1-1-1999

CHARITABLE TRUSTS—DONOR STANDING UNDER THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT IN LIGHT OF CARL J. HERZOG FOUNDATION, INC. V. UNIVERSITY OF BRIDGEPORT

Paula Kilcoyne

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
NOTES

CHARITABLE TRUSTS—DONOR STANDING UNDER THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT IN LIGHT OF CARL J. HERZOG FOUNDATION, INC. V. UNIVERSITY OF BRIDGEPORT

INTRODUCTION

In the late 1960s, colleges and universities faced economic hardship due, in part, to inflation and low enrollments.\(^1\) The problems were exacerbated because, even if an institution had endowment funds or other gifts, the common law of charitable trusts imposed two important restrictions on their use.\(^2\) First, trustees were limited to a fairly conservative "prudent man" investment strategy.\(^3\) Second, if a charitable gift had a restriction on its use, and the restriction was outmoded, the institution could alter the terms of the restriction only by obtaining the court's permission through the doctrine of *cy pres*.\(^4\) The college or university thus had...

---


3. A charitable trust is distinguished from a private trust in that the "property is devoted to purposes beneficial to the community." RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. c (1959).


4. *Cy pres* is a common law doctrine that allows a charitable gift to be used for a different purpose when the original purpose cannot be executed. See Hartford Hosp. v. Blumenthal, No. CV-95-0555462-S, 1996 WL 240440, at *4 (Conn. Super. Ct. Apr. 15, 1996). See infra Part I.A.4 for a thorough discussion of the common law doctrine of *cy pres* through which charitable institutions can alter the terms of restricted charitable gifts.

A charitable gift is a "gift for a general public use... for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious,
to incur litigation costs.

Under common law, a college or university must obtain the court's permission to alter a gift restriction even if the donor consents to changing the restriction. This is because once a gift is complete, under common law, donor consent has no legal effect on the terms of the gift. In addition, if the trustees of a charitable institution alter the terms of a charitable gift without obtaining the court's permission, only the Attorney General has standing to sue to enforce the terms of the completed gift. The donor has no standing to sue unless the donor reserves a specific right to control the property in the gift instrument.

In 1969, the Ford Foundation commissioned a study to examine the concerns over the common law restrictions on grants to educational institutions. As a result of the study, in 1972, the Commissioners on Uniform State Laws introduced the Uniform Management of Institutional Funds Act ("UMIFA") to help colleges and universities. UMIFA contained two changes for charitable institutions: it allowed the institutions to make riskier moral, physical or social standpoint." American Soc'y for Testing & Materials v. Board of Revision of Taxes, Philadelphia County, 225 A.2d 557, 560 (Pa. 1967) (quoting In re Hill Sch., 87 A.2d 259, 262 (Pa. 1952)).

5. See Restatement (Second) of Trusts § 391 (1959).


A common way to retain control over property is through reserving a reversionary interest. A reversionary interest is a kind of forfeiture wherein the grantor "intends that the [body of trust] reverts to himself or his heirs if the charitable purpose is not served." Walton v. City of Red Bluff, 3 Cal. Rptr. 2d 275, 280 n.9 (Cal. Ct. App. 1992) (quoting In re Mareck, 100 N.W.2d 758, 762 (Minn. 1960)). Under such conditions, the gift is not considered a trust, but a conditional gift. See id. Reserving some kind of donor control over the gift, in the gift instrument, might create tax problems for the donor. See Herzog, 699 A.2d at 1001.


"The committee which acted for the National Conference of Commissioners on Uniform State Laws" which prepared UMIFA consisted of seven individuals who were lawyers and law professors from six different states. See Unif. Management of Institutional Funds Act Historical Notes, 7A Part II U.L.A. 476 (1999).
investments for higher returns and created an easier way to release restrictions on charitable gifts.9

In 1973, the Connecticut legislature passed the Connecticut Uniform Management of Institutional Funds Act ("CUMIFA"),10 Closely replicating UMIFA,11 CUMIFA's adoption reflected Connecticut's growing concern over the financial health of its colleges and universities.12 Like UMIFA, the law created two important changes for charitable institutions. First, it allows trustees of charitable institutions, including colleges and universities, to place the money from their endowments in investments that will produce a high return.13 Second, it provides trustees with a mechanism for changing restrictions on gifts: donor consent or, in the absence of a donor, court approval.14

In 1991, the University of Bridgeport altered the terms of a donor's completed, but restricted, gift without obtaining either the consent of the available donor or the court, in violation of section 45a-533 of CUMIFA.15 The donor sued to enforce the restrictions on the gift.16 In Carl J. Herzog Foundation, Inc. v. University of Bridgeport,17 the Connecticut Supreme Court addressed the question of whether CUMIFA created a donor interest in the charitable gift itself, thus granting the donor standing to sue.18 The court, in a 3-2 decision, held that the donor had no standing to sue under

11. See UNIF. MANAGEMENT OF INSTITUTIONAL FUNDS ACT, 7A PART II U.L.A. 475 (1999). Connecticut added sections 45a-529a and 45a-529b to its version of UMIFA. The issue in this Note, however, focuses on section 45a-533, which codifies section 7 of UMIFA.
13. See UMIFA Hearing, supra note 12, at 337; see also CONN. GEN. STAT. §§ 45a-526 to -532 (1997); Dobris, supra note 7, at 51-52.
14. See CONN. GEN. STAT. § 45a-533(a)-(b) (1997); infra Parts II-III.
16. See id.
17. 699 A.2d 995 (Conn. 1997).
CUMIFA. The majority held that because CUMIFA does not explicitly state that the donor may sue to enforce CUMIFA's provisions, no interest was created in the donor, and the common law of charitable trusts applied to the issue of standing. The dissent in the case endorsed the reasoning of the appellate court, which stated that section 45a-533 of CUMIFA created an interest in the gift which conferred donor standing to sue when the University of Bridgeport violated CUMIFA's requirements.

The Herzog decision is important for two reasons. First, this is the first decision of any state court concerning standing under CUMIFA's model, UMIFA, a uniform law adopted by at least forty-four states and the District of Columbia. As such, other courts might look to this decision for guidance. Second, the Connecticut court's decision to deny donor standing under CUMIFA may have a far reaching effect on charitable donations to universities. As noted by the dissent in Herzog, the majority's decision may result in donors being more reluctant to contribute to charitable institutions when they realize that they will have no standing to sue if their gift restrictions are ignored.

This Note discusses the interpretation of donor standing under

---

20. See Herzog, 699 A.2d at 1002.
21. See id. at 1002 (McDonald, J., dissenting). The appellate court said that one could imply standing from the section of the statute requiring the donor's written consent for the release of gift restrictions. See Herzog, 677 A.2d at 1385. The Connecticut Supreme Court treated the issue as a question of a property interest in the gift. See Herzog, 699 A.2d at 999. The appellate court was less clear about what the interest was, but, in part, treated the interest as the donor's right to require the donee to obtain its written consent for alterations of a completed gift. The appellate court also said that the donor could withhold consent. See Herzog, 677 A.2d at 1381-82.
23. As of 1999, the only states which had not adopted a version of UMIFA were Alaska, Arizona, Mississippi, Pennsylvania, and South Dakota. See Unif. Management of Institutional Funds Act, 7A Part II U.L.A. 475-76 (1999); see also Salaway, supra note 3, at 1048.
24. Connecticut courts are already citing this case as they consider donor standing to sue, even though cases are not specifically being brought under CUMIFA. See, e.g., Russell v. Yale Univ., No. CV-97-0400425-S, 1997 WL 809974, at *1 (Conn. Super. Ct. Dec. 31, 1997) (holding that under the principles established in Herzog, donor had no standing to sue).
25. See Herzog, 699 A.2d at 1002 (McDonald, J., dissenting). See infra notes 276-78 and accompanying text for a discussion of the fact that one practitioner has advised estate planners to take the Herzog decision into account and create protection for donors in the gift instrument.
CUMIFA by both the Connecticut Supreme Court in *Herzog* and the Connecticut Appellate Court it overruled. Part I describes the background information necessary to understand the issue raised in the case. It discusses the common law of charitable trusts, the tax implications for charitable gifts, the historic context in which CUMIFA was proposed, including its legislative history, and standing doctrine as it is applied in Connecticut. Part II presents the reasoning of the trial and appellate courts, as well as the Connecticut Supreme Court’s majority and dissenting opinions in *Herzog*. Part III suggests that while CUMIFA created a legally protected interest for donors, it was not an interest in the charitable gift itself, as assumed by the Connecticut courts, but rather, an interest in a particular process which CUMIFA requires to alter the terms of a charitable gift. Relying on the United States Supreme Court decisions of *Lujan v. Defenders of Wildlife*, *Bennett v. Spear*, and *National Credit Union Administration v. First National Bank & Trust Co.*, Part III argues that once a court recasts the right that CUMIFA created in the donor as a right to a process, injury is apparent and standing should be allowed. Part III also suggests that casting the right created in the donor under CUMIFA as the right to a process answers the concerns about donor standing which were raised by the Connecticut courts’ interpretations of CUMIFA in *Herzog*.

I. CHARITABLE TRUSTS, THE ORIGINS OF CUMIFA, AND
STANDING IN CONNECTICUT

A. Common Law of Charitable Trusts and the Doctrine of
Cy Pres

1. Creating a Charitable Trust

Charitable gifts are governed by the law of charitable trusts.31

26. Since the dissent in the case is very brief and simply endorsed the reasoning of the appellate court, an analysis of the legal reasoning in the case necessarily involves use of the appellate court decision.
30. One concern the Connecticut Supreme Court expressed was tax implications if donors controlled their charitable gifts. See infra Parts II-III for a complete discussion of the concerns of the Connecticut courts.
31. “The law governing the enforcement of charitable gifts is derived from the law of charitable trusts.” Carl J. Herzog Found., Inc. v. University of Bridgeport, 699 A.2d 995, 997 n.2 (Conn. 1997) (citing 4A Austin Wakeman Scott & William
A charitable trust is a fiduciary relationship whereby the person who holds charitable property or gifts has a duty to use the property for charitable purposes.\footnote{See \textit{Herzog}, 699 A.2d at 997 n.2.} A charitable trust is created when a donor manifests an intention to create such a trust and subjects the donee to a duty to use the trust for charitable purposes.\footnote{See \textit{Restatement (Second) of Trusts} § 348 (1959).} It is not the intention of the donor, but rather the purpose to which the property is put, which determines whether a trust has been created.\footnote{See \textit{Herzog}, 699 A.2d at 997 n.2 (citing \textit{Lefkowitz v. Lebensfeld}, 417 N.Y.S.2d 715, 720 (App. Div. 1979); \textit{Restatement (Second) of Trusts} § 348 (1959)).} The donor of property may either give the property to trustees to be held for charitable purposes or "transfer[ ] it to a charitable corporation."\footnote{See \textit{supra} note 4 for a more detailed definition of charitable gift.} If the donor makes a gift to a charitable corporation, he may make it with or without restrictions on the use of the gift.\footnote{See \textit{supra} note 32, § 348.1, at 9.} The charitable corporation must observe any restrictions on the gift.\footnote{See \textit{Restatement (Second) of Trusts} § 348 cmt. f (1959) (stating that the Attorney General will sue to enforce gift restrictions). The enforcement of gifts by the Attorney General is discussed \textit{infra} Part I.A.2.}

\begin{footnotes}
\footnote{See \textit{Franklin Fratcher}, \textit{The Law of Trusts} § 348.1 (4th ed. 1989)); see also \textit{Steeneck v. University of Bridgeport}, 668 A.2d 688, 695 (Conn. 1995).}
\footnote{See \textit{Herzog}, 699 A.2d at 997 n.2. A charitable gift is a gift given to the public where the beneficiaries are not defined. See 4A \textit{Austin Wakeman Scott & William Franklin Fratcher}, \textit{The Law of Trusts} § 348, at 32 (4th ed. 1989); see also \textit{Herzog}, 699 A.2d at 997 n.2 (citing \textit{Lefkowitz v. Lebensfeld}, 417 N.Y.S.2d 715, 720 (App. Div. 1979); \textit{Restatement (Second) of Trusts} § 348 (1959)). See \textit{supra} note 4 for a more detailed definition of charitable gift.}
\footnote{See \textit{Restatement (Second) of Trusts} § 348 (1959). "A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." \textit{Id.}}
\footnote{See \textit{supra} note 32, § 348, at 6.}
\footnote{4A \textit{id.} § 348, at 8; see also \textit{Restatement (Second) of Trusts} § 348 cmt. c (1959).}
\footnote{See 4A \textit{id.} § 348, at 8-9; see also \textit{Restatement (Second) of Trusts} § 348 cmt. f (1959). A charitable gift may be made without any restrictions, in which case it may be used by the corporation in such manner as it sees fit for the accomplishment of any of the purposes for which it exists; or the gift may be restricted to the accomplishment of one of the purposes for which the corporation exists; or it may be provided that the corporation may devote the income to any of its purposes or to a particular purpose, but shall not expend the principal.}
\footnote{4A \textit{Scott & Fratcher}, \textit{supra} note 32, § 348.1, at 9.}
\footnote{A donor simply writing out a check to "X College" would be an example of the first kind of charitable gift. A donor who had a gift instrument requiring that its donation be earmarked for scholarships for medical related degrees would be an example of the second kind of gift. A donor whose gift instrument instructs that only the income from the principal he is giving can be used for medical related degrees would be an example of the third kind of gift. Where appropriate, Part I of this Note will build on this example of gift restrictions.}
\footnote{See \textit{Restatement (Second) of Trusts} § 348 cmt. f (1959) (stating that the Attorney General will sue to enforce gift restrictions). The enforcement of gifts by the Attorney General is discussed \textit{infra} Part I.A.2.}
\end{footnotes}
2. Revoking, Modifying, and Enforcing Charitable Trusts

If a donor creates a completed charitable gift, even one containing restrictions on its use, the donor loses control over the gift’s disposition. This is because when a donor makes a charitable gift, the beneficiary is not an individual, but the community. However, a donor may modify or revoke a gift under two conditions: if the donor has “reserved such a power, or if the omission to reserve such power is due to a mistake.” In addition, unless a right to the gift itself is reserved in the gift instrument, the terms of a charitable gift can be enforced in only three ways: by the Attorney General or other public official, by another trustee of the charitable trust, or by someone who has a special interest.

