled on a volunteer basis, the fees would encompass the agency's staff compensation. If the annual fees are not able to raise the necessary funds, the agencies would become underfunded like many of the offices of attorneys general,¹⁸⁷ resulting in continuing ineffectiveness in monitoring charitable trusts. However, charitable trusts play an important role in local and national communities to relieve poverty, advance education, and religion.¹⁸⁸ The inclination of individuals to donate to others in need or for public benefit is inherent in our society,¹⁸⁹ and the

184. LESSARD-SAMS OUTDOOR HERITAGE COUNCIL, <http://www.lsohc.leg.mn/index.html> (last visited June 4, 2012).

185. Helge, *supra* note 13, at 66–67 (analogizing to federal agencies that are self-funded). The Uniform Law Committee proposed a \$15 registration fee with a \$25 monthly late fee. PROTECTION OF CHARITABLE ASSETS ACT § 5 (Tentative Draft 2011), available at http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011feb_draft.pdf. More likely than not, to fully support the agency's regulatory power a slightly larger fee would be assessed.

186. See Helge, *supra* note 13, at 73 (arguing that self-funding fees can be placed on a sliding scale examining a trust's asset size, gross revenues, or both).

187. See FREMONT-SMITH, *supra* note 14, at 445 (identifying underfunding as the principal reason for the disinterest of attorneys general in supervision of charitable trusts).

188. ALASTAIR HUDSON, EQUITY & TRUSTS 995–96 (Routledge-Cavendish 6th ed. 2010); see also Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy*, 85 CHI.-KENT L. REV. 571, 613–14 (2010) (arguing that charities provide a “powerful third force” that is an independent civic good).

189. See, e.g., Alison Dunn, *As 'Cold as Charity?: Poverty, Equity, and the Charity Trust*, 20 LEGAL STUD. 222, 223–25 (2000) (“Whether on religious or moral grounds, both Victorian and contemporary society have inclined toward the former, and by the nineteenth century there was a firm entrenchment of philanthropy in society.”).

law has long supported the continuation of this practice.¹⁹⁰ Thus, it is unlikely that this mandatory registration and reporting fee would be such a deterrent as to extinguish the creation of charitable trusts.

A wholly self-funded agency is the main distinction from earlier proposed state agencies to supervise charitable trusts. Noticing the local importance of charitable trusts and the shortfalls of supervision,¹⁹¹ earlier proposals have suggested state agencies.¹⁹² One of the earliest proposals, suggested in 1960, did not include a self-funded agency, but instead recommended heavier taxation to support the agency.¹⁹³ As mentioned above, states are already suffering from decreased tax revenue.¹⁹⁴ Although this Note agrees that scholars were correct in recognizing that a separate state agency would cure many of the outstanding issues in charitable trust law, during the current financial crisis it is unrealistic to suggest that the state could spread its budget even more thinly to include a new agency to watch over charitable trusts.¹⁹⁵ For that reason, state budgets would not have to incorporate this Note's proposed independent agency into its budget. Furthermore, if the funding would come from the state taxes, there could be potential for variations in the effectiveness of agencies from state to state due to variations in funding leading to variations in resources. But with fees assessed to each charitable trust, the funding for the agency would correlate with the number of charities in that

190. See *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 591 (1867) ("Our ancestors brought with them from England the elements of the law of charitable uses, and . . . in substance and principle, [it] has always been considered as part of our common law.").

191. Although it is unlikely that registration and reporting fees will deter charitable giving, "there is a compelling argument that potential donors will keep wealth in private hands rather than create charitable trusts if they believe their wishes will not be followed strictly." Eisenstein, *supra* note 16, at 1758.

192. Karst, *supra* note 31, at 483.

193. *Id.*; see also MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 452-54 (1965). Fremont-Smith analyzes Karst's 1960 proposal and argues that "[i]f the field of charity continues to grow," Karst's proposal of "separate Boards of Charity . . . will become, not only advisable, but highly desirable." *Id.* at 453.

194. MCNICHOL ET AL., *supra* note 92.

195. See Michael Cooper & Mary Williams Walsh, *Interest Adds Up to a \$1.3 Billion Bill for States*, N.Y. TIMES, Jan. 15, 2011, at A1, available at <http://www.nytimes.com/2011/01/15/us/politics/15stimulus.html> (reporting congressional refusal to assist state budgets during the recession).

particular state.¹⁹⁶ Therefore, the agency would be adequately self-funded to support the effective supervision of all the states' charitable trusts.

In sum, a self-funded, independent, quasi-state agency would cure many of the outstanding enforcement issues in charitable trust law. A mandatory registration and reporting, like that suggested by the National Conference of Commissioners on Uniform State Laws in 1954 and currently proposed, would provide the agency with the necessary information to detect and prosecute fiduciary breaches of charitable trusts. Additionally, a mandatory registration and annual fee would allow the agency to be self-sufficient and completely independent from the state budget. Although this fee could cause hardships and deterrence impacts on a minority of charitable trusts, this impact would not be as significant as disincentives caused by donors' wishes not being followed. Furthermore, there may still be a slight concern for political influences on the agency's board of directors, but the board of directors would not be elected officials, thus avoiding the inherent political nature imbedded in attorneys general. When the public benefit at large is at issue it is highly unlikely that political influences will ever be completely removed. However, by creating an agency that is composed of nominated directors, which is completely self-funded and independent, various political incentives can be subsided.

CONCLUSION

Donors create charitable trusts to serve the public interest and set strict restrictions on the trust to ensure that those wishes are followed long after their death. As demonstrated by the current economic turmoil, the restrictions imposed on the charitable trusts can become impractical or impossible to obey. The recent financial crisis produces incentives for the trustees to diverge from the restrictions emphasizing the ineffective supervision of the trusts by attorneys general. While taking into account the strained economies of the states, this Note's proposal to create self-funded, independent, quasi-state agencies, would resolve many of the issues outstanding in the management of charitable trusts. Although political influences cannot be completely removed from supervision of charitable trusts,

196. Not every state has the same number of charities or charitable trusts; the majority of charities are in fact organized in one of the twelve states that have required registration of reporting for nonsolicitation purposes. FREMONT-SMITH, *supra* note 14, at 444.

these agencies would certainly be less likely to be persuaded by political influences than state attorneys general, who are elected officials in the majority of the states. New agencies would help curb the abuses of charitable trusts and be better equipped to propose acceptable modifications if the restrictions imposed by the donor(s) become truly problematic. The recently experienced deviations from donors' wishes will continue to be a problem if there is not an effective watchdog in place. This debate has been going on for far too long in the scholarly world, and it is time that the states take action.