The reason the Attorney General is charged with enforcing the trust is because the Attorney General is the legal representative of the community in the matter. The Attorney General may initiate the suit himself or may bring suit “on relation of a third person . . . [who] need not have any direct interest in the enforcement of the trust.” If the suit is brought at the request of the third party, the

39. See 4A SCOTT & FRATCHER, supra note 32, § 348, at 8.
40. 4A id. § 367, at 113; see also RESTATEMENT (SECOND) OF TRUSTS § 367 (1959). Building upon the example of the donor’s gift to a college for scholarships for medical related degrees, unless the instrument explicitly stated that the donor retained the right to the gift, the donor cannot redress any violation of the restrictions on the gift. There have been exceptions, however. In New York, a university’s alumni association which gave a professorship to an educational institution reserved the power to nominate the professor. The association was allowed to sue to enforce the terms of the gift. See 4A SCOTT & FRATCHER, supra note 32, § 391, at 376 (citing Association Alumni v. Theological Seminary, 57 N.E. 626 (N.Y. 1900)).

41. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959). Section 391 states the following:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

Id.

42. See 4A SCOTT & FRATCHER, supra note 32, § 391, at 357-59. The tradition of the Attorney General’s office protecting the public has its roots in British history. It is based on the idea of the monarch as parent (parens patriae) with a duty to protect his subjects. In the United States the parens patriae is the state, and it is the Attorney General who acts for the state. See Mary Grace Blasko et al., Standing to Sue in the Charitable Sector, 28 U.S.F. L. Rev. 37, 40 (1993).

43. 4A SCOTT & FRATCHER, supra note 32, § 391, at 359. A “relator” is someone who is allowed to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official.” GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, TRUSTS AND TRUSTEES § 411, at 7 n.16 (2d ed.
third party "is liable for costs which would otherwise have to be paid by the state." In addition, if a person has no special interest in the enforcement of a trust, he "cannot maintain a proceeding, by mandamus or otherwise, to compel the Attorney General to bring an [enforcement] action." The latter rule exists to reduce the likelihood of charities having to contend with harassing litigation.

A co-trustee also may bring suit to enforce the terms of a charitable trust. The suit may be an action to "compel the redress of a breach of trust." In such suits, the Attorney General must be joined as a party to the action.

Individuals with a special interest also can sue to enforce the terms of a trust. Although a charitable trust does not name an individual beneficiary, an individual who can show that he is entitled to receive a benefit from the trust "which is not merely the benefit . . . which the . . . general public" receives from the trust, has a special interest and may sue. For example, if a charitable trust is given for education, and if a particular individual is entitled to preference under the trust, he may file suit to receive the benefit. The person with the special interest must join the Attorney General in the suit so that the Attorney General may protect the public interest. If the community is not affected by the outcome of the suit, the person does not have to join the Attorney General.

3. Tax Implications for Charitable Donations

If a donor reserves the right to enforce the terms of a charitable trust, he may face tax implications. Section 170 of the Internal Revenue Code concerns tax deductions for charitable donations to

44. 4A SCOTT & FRATCHER, supra note 32, § 391, at 359; see also RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. a (1959).
45. 4A SCOTT & FRATCHER, supra note 32, § 391, at 361.
46. See 4A id. § 391, at 373; see also Blasko et al., supra note 42, at 42.
47. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).
48. 4A SCOTT & FRATCHER, supra note 32, § 391, at 365.
49. See 4A id. The Attorney General must be joined when the suit is brought by the trustee "for the construction of the instrument creating it, or to determine its validity, or where a suit is brought by others to invalidate a charitable trust." 4A id.
50. See 4A id. § 391, at 366.
51. 4A id.
52. See RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).
53. See 4A SCOTT & FRATCHER, supra note 32, § 391, at 369.
54. See 4A id. § 391, at 370.
charitable institutions.\(^{55}\) Charitable institutions include organizations such as churches, educational institutions, hospitals, and foundations.\(^{56}\) For federal income tax purposes, an individual who donates to a charitable organization is allowed to deduct the amount from his adjusted gross income.\(^{57}\) However, a gift which has a condition precedent cannot be taken as a deduction until the condition is met.\(^{58}\) A condition precedent on a gift would be a condition that had to be met in order for the gift to vest in the donee.\(^{59}\) In addition, if a donor is giving a gift of property rather than cash, the donor must "part with dominion and control over the property" and must not "retain incidents of control," in order to receive a tax deduction under section 170.\(^{60}\) Finally, donors are allowed to deduct gifts of partial interest in property or in trust if the terms of the gift meet the exceptions contained in section 170(f)(3).\(^{61}\)

56. See id. § 170(b)(1)(A)(i)-(viii).
58. See Kirschten & Neeley, supra note 57, at A-4.
59. See id.
60. Id. at A-8.
61. See id. at A-38. The exceptions for partial interest in property arise when: (1) the partial interest in property is the donor's entire interest, (2) the donor gives an undivided portion of the donor's entire interest, (3) the donation is a remainder interest in a personal residence or farm, (4) the donation is a qualified contribution for conservation purposes (e.g., preserving land or open space, historic sites), (5) the donation is a future interest in personal property, (6) if the partial interest would be deductible if transferred in trust, and (7) if the donor's retained interest is not substantial. See id. at A-38 to A-47. "The test [for insubstantial interest] is whether the interest retained by the donor is so insubstantial that the donor has in substance transferred his entire interest." Id. at A-47.

A contribution in trust can be given by splitting the trust between charitable and non-charitable beneficiaries. See id. at A-47 to A-57. The deduction in such circumstances is allowed only if the remainder interest of the trust is in one of the following forms: (1) charitable remainder annuity trust, (2) charitable remainder unitrust, or (3) pooled income fund. See Bonnie Brier & Jennifer J. Knauer, Charitable Remainder Trusts and Pooled Income Funds, 435-2nd Tax Mgmt. (BNA) (1995).
4. **Cy Pres**

*Cy pres* is a doctrine which allows the court to alter a charitable gift when the gift's specific terms cannot be fulfilled.\(^{62}\) The doctrine applies only to charitable trusts and corporations.\(^{63}\) It is applied when the donor has not reserved a right of control over the charitable trust and the fulfillment of the terms of the trust becomes "impossible or impracticable or illegal to carry out."\(^{64}\) Equity will not allow a charitable trust to fail,\(^{65}\) and the court will try to apply the trust to "some other charitable purpose that falls within the general charitable intention of the settlor."\(^{66}\) Since the donor's control ends at the time the trust is created, the court does not have to take into consideration the donor's wishes while he is living, although the court "undoubtedly" will.\(^{67}\) Generally, state law determines whether a court will apply *cy pres* to the trust at issue.\(^{68}\)

---


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

*Id.*

\(^{63}\) See RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a (1959).

\(^{64}\) 4A SCOTT & FRATCHER, supra note 32, § 367.2, at 118. Some examples of when a charitable trust can fail are when the amount given is insufficient to accomplish the purpose, the particular purpose is already accomplished, lack of consent, the purpose has no value to the community, or illegality. *See RESTATEMENT (SECOND) OF TRUSTS* § 399 cmts. j-n (1959).

\(^{65}\) See Kruger, supra note 62, at 251. This is because, at least in Connecticut, the courts assume that the "donor would attach so much more importance to the object of the gift than to the mechanism." *Id.* (quoting Briggs v. Merchants Nat'l Bank, 81 N.E.2d 827, 834 (Mass. 1948)).

\(^{66}\) 4A SCOTT & FRATCHER, supra note 32, § 367.2, at 118; *see also RESTATEMENT (SECOND) OF TRUSTS* § 399 cmt. d (1959).

A settlor is a donor or person who creates a trust. *See RESTATEMENT (SECOND) OF TRUSTS* § 3 (1959). Just because a trust fails does not mean that the court will find that the donor had a general charitable intent. In *Evans v. Abney*, 396 U.S. 435 (1970), property which was conveyed in a will to the city of Macon, Georgia to create a whites-only park was allowed to fail because there was no general charitable intent. *See id.* at 441-43; *see also* Kruger, supra note 62, at 252.

\(^{67}\) 4A SCOTT & FRATCHER, supra note 32, § 367.2, at 118.

\(^{68}\) See Kruger, supra note 62, at 252. Connecticut applies a three part test when
The trustees of the charitable trust are not allowed to decide whether or not to devote the property of the failed trust to some other general charitable purpose, even if that purpose falls within the intent of the donor. 69 Instead, the trustees must apply to the court for a determination of the donor's charitable intention; thus, the court decides where to apply the failed trust. 70 If the trustees do not apply for court approval, they "are subject to liability for breach of trust." 71

B. Standing Under Connecticut Law

In order to commence a lawsuit, a plaintiff must be a proper party to bring the suit; this is known as standing. 72 According to the Connecticut Supreme Court, standing is a "practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate non-justiciable interests and that judicial decisions which may affect the rights of others are forged in hot controversy with each view fairly and vigorously represented." 73 Courts decide that the requirements of justiciability and controversy are "met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity." 74 A plaintiff cannot have standing "unless he has . . . some real interest in the cause of action, or a legal or equitable..."
right, title or interest in the subject matter of the controversy.”

One must merely allege injury or “attempt to vindicate ‘arguably’ protected interests” in order to have standing.

When a claim arises by operation of a statute, the Connecticut Supreme Court uses a two part “aggrievement” test to determine whether a plaintiff has a statutory right to sue. First, the plaintiff “must successfully demonstrate a specific personal and legal interest in the subject matter.” Second, following the United States Supreme Court’s decision in *Lujan v. Defenders of Wildlife*, the plaintiff must show that he has been injured and that the injury

---

75. Id. at 491 (quoting Presidential Capital Corp. v. Reale, 652 A.2d 489 (Conn. 1994)).
76. Id. at 491 (quoting *Maloney*, 439 A.2d at 354 n.6 (citing Ducharme v. Putnam, 285 A.2d 318, 320 (Conn. 1971); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970))).

In federal cases, the requirement to show injury is the first of three factors that a plaintiff must satisfy in order to have standing under Article III’s case and controversy provision. See *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 471-72 (1982). The other factors of the test are that the defendant must have caused the injury and that the court must be able to redress the injury. See id. See infra note 79 and accompanying text for a full discussion of this test as outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

78. Id. A specific interest must be more than a general interest. A general interest is an interest which “is the concern of all members of the community as a whole.” Id. at 146 (quoting *United Cable Television Servs. Corp. v. Department of Pub. Util. Control*, 663 A.2d 1011, 1017 (Conn. 1995)).
79. 504 U.S. 555 (1992). In *Gay & Lesbian Law Students Ass'n at the University of Connecticut School of Law v. Board of Trustees, University of Connecticut*, 673 A.2d 484 (Conn. 1996), the Connecticut Supreme Court endorsed the standing analysis contained in *Lujan*, stating “[t]here is little material difference between what we have required and what the United States Supreme Court . . . demanded of the plaintiff to establish standing.” Id. at 491 n.10.

*Lujan* added to a line of United States Supreme Court cases about standing and contained a three prong test. First, the complainant must demonstrate an “injury in fact.” This means that the plaintiff must have a “concrete and particularized [injury] . . . [which is] actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560-61. Second, the injury must be caused by the defendant’s actions, rather than by another party. See id. Third, it must be likely, rather than speculative, that a favorable decision will grant relief from the injury. See id. at 561; see also *Gay & Lesbian Law Students*, 673 A.2d at 490-91; Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. Tol. L. REV. 93, 97-148 (1996) (arguing that Supreme Court’s standing doctrine can be understood as reflecting changes in Court personnel and decision making styles of Justices). See generally *Allen v. Wright*, 468 U.S. 737, 752 (1984) (articulating, for the first time, the three prong test for standing); *Valley Forge Christian College*, 454 U.S. at 489-90 (denying taxpayer standing).

Two recent Supreme Court cases which discuss standing under operation of a statute, *Bennett v. Spear*, 504 U.S. 154 (1997), and *National Credit Union Administration v.*
“falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint.”80 The zone of interests portion of the aggrievement test is part of standing, which is a “set of prudential principles” the judiciary uses to limit its power to hear cases.81 The Connecticut Supreme Court looks to the language of the statute and to legislative intent to define the zone of interests.82

Courts may confer standing on a plaintiff when the statute does not explicitly grant a right to sue; this is known as a statutory implied private right of action.83 Connecticut courts use implied pri-

---

First National Bank & Trust Company, 118 S. Ct. 927 (1998), are discussed in detail infra Part III.

80. Med-Trans, 699 A.2d at 146 (quoting United Cable Television, 663 A.2d at 1018 (quoting Air Courier Conference v. Postal Workers, 498 U.S. 517, 523 (1991) (citing Lujan v. National Wildlife Fed’n, 497 U.S. 871, 873 (1990)))). In Med-Trans, the Connecticut Public Health and Addiction Services department decided to grant a license to an emergency ambulance service. Another ambulance service which, until then, had a monopoly on the service, appealed the decision. The court held that the claimant ambulance service lacked standing under the licensing statute because it did not fall within the zone of interests protected by the statute. See id. at 147-51.


81. Valley Forge Christian College, 454 U.S. at 474. Under prudential standing, even if a plaintiff can show injury caused by actions of the defendant, which are redressable in court, standing may be denied under certain conditions. First, the plaintiff must be asserting his own legal rights or interests rather than those of third parties. Second, even if the plaintiff has a redressable injury, the court will not hear a case if the injury is based on an abstract question or an issue that is better addressed by the other branches of government. Third, the plaintiff’s “complaint [must] fall within ‘the zone of interests [that are] protected or regulated by the statute or constitutional guarantee.’” Id. at 475 (quoting Association of Data Processing Servs., 397 U.S. at 153); see also William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988) (arguing that the standing doctrine should be abandoned in favor of deciding standing on the merits of plaintiff’s claim); Cass R. Sunstein, What's Standing After Lujan? of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163 (1992) (critiquing current conceptions of standing doctrine); Kelso & Kelso, supra note 79; Renfer & Smith, supra note 80.

82. See Med-Trans, 699 A.2d at 149-50. See supra Part I.C and infra Parts II-III for a discussion of the fact that there is no legislative history to CUMIFA that explicitly covers donor standing under the statute. See infra Part III.B.3 for a discussion of National Credit Union Administration v. First National Bank & Trust Co., 118 S. Ct. 927 (1998), where the Supreme Court rejected the search for legislative intent in the zone of interests analysis.

83. In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court stated that the
Private rights of action as part of their analysis of the statutory right to sue. In *Mead v. Burns*, for example, the Connecticut Supreme Court found an implied private right of action under the Connecticut Unfair Trade Practices Act ("CUTPA"). Several factors are relevant in determining whether a private right of action can be implied under a statute. These factors are derived from a test articulated by the United States Supreme Court in *Cort v. Ash*.

First, is the plaintiff one of the class for whose...? Second, is there any indication of legis-

zone of interests analysis is part of standing analysis unless Congress expressly forbids it in the statute. See id. at 163. *Bennett* is discussed fully infra Part III.

When a statute explicitly grants standing to particular individuals, this is also known as conferring a private right of action. The focus of this Note is a statute which does not explicitly do so. Cf. Superintendent of Ins. v. Bankers Life and Cas. Co., 404 U.S. 6, 12 (1971) (finding implied private right of action under section 10(b)-5 of the Securities Exchange Act ("SEA") of 1934, 15 U.S.C. § 78j(b) (1994), when fraud is used in sale or purchase of securities); J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (implying a private right of action under section 14(a) of the SEA, 15 U.S.C. § 78n(a) (1994), because SEA implies availability of judicial relief to achieve the purpose of the statute). This is sometimes known as the private attorney general. See *Bennett*, 520 U.S. at 165. However, many courts use the term “private attorney general” when they are discussing whether or not the plaintiff will be awarded attorney’s fees. See, e.g., Doe v. Heintz, 526 A.2d 1318, 1322 (Conn. 1987).

In *Town of Willington*, in 1993, the town joined a regional school district established by two other towns, Ashford and Mansfield. See id. at *1. Willington paid the school district to educate its students. See id. at *2. At the end of the 1993-94 fiscal year, the school had a surplus in its budget and the regional board of education voted to return the money to the budgets of Ashford and Mansfield. See id. The Town of Willington sued, claiming that the decision to return the surplus money to the other two towns violated section 10-51(c) of the General Statutes of Connecticut, which said that any surplus should be applied to the next year’s school budget. See id. at *3. Among other things, the defendants claimed that Willington did not have a private right of action under section 10-51(c). See id. The Connecticut court applied the three factors derived from *Cort v. Ash*, 422 U.S. 66 (1975), and denied a cause of action to Willington. See *Town of Willington*, 1997 WL 663100, at *4-6.

In *Cort*, the stockholders of the Bethlehem Steel Corporation tried to get an injunction against the corporate directors who were using corporate funds to pay for advertisements in the 1972 presidential election. Although he was not mentioned by name, the ads targeted Senator George McGovern, the nominee for the Democratic party. The stockholders argued that 18 U.S.C. § 610, which prohibited corporations from making contributions and expenditures to federal elections, gave them an implied private right of action to sue to stop the funding of the advertisements. The court disagreed and found no implied private right of action. See id.
lative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?89

C. The Uniform Management of Institutional Funds Act ("UMIFA") and the Connecticut Uniform Management of Institutional Funds Act ("CUMIFA")

1. Purpose of UMIFA and CUMIFA

UMIFA and CUMIFA were designed to bring changes to the common law governing charitable institutions.90 The drafters of UMIFA considered changes necessary because, traditionally, colleges and universities had relied on funds generated from the investment of endowment funds to supplement the money they received from tuition.91 The college or university had to go to court if it wanted to change a gift restriction.92

Largely as a result of a 19th century Massachusetts case,93 courts held trustees of charitable institutions to a "prudent man" standard when they invested endowment funds.94 Through subsequent decisions, courts narrowed the rule to a very stringent stan-

---

89. Napoletano, 680 A.2d at 144-45 (quoting Cort, 422 U.S. at 78) (alterations in original); see also Town of Willington, 1997 WL 663100, at *3.
90. The titles of the sections of CUMIFA are as follows:
45a-526. Short Title: Uniform Management of Institutional Funds Act.
45a-527. Definitions.
45a-528. Expenditure of net appreciation, standards.
45a-529. Exception and restriction on expenditure of net appreciation.
Construction.
45a-529a. Accumulation of annual net income, standards.
45a-529b. Exception and restriction on accumulation of annual net income.
Construction.
45a-530. Investment of institutional funds.
45a-531. Delegation of powers of investment.
45a-532. Standards applicable to actions of governing board.
45a-533. Release of restriction in gift instrument: Written consent, court order.
Limitations. Doctrine of cy pres applicable.
45a-534. Construction.
91. See Salaway, supra note 3, at 1045-46.
92. See supra Part I.A.4 for a discussion of cy pres, the common law process for changing restrictions on charitable gifts.
94. See Salaway, supra note 3, at 1053 (citing Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830)). The "prudent man" standard meant that while trustees could invest funds, they could not do so speculatively, but had to consider "the probable income, as well as the probable safety of the capital to be invested." Id. at 1054. If
standard which "hampered the investment choices of trustees."95 As a result, trustees followed a conservative strategy, investing in "safe" government bonds, and high dividend stocks rather than growth stocks.96

The investment strategy worked until the late 1960s, when inflation, low enrollment, and a drop in the stock market caused colleges to suffer financially.97 In the late 1960s, the Ford Foundation commissioned a study "to examine the legal restrictions on the powers of trustees . . . of colleges and universities to invest endowment funds to achieve growth, to maintain purchasing power, and to expend a prudent portion of appreciation in endowment funds. They concluded that . . . the legal impediments . . . [were] more legendary than real."98 As a result of the study, the Commissioners on Uniform State Laws introduced UMIFA in 1972.99

The purpose of UMIFA was to allow trustees of charitable institutions, including colleges and universities, to invest more liberally in order to obtain higher yields. UMIFA offered a trustee

(1) a standard of prudent use of appreciation in invested funds;
(2) specific investment authority; (3) authority to delegate investment decisions; (4) a standard of business care and prudence to guide governing boards in the exercise of their duties under the Act; and (5) a method of releasing restrictions on the use of funds or selection of investments by donor acquiescence or court action.100

What UMIFA has meant in practice is that the standard of care for the trustees is less stringent than before, going from prudent man to business prudence, and colleges and universities are now more free to choose higher risk investments with higher returns.101 In addi-

95. Salaway, supra note 3, at 1054.
96. See id. Institutions would spend the money from the income on the endowment but leave the principal intact. See id.
97. See Daugherty, supra note 1, at 319.
99. See Salaway, supra note 3, at 1057. See supra note 23 and accompanying text for a discussion of which states have adopted UMIFA.
101. See Salaway, supra note 3, at 1056. Some examples of the new kinds of investments are venture capital, derivatives, and hedge funds. See id. at 1046.
tion, it offers trustees a mechanism for altering gift restrictions without having to incur court costs.

2. Section 45a-533 of CUMIFA (Section 7 of UMIFA)

In 1973, Connecticut adopted CUMIFA, its version of UMIFA. CUMIFA provides charitable institutions with a scheme for altering restrictions on gifts through section 45a-533. Section 45a-533 does not explicitly confer a right to sue to enforce gift restrictions on donors. Section 45a-533(a) states that a restriction on a gift may be altered by "the written consent of the donor." Section 45a-533(b) provides for a judicial ruling on the restriction if the donor is dead, disabled, unavailable, or impossible to identify. Section 45a-533(c) states that releases from restrictions will be allowed only if the money is to be used for educational or other charitable purposes. Section 45a-533(d) states that sections (a) through (c) do not limit the application of cy pres. Accordingly, the court may determine the intent of the donor and require that the money be spent in close approximation to that intent.

Although section 45a-533 does not confer donor standing to sue, the language of section 45a-533(a) significantly alters the com-

---

102. Section 45a-533 of CUMIFA is identical to section 7 of UMIFA. The text of section 45a-533 is as follows:

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability or impossibility of identification, the governing board may apply, in the name of the institution, to the Superior Court for a judicial district in which the institution conducts its affairs for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund:

(c) A release under this section may not allow a fund to be used for purposes other than educational, religious, charitable or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of cy pres or approximation.

CONN. GEN. STAT. § 45a-533 (1997).

103. CONN. GEN. STAT. § 45a-533(a) (1997).

104. See id. § 45a-533(b).

105. See id. § 45a-533(c).

106. See id. § 45a-533(d).

mon law. Under common law, once a gift was completed, a donor had no power to consent to changes in gift restrictions. Instead, donees had to obtain court permission through the use of *cy pres*. Section 45a-533(a) of CUMIFA allows gift restrictions to be modified solely through the consent of the donor. CUMIFA gives legal force to donor consent, something that did not exist at common law.

3. The National Conference of Commissioners of Uniform State Laws’ Notes to UMIFA

The National Conference of Commissioners of Uniform State Laws provided notes to UMIFA. The notes have two main parts, a “Prefatory Note,” which is an overview of the entire Act, including some commentary about each of UMIFA’s sections, and a “Comment” provision, which corresponds to each of UMIFA’s sections. The Prefatory Note to UMIFA contains an initial discussion of both the problem with investing that charitable institutions were facing and the Ford Foundation study. In addition, part of the Prefatory Note addresses section 7 of UMIFA. It states that while donors are allowed by law to place restrictions on gifts, UMIFA provides a mechanism to obtain the donor’s acquiescence in the face of “outmoded or wasteful or unworkable” restrictions.

UMIFA’s Comment to section 7 also is very brief. It states that while the donor retains no property interest in a completed

108. Compare CONN. GEN. STAT. § 45a-533(a) (1997), with the discussion of common law principles *supra* Part I.A.
109. See *supra* Part I.A for a discussion of the common law of charitable trusts.
111. See *supra* Part I.C.1 for a discussion of the statute’s purpose.
113. *Id.* The text of the Prefatory Note’s reference to Section 7 of UMIFA states: It is established law that the donor may place restrictions on his largess which the donee institution must honor. Too often, the restrictions on the use or investment become outmoded or wasteful or unworkable. There is a need for review of obsolete restrictions and a way of modifying or adjusting them. The Act authorizes the governing board to obtain the acquiescence of the donor to a release of restrictions and, in the absence of the donor, to petition the appropriate court for relief in appropriate circumstances.
*Id.*
gift, his restrictions control. Because use of the common law doctrine of *cy pres* had not always been helpful in dealing with donor restrictions, UMIFA allows the institution to obtain a release from those restrictions. No federal tax problems were anticipated by having the donor consent to such a release, because the donor did not have the right to enforce the restriction; the donor could only acquiesce in lessening it.

4. Legislative History of CUMIFA

Connecticut enacted its version of UMIFA in 1973. Like the committee notes to UMIFA, the legislative history of CUMIFA does not directly address a donor's right to sue in order to enforce gift restrictions. During the hearings on CUMIFA, all of the discussion in the legislature centered on investment advantages for charitable institutions. The Connecticut legislature's Judiciary Committee heard endorsements of the law from Lewis Hyde, the Executive Director of the Connecticut Conference of Independent Colleges, John Tilson, counsel for both the Connecticut Hospital Association and the Connecticut Association of Independent Schools, and Alan N. Houghton, Headmaster of the Hotchkiss

115. *See id.*
116. *See id.*
117. *See id.* The text of the Comment to section 7 of UMIFA provides the following:

There should be an expeditious way to make necessary adjustments when the restrictions [on gifts] no longer serve the original purpose. *Cy pres* has not been a satisfactory answer and is reluctantly applied in some states . . . .

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden . . . .

If the donor is unable to consent or cannot be identified, the appropriate court may upon application . . . release a limitation which is obsolete, inappropriate, or impracticable . . . .

No federal tax problems for the donor are anticipated by permitting release of a restriction. *The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.*

*Id.* (citing *Restatement (Second) of Trusts* §§ 367, 381, 399 (1959); 4 *Austin Wakeman Scott, The Law of Trusts* § 399, at 3084, § 399.4, at 3119, § 367.3, at 2846 (3d. ed. 1967)) (emphasis added).

School. 119

The only other record of discussion is from the House Proceedings of May 9, 1973, where several representatives spoke in support of the bill. 120 Representative Bingham said that the bill would allow a rational solution to the problem of making "effective use of endowment and other investment funds." 121 Representative Neiditz endorsed the bill because he saw it as a way to help charitable institutions better manage their endowments. 122 He said that UMIFA was drafted by experts 123 and was carefully worded—the bill contains carefully worded safeguards intended to protect the public interest and the charitable endowments. The bill generally leaves it to the donor to make his own provisions for the matters covered in the bill. The bill applies when the donor has not specified another way. The matter of putting charitable [institutions] in a position to get the best total return is particularly important. 124 Representative Demerell voiced fear that the bill was dangerous because schools did not have investing expertise and, consequently, might make mistakes which would cost them more in the long run. 125 Representative Healey said that Representative Demerell’s fears were misplaced because the investment standard of care imposed on schools would require them to take into account long term risks. 126 In addition, he said “if the donor has seen fit to spell out restrictions, then those restrictions govern. This bill steps in only in the event that he has not spelled out the restrictions.” 127

119. See UMIFA Hearing, supra note 12, at 337, 338, 349, 350. Mr. Hyde explained that colleges in Connecticut needed to be investing in such a way as to account for inflation. See id. at 337. He also briefly explained the provisions of CUMIFA. See id. Mr. Tilson said that other kinds of schools have the same problems with endowments that colleges have. See id. at 338. Mr. Houghton submitted his endorsement in the form of a letter which was read into the record by Mr. Olson. See id. at 349. The letter stated that CUMIFA would go a long way toward freeing up monies from endowment for investing in a way that was appropriate for the modern economy. See id. at 350.

120. The Connecticut Senate passed the bill on the consent calendar on May 16, 1973, without commentary. See 16 S. Proc., Pt. 8, 1973 Sess., at 3865 (Conn.). The bill passed the House by a vote of 140 for, and 1 against, with 10 either absent or not voting. See House Proceeding, supra note 12, at 5736.

121. House Proceeding, supra note 12, at 5723.

122. See id. at 5724.

123. See id. at 5725.

124. Id. at 5725-26.

125. See id. at 5727-29.

126. See id. at 5731-32.

127. Id.
Representative Dooley supported the bill because "those entrusted with endowment funds with the passage of this bill will no longer have to rely on case law to govern their actions." Representative Bevacqua supported the bill because he believed that deceased donors would have acquiesced in changing restrictions on their gifts to accommodate their original intent. He echoed the belief of Representative Webber that releasing restrictions would bring about more scholarships for students.

The issue of a donor's right to sue if a donee violates section 45a-533(a) is not addressed directly by the express language of UMIFA or CUMIFA, the notes to UMIFA, or the legislative history of CUMIFA. That issue arose for the first time in 1991, in Carl J. Herzog Foundation, Inc. v. University of Bridgeport.

II. CARL J. HERZOG FOUNDATION, INC. V. UNIVERSITY OF BRIDGEPORT

A. Facts

The plaintiff, Carl J. Herzog Foundation, Inc. ("Foundation"), agreed, on August 12, 1986, to participate in a matching grant program with the University of Bridgeport ("University"), a private institution. If the University raised funds, the Foundation would match the amount, up to $250,000. The money was to "provide need-based merit scholarship aid to disadvantaged students for medical related education." The University wrote a letter on September 9, 1986, accepting the Foundation's offer. By June 28,
1988, the University had raised its share of the money and the Foundation made its final grant of money. The money went to scholarships for the University's nursing program.

On June 20, 1991, the University closed its nursing program, but did not inform the Foundation until November 21, 1991. The University did not request the Foundation's written consent to release the money for other purposes, nor did it apply to the court for a release as required by sections 45a-533(a) or (d) of CUMIFA. The Foundation filed suit alleging that the funds were no longer being used for their specified purpose and that, instead, the funds were commingled with the University's general funds in violation of sections 45a-527(1) and (2) of the General Statutes of Connecticut. The Foundation requested a temporary and permanent injunction ordering the University to segregate the $250,000, account for its use, and to spend the monies only for the purposes to which the Foundation had agreed. If the purposes of the gift could not be fulfilled, the Foundation wanted the University to give the money back.

The Foundation relied upon section 45a-533(a) to claim a right to sue. The Foundation's reasoning was that, by allowing the written consent of the donor to alter gift restrictions, the statute created a right to sue. The University relied upon the Comments to section 7 of UMIFA to claim that donors have no right of enforcement because they have no property interest in completed

136. See id. at 1380.
137. See id.
138. See id.
139. See id. See supra note 102 for the text of section 45a-533 of the General Statutes of Connecticut.
140. See Herzog, 677 A.2d at 1380. Sections 45a-527(1) and (2) define institution and institutional fund, respectively. See Conn. Gen. Stat. § 45a-527 (1997). Since this case was dismissed for lack of standing to sue, it is not clear from the cases where the University actually put the money it received from the Foundation. It also is not clear whether the University has other medical related programs where it could use the money.
141. See Herzog, 677 A.2d at 1380. See infra Part III.B.3.c for a discussion of this Note's suggestion that standing be limited, which would not allow the Foundation to take the money back. The suggestion that standing be limited addresses the tax concerns that the supreme court raised. See infra Part II.B.3 for a discussion of the Connecticut Supreme Court's holding.
142. See Herzog, 677 A.2d at 1381-82. See supra Part I.C for a discussion of the statute, and supra note 102 for the text of section 45a-533(a) of the General Statutes of Connecticut.
143. See Herzog, 677 A.2d at 1381.
144. See id. at 1383. See supra note 117 for the Comment to section 7 of UMIFA.
charitable gifts. Instead, the University argued that only the Attorney General has the right to sue to enforce gift restrictions.

B. The Reasoning of the Connecticut Courts

1. Connecticut Superior Court

The trial court granted a motion to dismiss the case for lack of subject matter jurisdiction. The court held that the Foundation did not have standing under CUMIFA because the statute does not give the donor the right to enforce gift restrictions. The court read the Comment to section 7 of UMIFA and stated that CUMIFA gave "no property interest" to the donor. The court noted that sometimes donors have been granted standing if "the gift is conditional or ineffective, or there is a clear reservation of right to terminate or revoke it." Because the Foundation did not reserve its rights, the court relied on common law and said that only the Attorney General may bring suit. The court ended its analysis by quoting from section 3-125 of the General Statutes of Connecticut, which explicitly states that the Attorney General represents the public interest in protecting charitable gifts. The Foundation appealed.

2. Connecticut Appellate Court

The appellate court reversed the trial court. The court said that the reason the Attorney General is put in charge of lawsuits is that once a gift is given to a charity the use of funds are matters of public, not private concern. See id. (citing Steeneck v. University of Bridgeport, 668 A.2d 688, 696 (Conn. 1995); 15 AM. JUR. 2D Charities § 148, at 175-76 (1976)).

145. See Herzog, 677 A.2d at 1383-84. See supra Part I.C.2 for a discussion of section 7 of UMIFA.

146. See Herzog, 677 A.2d at 1384. See supra Part I.A.2 for a discussion of enforcing charitable gifts.


148. See id. at *3.

149. See supra note 117 for the text of the Comment to section 7 of UMIFA.


151. Id. (quoting 15 AM. JUR. 2D Charities § 148, at 175-76 (1976)).

152. See id. at *3. The court said that the reason the Attorney General is put in charge of lawsuits is that once a gift is given to a charity the use of funds are matters of public, not private concern. See id. (citing Steeneck v. University of Bridgeport, 668 A.2d 688, 696 (Conn. 1995); 15 AM. JUR. 2D Charities § 148, at 175-76 (1976)).

153. See id. Section 3-125 of the General Statutes of Connecticut identifies "gifts, legacies or devises" as charitable gifts. CONN. GEN. STAT. § 3-125 (1997).


court held that section 45a-533(a) of CUMIFA, which allows the written consent of the donor to alter restrictions on gifts, gave the Foundation standing. The court ruled that the statute creates a donor’s right beyond common law because “[i]t would be anomalous for a statute to provide for written consent by a donor to change a restriction and then deny that donor access to the courts to complain of a change without such consent.” The court relied on statutory interpretation and common law to make its ruling.

The appellate court began its analysis with a discussion of the issue of standing. The court noted that standing is granted to those who have a “real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.” The court further noted that standing is conferred either by statute or by being “classically aggrieved.” The appellate court held that the Foundation had standing to bring suit because standing could be fairly implied in the statute. The court stated that there was no need to have a specific provision in a statute.

The court found the implication for standing in CUMIFA because the statute requires a gift recipient to obtain the written consent of the donor in order to release restrictions on a gift. Since a donor’s right to consent to release a gift restriction did not exist at common law, the court reasoned that this was a statutorily created right to grant or withhold consent. Further, the court agreed endorsed the reasoning of the appellate court. See id. at 1002 (McDonald, J., dissenting). See infra Part II.B.3.b for a discussion of the dissent in the supreme court’s decision.

156. See Herzog, 677 A.2d at 1380-81.
157. Id. at 1385.
158. See id. at 1381-85.
159. See id. at 1380-81.
160. Id. at 1381. Standing is “a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy.” Id. (citing Unisys Corp. v. Department of Labor, 600 A.2d 1019, 1022 (Conn. 1991)).
161. Id. (citing Steeneck v. University of Bridgeport, 668 A.2d 688, 692 (Conn. 1995)). The court stated that since the Foundation was relying on the statute for standing, it would not analyze whether the Foundation was classically aggrieved. See id. at 1381 n.2. Further, the court said that the issue of standing is different than a legal interest. A legal interest concerns the merits of the case. See id. at 1381.
162. See id. at 1381, 1385.
163. See id. at 1381 (citing Bucholz’s Appeal from Probate, 519 A.2d 615, 620-21 (Conn. App. Ct. 1987)). The court said that standing could be implied because the question of standing is only whether the interest the person is trying to protect “is arguably within the zone of interests” protected by the statute. Id.
164. See id. at 1385.
165. See id. at 1381-82.
with the Foundation’s argument that, if the donor could not enforce subsection 45a-533(a), the statute itself would be rendered meaningless.\textsuperscript{166}

The appellate court next examined the legislative intent of CUMIFA.\textsuperscript{167} The court noted the Connecticut legislature intended to create a means for colleges to “seek a release” of gift restrictions from donors directly and that CUMIFA would allow more freedom to use their endowments.\textsuperscript{168} However, the court noted “that the right championed by the plaintiff, namely, a statutory interest in a completed gift that is sufficient to require [the donor’s] consent, . . . is not inconsistent with the statutory right of a donee to obtain a release of a” gift restriction.\textsuperscript{169}

The court then turned to the official comments in UMIFA.\textsuperscript{170} The court noted the comments show that the drafters’ purpose was to have sections 45a-526 to 45a-534 read together, so as to make uniform law.\textsuperscript{171} The court went on to state that the main purpose of UMIFA is to provide a mechanism whereby, with donor consent, a charitable institution can modify obsolete restrictions.\textsuperscript{172} The court stated that written consent is required because donors have the right to place restrictions on gifts.\textsuperscript{173}

The court then addressed the two arguments raised by the University, both of which relied on the Comment to section 7 of UMIFA. First, the University posited that the Comment states that donors have no enforcement right in a completed gift.\textsuperscript{174} The court dismissed this argument by noting that the Comment was made explicitly in response to tax implications of a donor releasing a gift restriction and did not apply to enforcing the restrictions themselves.\textsuperscript{175} Second, the University claimed that only the Attorney General can enforce restrictions on a completed gift because do-

\textsuperscript{166} See id. at 1382.
\textsuperscript{167} See id.
\textsuperscript{168} Id. To support its statement, the court offered quotations from Connecticut state legislators. See id. at 1382 n.4 (“This bill . . . aid[s] charitable corporations . . . in the better management of their endowments . . . .”).
\textsuperscript{169} Id. at 1382.
\textsuperscript{170} See id.
\textsuperscript{171} See id. at 1383 (citing Yale Univ. v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993)).
\textsuperscript{172} See id. (citing UNIF. MANAGEMENT OF INSTITUTIONAL FUNDS ACT Prefatory Note, 7A U.L.A. 706 (1985)).
\textsuperscript{173} See id.
\textsuperscript{174} See id. at 1382. See supra note 117 for the text of the Comment to section 7 of UMIFA.
\textsuperscript{175} See Herzog, 677 A.2d at 1383.
nors have no property interest in the gift.\(^{176}\) The court conceded that the Comment states specifically that no property interest is created in a gift.\(^{177}\) However, the court pointed out that “it does not follow that no protectable statutory interest exists for the purpose of standing.”\(^{178}\) Instead, the court said that the statute created a protectable interest in the donor which can be enforced by individuals other than the Attorney General.\(^{179}\)

The court built upon the University’s argument that common law applied to this case. It pointed out that even under the common law of trusts, “[o]thers [besides the Attorney General] may . . . have standing to enforce charitable trusts, such as trustees, donors of gifts and heirs and executors of wills, which standing includes the right to bring actions or to intervene in actions brought to enforce provisions of trusts or wills.”\(^{180}\) The appellate court justified its finding that CUMIFA contained an implied right to standing by citing \textit{Buchholz’s Appeal from Probate}.\(^{181}\) \textit{Buchholz} held that although a statute does not specify that certain persons are covered, standing may be granted if it can be fairly implied.\(^{182}\)

With its emphasis on a statutorily created protectable interest, the court concluded by holding that “there has likely been an invasion of a statutorily protected interest, that there is a causal connection between the defendant’s conduct and the plaintiff’s alleged

\(^{176}\) See \textit{id.} at 1384.

\(^{177}\) See \textit{id.}

\(^{178}\) Id.

\(^{179}\) See \textit{id.} The court is not entirely clear, however, about what that interest is.

\(^{180}\) Id. (citing Hartford \textit{v. Larrabee Fund Ass’n}, 288 A.2d 71 (Conn. 1971)). The court also noted that in enforcing charitable trusts, the Attorney General is a necessary party in the suit. See \textit{id.} (citing Copp \textit{v. Barnum}, 276 A.2d 893, 894 (Conn. 1970)).

\(^{181}\) See \textit{id.} at 1385 (citing Buchholz’s Appeal from Probate, 519 A.2d 615, 621 (Conn. App. Ct. 1987)).

\(^{182}\) See \textit{Buchholz}, 519 A.2d at 621. In \textit{Buchholz}, the father of an adult woman who was mentally disabled sued for the right to be named the guardian of her estate. See \textit{id.} at 616. When the probate court made him a standby guardian and his ex-wife guardian, he appealed. See \textit{id.} His case was dismissed by the trial court, which claimed that he lacked standing under section 45-288 of the General Statutes of Connecticut, holding that he was not “aggrieved.” Id. at 617. The appellate court overturned the decision and held that although the term “parents” was not contained in the statute, it was fair to imply that parents had an interest under the statute because of the special relationship the law grants parent and child. See \textit{id.} at 619. Further, the court dismissed an argument that relied on the fact that a 1982 version of section 45-322 of the General Statutes of Connecticut deleted the requirement of consent by parents before an application of guardianship could be granted, as not dispositive of whether parents had an interest under the statute. See \textit{id.} at 620. The court stated that the deletion was only because parents of adults who were mentally disabled were often difficult to locate and not because parents did not have an interest in their child’s well being. See \textit{id.}
injury, and that a court can redress the injury." The appellate court reversed the trial court by granting standing to the Foundation, and ordered the case be tried. The University appealed and the Connecticut Supreme Court agreed to hear the petition.

3. Connecticut Supreme Court

a. Majority

The Connecticut Supreme Court, in a 3-2 decision, reversed the appellate court and ruled that CUMIFA did not establish standing for donors under section 45a-533(a). Instead, the supreme court agreed with the trial court that common law applied and only the Attorney General has standing to sue to enforce the terms of completed gifts. The majority used statutory interpretation and common law principles to determine that the Connecticut legislature did not intend CUMIFA to provide standing to a donor who made a completed charitable gift to an institution.

After a presentation of the facts and procedural history, the majority discussed the common law. The majority stated that at common law, if one made a completed charitable gift, only the Attorney General could sue to enforce its terms unless the donor reserved the right to enforce its terms in the gift instrument. The reason for this is that, by virtue of their position, Attorneys General are considered "closely associated with the public nature of charities." The court noted that others, such as trustees or fiduciaries, may enforce a charitable trust if they have a special interest but not "the settlor or his heirs, personal representatives or next of kin." In such cases, the Attorney General still must be joined to protect

---

183. Herzog, 677 A.2d at 1385.
184. See id.
185. See Carl J. Herzog Found., Inc. v. University of Bridgeport, 682 A.2d 998 (Conn. 1996). The appeal was limited to whether CUMIFA created statutory standing for donors to sue to enforce provisions of a charitable gift. See id. at 998.
187. See id.
188. See id. at 997-1002.
189. See id. at 997-99.
190. See id. at 997 & n.2 (citing Attorney Gen. v. First United Baptist Church, 601 A.2d 96, 98 (Me. 1992); Sarkeys v. Independent Sch. Dist. No. 40, 592 P.2d 529, 533 (Okla. 1979); Wilbur v. University of Vermont, 270 A.2d 889 (Vt. 1970); Restatement (Second) of Trusts § 348 cmt. f (1959)). See supra Part I.A.2 for a discussion of enforcement of charitable trusts.
191. Herzog, 699 A.2d at 998 n.3.
192. Id. at 998 n.4 (quoting Restatement (Second) of Trusts § 391 (1959)).
the public interest. The court concluded that, under common law, the Foundation had no standing.

Having explained the common law, the court then discussed the Foundation's contention that the common law had been altered by the fact that section 45a-533(a) requires the written consent of a donor in order to alter a gift restriction and thus, standing could be implied. The court explained that a well-recognized principle of statutory construction is that courts should not read into the statute anything that alters the common law; instead, the common law can be altered only by the "plain meaning" of the statute. The court

193. See id. The court then applied these principles to Herzog because Connecticut codified the rule that the Attorney General is the officer in charge of enforcing charitable gifts in section 3-125 of the General Statutes of Connecticut. See id. at 998 n.3. Section 3-125 codifies the "common law rule and has entrusted the attorney general with the responsibility and duty to 'represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes . . . .'" Id. (quoting CONN. GEN. STAT. § 3-125 (1997)).

194. See id. at 999.

195. See id. at 999 & n.6.

196. Id. at 997 (citing State v. Luzietti, 646 A.2d 85, 88 (Conn. 1994); State v. Sanchez, 528 A.2d 373, 376 (Conn. 1987); Ahern v. City of New Haven, 459 A.2d 118, 121 (Conn. 1983)). In each of the cited cases, the court held that courts cannot alter the common law further than the words in a statute allow.

In Luzietti, a defendant was charged with the crime of operating a motor vehicle while his license was under suspension. See Luzietti, 646 A.2d at 86. The issue before the court was whether a statute allowing a trial court to reduce a defendant's sentence also conferred authority on the court to re-hear a motion for acquittal after the court had denied such a motion and upheld the defendant's conviction. See id. at 86-88. The trial court initially denied the defendant's motion for acquittal and the defendant began serving his sentence. The court granted a motion to re-argue the motion for acquittal and subsequently granted the acquittal motion based on recently discovered information that insufficient evidence was presented to the jury to support its verdict of operating a vehicle while his license was suspended. The state argued that the judge did not have the jurisdiction to vacate the conviction because the defendant had already begun serving his sentence. See id. at 86-87. The Connecticut Supreme Court ruled that there was no legislative grant of power to reconsider the motion. It then applied the common law rule that denies a court jurisdiction to modify its judgment, and held that the trial court could not reconsider the motion. See id. at 88. The court ruled that the statute would have allowed the court to reduce the sentence of the defendant. See id.

In the Sanchez case, the defendant was charged with perjury while providing an alibi for her boyfriend during the boyfriend's trial for burglary, assault, and larceny. See Sanchez, 528 A.2d at 374. Sanchez had testified that she and her boyfriend took Sanchez's daughter out of school and all three were in Massachusetts at the time of the crime. See id. The attendance records for the daughter indicated that she was in school on the day in question. See id. at 374-75. The issue before the court was how much corroboration the state needed to prove perjury under a Connecticut perjury statute which was silent on the issue. See id. at 375-79; see also id. at 373 n.1 (citing section 53a-156(a) of the General Statutes of Connecticut, which defines perjury). The court ruled that since the statute was silent, and the legislative history did not contain any evidence that the statute was "anything but a direct codification of the common law crime of
pointed out that even the Foundation conceded that there is nothing in the plain language of the statute expressly giving donors the right to sue.197

The court further supported its rejection of the appellate court’s reading of subsection (a) by an analysis of the intent of the Connecticut legislature.198 In order to do so, like the trial and appellate courts, the supreme court used the notes to UMIFA and the legislative history of CUMIFA to fill in gaps in the text of CUMIFA.199 From UMIFA, the court relied on the Prefatory Note and the Comment to section 7.200 First, the court noted that the Prefatory Note to UMIFA states that UMIFA was created to allow colleges and universities to use their endowments more efficiently by providing “[a]n expeditious means to modify obsolete restrictions.”201 The court said that UMIFA’s Prefatory Note also states that colleges and universities had been facing uncertainty in the law of investment because “there [was] virtually no statutory law . . . and [the] case law [was] sparse.”202 From this, the court concluded that colleges and universities were the intended beneficiaries of the law.203 Second, the court noted that the Prefatory Note to UMIFA states that the Ford Foundation commissioned a study “to examine

perjury,” the court should apply the common law rule. Id. at 376. The common law rule was that the state had to have one live witness and corroboration from another source. In this case, the only evidence was the school attendance record and that was not enough. See id.

Ahern involved a group of New Haven police officers who were convicted of illegal wiretapping. See Ahern, 459 A.2d at 118. The officers sued New Haven to recover the costs of defending themselves. See id. The officers argued that a 1975 amendment to a statute, indemnifying government officials, applied to their case even though the illegal actions took place before the amendment was passed. See id. at 121. Ahern argued that the lawsuit was brought after the statute was amended, and thus, applied to him. The court said that the applicable time period was when the violation occurred and refused to retroactively apply the statute. See id. The court said that the common law insulating government officials from tort liability applied in this case. See id.

This Note argues infra Part III that the use of these criminal cases was not appropriate in Herzog because criminal statutes involve constitutional due process considerations and civil statutes do not.

197. See Herzog, 699 A.2d at 1000.

198. See id. at 1000-02.

199. See id. See supra Parts II.B.1-2 for a discussion of the use of legislative history by the trial and appellate courts.

200. See Herzog, 699 A.2d at 1000-01. See supra Part I.C.3 for a discussion of the notes to UMIFA.


203. See id.
the legal restrictions" on colleges which made them invest their endowments conservatively. The court concluded that, since the drafters of UMIFA relied on the Ford Foundation study, the drafters "attempted to offer as much relief as possible to charitable institutions, without any mention of concern regarding a donor’s ability to bring legal action to enforce the condition on a gift." Third, the court endorsed the University’s claim that the Comment to section 7 of UMIFA said that the donor would not have a right to enforce a gift restriction, but "may only acquiesce in a lessening of a restriction already in effect." Fourth, although the above Comment about the right to enforce a restriction arose in the context of a debate about an income tax deduction, the supreme court rejected the appellate court’s limit on the meaning of that Comment to tax purposes. Instead, the court held that the sentence in the Comment means exactly what it says: only the Attorney General can bring suit and, therefore, the donor does not have standing to do so. Fifth, the court stated that there is no evidence that the drafters of either UMIFA or CUMIFA intended that the donor would supplant the Attorney General as the enforcer of the terms of a gift.

After its analysis of the notes and comments to UMIFA, the court then turned to the legislative history of CUMIFA. The court made two arguments to support its conclusion that the Connecticut legislature did not intend to establish donor standing when it enacted CUMIFA. First, the court said that the legislature "knows how to establish statutory standing and it has done so unambiguously in a plethora of instances." Second, the court believed that the legislative history itself showed that donor standing

204. Id. (quoting Unif. Management of Institutional Funds Act Prefatory Note, 7A U.L.A. 706 (1985)).
205. Id.
206. Id. at 1001 (quoting Unif. Management of Institutional Funds Act § 7 cmt., 7A U.L.A. 724 (1985)).
207. See id. The debate centered around the fact that under section 170(a) of the Internal Revenue Code, a donor who has not “permanently surrendered ‘dominion and control’” over his charitable donation cannot take a tax deduction. Id. See supra Part I.A.3 for a discussion of section 170(a). It is important to note that the court’s analysis did not address the fact that Herzog was a tax exempt foundation and did not face loss of a tax deduction.
208. See Herzog, 699 A.2d at 1001.
209. See id.
210. See id. at 1002.
211. See id.
212. Id. The court cited two instances: “General Statutes § 42-110g(a) (private cause of action based on violation of Connecticut Unfair Trade Practices Act); General
was discussed and rejected. To support its position, the court quoted Representative James T. Healey, who said “if the donor has seen fit to spell out restrictions, then those restrictions govern. This bill steps in only in the event that [the donor] has not spelled out the restrictions.” The court also quoted Representative David Neiditz, who stated “the bill generally leaves it to the donor to make his own provisions for the matters covered in the bill. The bill applies when the donor has not specified another way.” In its analysis of the legislative history of UMIFA and CUMIFA, the court concluded that if CUMIFA was read to establish standing for donors, it would defeat CUMIFA’s purpose of making it easier for colleges and universities to free themselves of gift restrictions “by virtue of the potential of lengthy and complicated litigation.” The supreme court reversed the appellate court and remanded the case to the appellate court, instructing it to affirm the trial court’s decision not to grant standing to the Foundation.

b. Dissent

The two judges who joined in dissent in Herzog endorsed the reasoning of the appellate court because they believed that this decision would have a chilling effect on donations to Connecticut schools. They said that the decision of the supreme court was akin to the donee “double-crossing the donor . . . with impunity.” The two endorsed the “thoughtful and well reasoned opinion of the

Statutes § 46a-99 (persons aggrieved by violations of antidiscrimination statute ‘may petition the Superior Court for appropriate relief’).” Id.

213. See id.
214. Id. (quoting House Proceeding, supra note 12, at 5732).
215. Id. (quoting House Proceeding, supra note 12, at 5726).
216. See supra Part I.C.4 for a discussion of the legislative history of CUMIFA.
217. Herzog, 699 A.2d at 1002 (discussing the court’s conclusion about legislative intent based on its reading of the legislative histories of both UMIFA and CUMIFA).
218. See id.
219. See supra Part II.B.2 for a discussion of the appellate court decision. The dissenting opinion was very brief and simply referred the reader to the appellate decision. See Herzog, 699 A.2d at 1002 (McDonald, J., dissenting).
220. See Herzog, 699 A.2d at 1002 (McDonald, J., dissenting).
221. Id. (McDonald, J., dissenting). The dissent stated the following: This decision is simply an approval of a donee, in the words of the donor, “double-crossing the donor,” and doing it with impunity unless an elected attorney general does something about it. This decision will not encourage donations to Connecticut colleges and universities. I fail to see why Connecticut, the home of so many respected schools that would honor their promises, should endorse such sharp practices and create a climate in this state that will have a chilling effect on gifts to its educational institutions.

Id.
Appellate Court.”

III. UMIFA & CUMIFA CREATE A LIMITED RIGHT TO SUE FOR THE DONOR

In *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, the Connecticut Supreme Court decided that the Foundation did not have standing by applying a rule of statutory construction whereby a court should not go beyond the common law in interpreting statutes unless the language of the statute explicitly alters the common law. Further, the court looked to the official comments to UMIFA and the legislative history to CUMIFA to discern legislative intent to grant donors standing under CUMIFA. The court held that there was no evidence of legislative intent to supplant the common law rule that only the Attorney General may sue to enforce the terms of a completed gift. The Connecticut Appellate Court held that one may imply standing based on the “written consent” requirement of section 45a-533(a). The dissent in *Herzog* endorsed the appellate court’s approach and expressed concern that the Connecticut Supreme Court’s holding in *Herzog* might cause donors to hesitate to donate money to charitable institutions if they believe that their wishes will be flouted “with impunity.”

There is another approach to the problem of donor standing under CUMIFA, however. One can view the legal interest created by CUMIFA as a donor’s right to a process which donees must observe in order to change restrictions on completed gifts. Recasting the legal right CUMIFA created for donors as the right to a process allows donor standing in a limited way that addresses and resolves both the weaknesses of the majority decision in *Herzog* and the concerns raised by all sides of the controversy.

---

222. Id. (McDonald, J., dissenting). See supra Part II.B.2 for the appellate court’s opinion.
223. 699 A.2d 995 (Conn. 1997).
224. See id. at 997.
225. See id. at 1000-02.
226. See id. at 1002.
227. See supra Part II.B.2 for a discussion of the analysis applied by the appellate court.
229. See infra Part III.B for a discussion of limiting donor standing to the right to enforce the process of releasing gift restrictions outlined in CUMIFA.
A. The Weaknesses of the Connecticut Supreme Court’s Decision in Herzog

The Connecticut Supreme Court’s decision in Herzog contains several weaknesses. First, the court’s analysis disregarded the plain language of the statute, which clearly alters the common law. In doing so, the court contravened one of its own well-established rules of statutory construction. Second, in determining its statutory construction, the court relied upon cases that are questionable as precedent for the Herzog case. Third, the court’s discussion of legislative intent was based upon inconclusive legislative history. Fourth, the court’s decision allowed the University to violate CUMIFA with impunity.

1. The Court’s Decision Disregarded the Plain Language of CUMIFA, Which Clearly Alters the Common Law

The first weakness in the Herzog case is that the Connecticut Supreme Court ignored the plain language of the statute, which clearly alters the common law. In doing so, the court disregarded its own well-established rule for statutory construction. The Connecticut Supreme Court said that there was nothing in the legislative history to CUMIFA that suggested that the legislature wanted to “supplant” the common law rule that the Attorney General is the enforcer of the terms of charitable gifts. However, this statement ignores the fact that, under common law, donors had no power to consent to any change in a completed gift. Under common law, the written consent of the donor was not required to alter restrictions on completed gifts. The donor had control over a completed gift only if he took the initiative to reserve such power in the gift instrument. CUMIFA, on the other hand, allows the written consent of the donor to alter the terms of a gift restriction and does not mention reserving such power in the gift instrument.

230. This Note argues that the primary reason for the flaws in the Herzog decision stems from the fact that the court incorrectly labeled the right the statute created in the donor as a property interest in the gift. See infra Part III.B for a discussion of this point.

231. See Herzog, 699 A.2d at 1002.

232. Such consent, presented to a court in an action for cy pres, would have been meaningless. See supra Part I.A.4 for discussion of donor rights under the common law and the doctrine of cy pres.

233. See supra Part I.A for a discussion of the common law of charitable trusts.

234. This argument is different from what the Connecticut Supreme Court said. The court stated that one should apply the common law rule that only donors who
court’s opinion ignores the fact that section 45a-533(a) alters the common law in that it allows donors to consent to changes in a completed gift and gives legal force to that consent by permitting charitable institutions to avoid the costs of having to go to court to change the terms of the gift.235

The court’s opinion also is problematic because it does not address section 45a-533(b), which does state, explicitly, when the drafters expected the Attorney General to be heard.236 If the donor’s written consent “cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification,” the donee may ask a court to release the restriction and the Attorney General must have an opportunity to be heard.237 The Connecticut Supreme Court did not discuss how its decision to deny donors a statutory implied private right of action under section 45a-533(a) impacts on the proper reading of section 45a-533(b).

In disregarding both the plain language of the statute and the impact of section 45a-533(a) on section 45a-533(b), the court failed to follow its own principle of statutory construction: all parts of the statute should be given meaning.238 This principle of statutory construction, noticeably absent in the Herzog decision, is a presumption that every “sentence, clause, or phrase in a legislative enactment” has a purpose.239 The Connecticut Supreme Court has said that “[s]tatutes should be construed so that no part of a legislative enactment is to be treated as insignificant and unnecessary.”240 In addition, this rule of statutory construction comports with what the United States Supreme Court said in Bennett v. Spear:241 it is a court’s “duty ‘to give effect, if possible, to every clause and word’

reserved control in the gift instrument could modify and revoke gifts. See supra Part II.B.3 for a discussion of the Connecticut Supreme Court’s reasoning.

The argument that section 45a-533 of CUMIFA goes beyond the common law is reinforced by the discussion, infra this subsection, of another rule of statutory construction that Connecticut courts follow: the presumption that all parts of a statute have meaning.

235. See supra Parts I.A, I.C, II.B.3. For a discussion of the fact that the Connecticut Supreme Court stated that one purpose of CUMIFA was to allow donees to avoid litigation costs, see supra note 217 and accompanying text.

236. See supra note 102 for a complete text of section 45a-533 of the General Statutes of Connecticut.

237. CONN. GEN. STAT. § 45a-533(b) (1997). See supra note 102 for the complete text of section 45a-533.


239. Id. (quoting Charlton Press, 214 A.2d at 357).

240. Id.

... rather than to emasculate an entire section” of a statute.242 It is not clear why the Connecticut Supreme Court did not apply this rule in its decision.243

Under the Connecticut Supreme Court’s analysis, section 45a-533(b) is rendered “insignificant and unnecessary,” contrary to the courts principle of presuming purpose in every sentence of a statute.244 That is, in assuming that the Attorney General always is the only one who can sue to enforce gift restrictions, the court does not explain why the statute specifically lists conditions under which the Attorney General must be heard.245 The decision of the Connecticut Supreme Court seems to “emasculate” section 45a-533(b) because when the court created a role for the Attorney General in section 45a-533(a) where none existed, it made section 45a-533(b) unnecessary. None of the Connecticut courts discussed section 45a-533(b) and the impact that finding or denying standing would have on it.

2. The Court’s Solution to Donor Standing Under CUMIFA is Based on Questionable Precedent

The Connecticut Supreme Court based its decision on questionable precedent. The court relied on cases containing a rule for analyzing statutes which replace or codify common law:246 State v. Luzietti,247 State v. Sanchez,248 and Ahern v. City of New Haven.249 The rule that the Connecticut Supreme Court used in these cases is


243. The Connecticut Appellate Court applied the rule implicitly in its decision when it said “[i]t would be anomalous for a statute to provide for [the] written consent [of the] donor . . . and then deny that donor access to the courts . . . .” Carl J. Herzog Found., Inc. v. University of Bridgeport, 677 A.2d 1378, 1385 (Conn. App. Ct. 1996), rev’d, 699 A.2d 995 (Conn. 1997).

244. Frauwirth, 355 A.2d at 41.

245. If the donor’s written consent “cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification,” the donee can ask a court to release the restriction and the Attorney General must have an opportunity to be heard. CONN. GEN. STAT. § 45a-533(b) (1997). See supra note 102 for the complete text of section 45a-533.

246. See Carl J. Herzog Found., Inc. v. University of Bridgeport, 699 A.2d 995, 997 (Conn. 1997); supra Part II.B.3.


that courts may not go beyond the common law if the language of
the statute does not explicitly allow it.\textsuperscript{250} The supreme court did
not explain why it applied this rule instead of the analysis for a
statutory implied private right of action.\textsuperscript{251} It is important to note
that none of the three cases involved a standing issue. Instead, each
case dealt with people charged with crimes.\textsuperscript{252} Further, none of the
cases covered issues for which an alternative test was available.
However, with \textit{Herzog}, the test for standing was an available alterna­
tive, and it is a test the Connecticut courts use at other times.\textsuperscript{253}

A rule prohibiting the alteration of the common law in criminal
matters is an important one, given that criminals are entitled to con­
stitutionally protected due process under the Fifth and Fourteenth
Amendments to the Constitution.\textsuperscript{254} Altering the common law af­
ter arrest would at least raise the issue of notice.\textsuperscript{255} But the rele­
vance of these cases remains a critical question because the court
did not adequately explain why it used a rule of statutory construc­
tion developed for criminal cases instead of traditional implied pri­
vate right of action analysis when it decided \textit{Herzog}.

Furthermore, the rule stating that courts may not go beyond the
common law in statutory interpretation, particularly as it is ar­
ticulated in \textit{Sanchez}, would not apply to section 45a-533(a) of
CUMIFA even if one could argue that it might apply to other kinds
of statutes. In \textit{Sanchez}, the court stated that it did not go beyond the
common law because there was no indication that the statute
was "anything but a direct codification of the common law crime of
perjury."\textsuperscript{256} However, in the text of section 45a-533(a) of CUMIFA
the legislature has gone beyond the common law.\textsuperscript{257}

The other cases that the Connecticut Supreme Court relied
upon in the \textit{Herzog} decision were of two types, both of which also

\textsuperscript{250} See \textit{Herzog}, 699 A.2d at 999.

\textsuperscript{251} This Note argues, infra Part III.B, that one explanation for this confusion
over which analysis to use stems from the fact that the courts cast the legal interest
incorrectly as an interest in the gift itself.

\textsuperscript{252} See supra note 196 for a discussion of the facts of these cases.

\textsuperscript{253} See supra Part I.B for examples of cases where the Connecticut courts used
analysis for statutory implied private right of action.

\textsuperscript{254} See \textit{LaChance} v. Erickson, 118 S. Ct. 753, 756 (1998) ("The core of due pro­
cess is the right to notice and a meaningful opportunity to be heard." (citing Cleveland
259, 265-67 (1997) (stating that, in criminal cases, due process includes notice).

\textsuperscript{255} See \textit{Lanier}, 520 U.S. at 265-67; see also \textit{LaChance}, 118 S. Ct. at 756.

\textsuperscript{256} State v. Sanchez, 528 A.2d 373, 376 (Conn. 1987).

\textsuperscript{257} See supra Parts I.A and I.C for a discussion of how CUMIFA altered the
common law.
are questionable precedent. First, there were cases that dealt with standing to enforce charitable trusts.\textsuperscript{258} In those cases, standing was interpreted according to the common law, allowing only the Attorney General and persons with a special interest to sue to enforce the terms of gifts.\textsuperscript{259} However, these cases are of doubtful value to \textit{Herzog} because they did not involve a statute at all.\textsuperscript{260} The second set of cases upon which the Connecticut Supreme Court relied also are not on point because, while they dealt with interpreting and applying other sections of CUMIFA, they did not concern the issue of donor standing.\textsuperscript{261}

3. The Court Based Its Analysis of Legislative Intent upon Inconclusive Legislative History

The third aspect of the \textit{Herzog} decision that is problematic is

\begin{itemize}
\item 258. See \textit{supra} note 190 and \textit{infra} note 259 for a list of the cases upon which the majority relied.
\item 259. See \textit{Carl J. Herzog Found., Inc. v. University of Bridgeport}, 699 A.2d 995, 997-98 (Conn. 1997). The court cited the following cases from the common law: \textit{Lopez v. Medford Community Center, Inc.}, 424 N.E.2d 229 (Mass. 1981) (stating plaintiffs had to join Attorney General when members of charitable corporation brought action against board of directors for corporate mismanagement); \textit{Marin Hospital District v. Department of Health}, 154 Cal. Rptr. 838 (Cal. Ct. App. 1979) (holding hospital did not buy the computerized body scanner for which it solicited donations, but donors may not recover their money); \textit{Lefkowitz v. Lebensfeld}, 417 N.Y.S.2d 715 (App. Div. 1979) (holding Attorney General had no standing to sue on behalf of recipients of charitable gift of stock who sued to be paid those dividends. Attorney General has no standing to sue on behalf of ultimate beneficiaries); \textit{Sarkeys v. Independent School District No. 40}, 592 P.2d 529 (Okla. 1979) (holding Attorney General had authority to settle suit where Attorney General was party when school sued descendants of charitable foundation for indirect self-dealing); \textit{Wier v. Howard Hughes Medical Institute}, 407 A.2d 1051 (Del. Ch. 1979) (holding only Attorney General has the right to enforce charitable trust, not the administrator of the charitable trust who tried to apply the intention of the donor); \textit{Hagaman v. Board of Education}, 285 A.2d 63 (N.J. Super. Ct. App. Div. 1971) (holding son of deceased donor denied return of property conveyed under condition that school be built, when school ultimately closed and used as park, because there were no words in the instrument making a grant of a fee simple determinable or condition subsequent); \textit{Wilbur v. University of Vermont}, 270 A.2d 889 (Vt. 1970) (holding that charitable trust does not fail simply because trustees violate the terms of the trust; heirs may not compel reversion, but Attorney General can sue trustees to force observance of trust); \textit{McGee v. Vandeveeter}, 158 N.E. 127 (Ill. 1927) (holding abuse of trust does not cause reverter unless there is a reserved right in gift, but equity allows Attorney General to sue to compel observance of conditions). See \textit{Herzog}, 699 A.2d at 997-99.
\item 260. See \textit{supra} Parts I.A and I.C for a discussion of how CUMIFA altered the common law.
\item 261. \textit{Herzog} was the first case in which the issue of donor standing under CUMIFA arose. See \textit{Herzog}, 699 A.2d at 1000 (citing \textit{Yale Univ. v. Blumenthal}, 621 A.2d 1304, 1306 (Conn. 1993)).
\end{itemize}
the court's reliance on legislative intent. There is no indication in either the comments to UMIFA or the legislative history to CUMIFA of what the legislature intended regarding donor standing under section 45a-533(a). When it discussed its reading of legislative intent, therefore, the court, extrapolated from other parts of the comments and legislative history.

The most problematic issue concerning the court's reliance on the legislative history is that the history itself is scant. First, there is no recorded legislative history from the Connecticut Senate. As a result, at best, one can speak of a legislative intent only for the Connecticut House. In the House of Representatives, of the one hundred forty-one members voting on the bill, only seven made statements about the bill itself, and all seemed to offer different reasons for supporting it. Given this record, it is reasonable to ask whether one can glean anything about legislative intent from the statements of five percent of the one half of the Connecticut state legislature. It is also reasonable to ask how many of the seven House members were actively thinking about donor standing when they rose to speak about CUMIFA. When a court bases a large part of its decision on a scant record, in which there is no discussion of the issue the court is deciding, it runs the risk of seeming to manipulate the record in order to reach a desired outcome, which, in turn, may undermine public confidence in the judicial system.

Because there is no direct legislative history, the court relied upon segments of the official comments to UMIFA that addressed a tax issue rather than standing. The court identified the tax issue

262. See supra Part II.B.3 for a discussion of the supreme court's reliance on legislative intent.

263. See supra Part I.C.4 for a discussion of the intent of the Connecticut legislature.


265. See House Proceeding, supra note 12. The Representatives who spoke have been quoted supra Parts I.C.4 and II.B.3. They are: Bingham, Neiditz, Demerell, Webber, Healey, Dooley, and Bevacqua. Representative Churchill spoke, but only to recuse himself for possible conflict of interest. See House Proceeding, supra note 12, at 5727.

266. Since there is no legislative record from the Senate, one cannot know whether there was discussion at all.

267. See Carl J. Herzog Found., Inc. v. University of Bridgeport, 699 A.2d 995,
as the potential for donors to lose their tax deduction if they were granted standing to sue and used the tax concern to bolster its decision to deny standing to donors. The court's use of the tax issue presents problems, however. In this particular case, taxes seem to be irrelevant because the Herzog Foundation is a tax exempt organization and, by definition, cannot take tax deductions.

4. The Court's Decision Allowed the University to Disobey CUMIFA with Impunity

As the dissent in Herzog stated, the Connecticut Supreme Court's decision may send the wrong message to both donors and donees. The dissent stated that the signal the Herzog decision may send to potential donors is that their wishes can be disregarded "with impunity," resulting in a two-fold risk. The first risk is that donors will now be reluctant to make gifts to charitable institutions. The second risk is that the decision, while purporting to help charities, will hurt those institutions in the long run. These

1001-02 (Conn. 1997); supra Part II.B.3. The court also relied upon the Comment to section 7 of UMIFA for this part of its analysis. See Herzog, 699 A.2d at 1001-02; supra Part II.B.3.

268. See Herzog, 699 A.2d at 1001; supra Part II.B.3.

269. See supra Part I.A.3 for a discussion of the tax issues implicated in Herzog. Section 500 of the Internal Revenue Code covers tax exempt organizations. See I.R.C. § 501-509 (West Supp. 1998). Section 501(c) lists the kinds of organizations that are tax exempt, such as foundations and corporations operated for religious, charitable, educational, or literary purposes. See I.R.C. § 501(c) for a complete list of purposes and organizations. The section also states that organizations cannot devote monies to "influence legislation" or to "political campaign[s]." Id. § 501(c). Since foundations are tax exempt, if they donate money to other charitable organizations, they cannot take a tax deduction under section 170. See I.R.C. § 170, for the list of deductions. Of course, individual donors who do not have foundations set up can take a deduction for charity. See supra Part I.A.3 for a discussion of charitable deductions for individuals. Private foundations are covered specifically by I.R.C. §§ 507-509.

See Charles E. Muller, II, Private Foundations—Self Dealing (Section 4941), Tax Mgmt. (BNA), at A-1 (1996), and Sue Stern Stewart & Johanna V. Bartlett, Private Foundations—Distributions (Sec. 4942), 880 Tax Mgmt. (BNA) (1996), for more information about tax exempt foundations and their regulation in the Internal Revenue Code. There is a larger question, beyond the scope of this Note, about whether any statute should be interpreted based on tax implications which, of course, could be changed by the Congress at any time. See U.S. Const. art. I, § 8, cl. 1.


271. See id. (McDonald, J., dissenting).

272. Id. (McDonald, J., dissenting).

273. See id. (McDonald, J., dissenting).

274. See id. (McDonald, J., dissenting).
risks may cause either a decrease in gifts to charities, or an increase in donors reserving an interest in the gift instrument.

Indeed, at least one practitioner is advising estate planners to take into account the Herzog decision in considering how to create charitable gift instruments. He took special note that colleges and universities supported the majority decision with amici curiae briefs. His suggestion for avoiding the problems donors face in light of the decision was to use "'reverter' clauses." If a right of reverter is inserted into the gift instrument, then the donor retains a specific right to control the gift and takes that right away from the Attorney General.

The decision in Herzog disregarded the plain language of CUMIFA, relied upon questionable precedent and inconclusive legislative history, and allowed the University of Bridgeport to violate CUMIFA. A better result might have been reached had the court used its test for statutory implied private rights of action to decide the case.

B. The Legal Interest CUMIFA Creates is the Right to a Process, the Violation of Which Gives Donors Standing

The Connecticut courts were correct in holding that CUMIFA did not create a donor's right in a charitable gift itself. However, the right that CUMIFA did create is a right to a process which donees must observe in order to change restrictions on completed gifts.

1. Connecticut Courts Analyzed Whether CUMIFA Created a Donor's Legal Interest in the Gift Itself

In Herzog, each level of the Connecticut courts analyzed whether CUMIFA created a legal interest for the donor in the gift. Given the legal interest the courts analyzed, it is under-

275. See id. (McDonald, J., dissenting) (arguing that the majority decision will "create a climate . . . that will have a chilling effect on gifts to [the state's] educational institutions").


277. See id.

278. Id. Reverter clauses create a reversionary interest in the donor. See supra note 6 for a discussion of reversionary interests.


280. See infra Part III.B.

standable why the supreme court was reluctant to grant such an interest to the donor. Such an interest indeed may have altered common law beyond what the Connecticut legislature may have intended. But, in trying to preserve the main purpose of the statute, to make it easier for donees to alter the terms of charitable gifts, the court's analysis created its own problems. A better reading of the legal interest CUMIFA created is to follow the plain language of section 45a-533(a) through 45a-533(d), which outlines a process by which donees can alter terms of a charitable gift.

2. The Plain Language of CUMIFA Creates a Legally Protected Interest in a Process by Which Donees May Alter Gifts

A reading of the plain language of CUMIFA's section 45a-533 clearly shows a process by which a charitable institution may alter the terms of a gift. Under section 45a-533(a), the donee may simply obtain the written consent of the donor. If consent is obtained, the donee avoids the cost of litigation and the gift is altered. Under section 45a-533(b), if the donor's “consent cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification,” the donee may ask the court to release the restriction and the Attorney General must have the opportunity to be heard. Section 45a-533(c) directs that a “release” under section 45a-533 cannot be granted for anything other than charitable purposes. Section 45a-533(d) states that courts may still use cy pres. It is important to note that the Connecticut courts did not analyze what would happen under CUMIFA if a donor was avail-


282. One can imply this because it is clear that the primary purpose of CUMIFA was to make it easier on donees who needed to alter the terms of charitable gifts. See supra Part I.C. But, the mechanism chosen to accomplish that purpose, allowing donors to consent to changes, empowered donors to a degree they never had under the common law.

283. See supra Part III.A for a discussion of the flaws in the reasoning of the supreme court, and supra Part I.C for a discussion of CUMIFA's purpose.


285. See Herzog, 699 A.2d at 1002.

286. See CONN. GEN. STAT. § 45a-533(b) (1997).

287. See CONN. GEN. STAT. § 45a-533(c) (1997). For the sake of argument, this Note assumes that subsection (c) refers to releases both by the donor (subsection (a)) and by the court (subsection (b)).

288. See CONN. GEN. STAT. § 45a-533(d) (1997).
able but refused to consent to changes in the gift.\textsuperscript{289} Since subsection (b) is specific about when it applies and does not specifically list donor refusal to consent, it is reasonable to argue that subsection (d) would apply; the common law process of \textit{cy pres} would therefore have to be used.\textsuperscript{290}

Given that CUMIFA specifically outlines the process by which a donee can alter the terms of a charitable gift, it is reasonable to assume two things. First, CUMIFA is now the process by which donees may alter the terms of gifts. This is a reasonable interpretation of CUMIFA because the statute creates a new process, yet specifically incorporates the only common law method of gift alteration, \textit{cy pres}. Second, CUMIFA grants the donor a role in that process. Since section 45a-533(a) makes the donor part of the process, it is reasonable to argue that the statute creates a legally protected interest in the process for the donor. Thus, when the University altered the terms of Herzog's gift, without following either subsection 45a-533 (a), (b), or (d) of CUMIFA, it injured Herzog's legal interest in the process. A statutory implied private right of action may be found once the injury is recast in this way, and a donor whose interest is violated has standing to sue.

Further, labeling the legal interest as an interest in the process avoids the problems which concerned the Connecticut Supreme Court. For example, if the interest is an interest in the process, the donor does not have an interest in the gift itself, and no tax problems are created. Furthermore, because the gifts themselves remain in the charitable sector, there is no need for concern that donors will use the written consent section of CUMIFA to revoke their gifts.\textsuperscript{291}

\textsuperscript{289} Although the appellate court stated that the donor could refuse to give its consent, it did not analyze what would happen if such an event occurred. \textit{See} Carl J. Herzog Found., Inc. v. University of Bridgeport, 677 A.2d 1378, 1381 (Conn. App. Ct. 1996), rev'd, 699 A.2d 995 (1997).

\textsuperscript{290} \textit{See supra} Part I.A.4 for a discussion of \textit{cy pres}. A Connecticut court has applied section 45a-533(d), \textit{cy pres}, when donors were dead, and thus, could not consent to changes in gift restrictions. \textit{See} Hartford Hosp. v. Blumenthal, No. CV-95-0555462-S, 1996 WL 240440, at *2 (Conn. Super. Ct. April 15, 1996).

The linking of the subsections of section 45a-533 of CUMIFA is suggested in the Prefatory Note to UMIFA, which states that the statute allows a release of gift restrictions "by donor acquiescence or court action." \textit{UNIF. MANAGEMENT OF INSTITUTIONAL FUNDS ACT} Prefatory Note, 7A Part II U.L.A. 477 (1999) (emphasis added). \textit{See supra} note 100 and accompanying text for the full text.

\textsuperscript{291} \textit{See} \textit{CONN. GEN. STAT.} § 45a-533(a) (1997). This solution would also avoid the problem of reconciling the Comment to section 7 of UMIFA which states that donors have no property interest in the gift. \textit{See supra} Part I.C.3. \textit{See infra} Part III.B.3.d
3. Once the Right is Labeled as the Right to Have Donees Observe the Process CUMIFA Outlines, Donors Have a Statutory Implied Private Right of Action and thus Have Standing

a. **Standing and private right of action analysis in Lujan v. Defenders of Wildlife, Bennett v. Spear, and National Credit Union Administration v. First National Bank & Trust Co.**

   In *Lujan v. Defenders of Wildlife*, *Bennett v. Spear* and *National Credit Union Administration v. First National Bank & Trust Co.*, the United States Supreme Court provided analysis of standing and the statutory implied private right of action. In *Bennett v. Spear*, the United States Supreme Court held that, when a statute does not explicitly confer standing on a particular individual, the plaintiff must first satisfy the "'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum.'" Thus, the plaintiff must satisfy a three-prong test by "demonstrat[ing] that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." In *Lujan*, the Supreme Court said that when there is a statute, any injury must be personally experienced to satisfy the Article III

---

292 State courts are not required to follow the United States Supreme Court's analysis for standing. However, this Note presents the Supreme Court analysis for two reasons. First, it is clear that Connecticut has followed standing analysis as articulated by the Supreme Court in the past. See *supra* Part I.B for a discussion of standing analysis in Connecticut. Second, even if Connecticut refused to follow the analysis contained in Supreme Court cases, the suggestion in this Note might be useful to courts in other jurisdictions that might want to consider the Supreme Court analysis as an alternative way to interpret donor standing under UMIFA.

296. 520 U.S. 154 (1997). In *Bennett*, the Court found that plaintiffs with commercial interests in a proposed irrigation project which the government rejected under the 1973 Endangered Species Act ("ESA"), 16 U.S.C. § 1531 (1994), had standing to sue under 16 U.S.C. § 1540(g). The Court found that the plaintiffs fell under the zone of interests protected by the ESA. *See Bennett*, 520 U.S. at 166.
297. *Bennett*, 520 U.S. at 162.
298. *Id.* (quoting *Lujan*, 504 U.S. at 560-61). See *supra* Part I.B and *supra* note 79 for a discussion of the *Lujan* case and other Supreme Court cases addressing standing in general, as well as standing under Connecticut law.
An individual can be injured through a violation of the "procedural rights" which a statute outlines, as long as the injury is connected to the individual's "own concrete harm." Once a plaintiff can demonstrate a personally experienced injury, the zone of interests analysis is used to determine whether the injury falls within the interests that the statute is designed to protect. In *Bennett*, the Supreme Court discussed how the "zone of interests" analysis should be used in determining standing. The Court held that the zone of interests analysis is part of the standing test unless such a test is "expressly negated" by Congress.

---

299. *See Lujan*, 504 U.S. at 563 (requiring that "the party seeking review be himself among the injured"). The Court said that it required the injury to be personal because if courts allowed anyone to sue for an injury to the general public it would be violating congressional authority to vindicate interests of the general public. *See id.* at 576-77.

300. *Id.* at 572 n.7, 573 n.8.

301. *See supra* Part I.B for a discussion of zone of interests and standing analysis.

302. *See Bennett*, 520 U.S. at 163-65. This discussion was necessary because earlier Supreme Court cases did not clearly establish that the zone of interests test was part of standing analysis. *See Kelso & Kelso, supra* note 79, at 145.

303. *Bennett*, 520 U.S. at 163. In *Bennett*, the Court granted standing to the plaintiffs, ranchers and irrigation districts, who had economic interests they claimed were harmed by government protection of endangered fish. They were allowed to bring suit under two provisions of the Endangered Species Act ("ESA"). *See id.* at 176-77.

Regarding the ESA, both the district court and the Ninth Circuit had dismissed the case for lack of standing, because both held that the zone of interests protected by the ESA was the preservation of wildlife and that competing commercial interests were not within the zone of interests. *See id.* at 160-61. The Supreme Court overturned the decisions by pointing out that when Congress created the citizen-suit provision of the ESA, it wrote the following words: "any person may commence a civil suit." *Id.* at 164 (quoting 16 U.S.C. § 1540(g) (1994)). The Court interpreted these words literally and held that the words negated the zone of interests test of standing under the ESA. However, Justice Scalia noted, in his opinion for the majority, that he believed the words negated the zone of interests test because they really enlarged the zone of interests to include every citizen. *See id.* at 165-66.

The Court then found standing to sue under section 1536(a)(2) of the ESA, which requires "each agency to 'use the best scientific and commercial data available'" in making its decisions. *Id.* at 176. The Court said that the reason standing could be found is that, in this instance, the zone of interests test should be applied, "not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies." *Id.* at 175-76. The Court agreed with the plaintiffs' contention that the requirement of section 1536(a)(2) was designed to prevent an overly zealous agency from causing "needless economic dislocation." *Id.* at 176. The vehicle the Court used to allow the plaintiffs a cause of action under section 1536(a)(2) was the Administrative Procedure Act ("APA"). The APA allows "a right to judicial review of all 'final agency action for which there is no other adequate remedy in court,' [5 U.S.C.] § 704." *Bennett*, 520 U.S. at 175. The only exceptions to this rule are if a statute explicitly excludes judicial review or if the agency has discretion. The Court stated that neither of the exceptions applied under the ESA. *See id.*
Under the analysis in *Bennett*, if the statute does not explicitly state which plaintiffs have standing, then courts should use the "zone of interests" analysis; however, if the statute does state which plaintiffs have standing, the test should not be used.304 In applying the zone of interests test, the Court said that one does not look at "the overall purpose of the Act in question . . . but . . . [refers] to the particular provision of the law upon which the plaintiff relies" in his claim.305

In *National Credit Union Administration v. First National Bank & Trust Co.*,306 the Supreme Court further clarified the zone of interests test to be used in determining whether a particular individual has standing to sue under a statute which does not explicitly confer standing. At issue was whether a court should look for a legislative purpose to benefit the "would-be plaintiff," when conducting a zone of interests analysis.307 The Court held that no such inquiry is required.308 All that a court should do is "first discern the interests 'arguably . . . to be protected' by the statutory provision at issue [and] then inquire whether the plaintiff's interests affected . . . are among them."309

b. The Connecticut Supreme Court did not use zone of interests analysis to determine standing

When it analyzed the standing problem in *Herzog*, the Connecticut Supreme Court did not use zone of interests analysis. Instead, it said that the common law of charitable trusts governed donor standing unless CUMIFA changed the common law.310 Because there was nothing in the plain language of CUMIFA explic-
Itly altering the common law of charitable trusts, the court searched for a legislative intent to alter the common law.\textsuperscript{311} The court found no legislative intent, but did find a statement from the Comment to section 7 of UMIFA stating that UMIFA did not create a property interest in the gift.\textsuperscript{312} Because the court had labeled the interest as a property interest in the gift itself, the court used the Comment to section 7 of UMIFA to deny standing.\textsuperscript{313} No standing or zone of interests analysis was attempted.\textsuperscript{314}

c. Applying the United States Supreme Court’s standing and zone of interests analyses gives the Foundation standing

Had the Connecticut Supreme Court both analyzed the right CUMIFA confers on the donor as the right to a process rather than as an interest in the gift, and applied standing and zone of interests analysis, the outcome in \textit{Herzog} would have been different. CUMIFA does not state directly whether donors have standing.\textsuperscript{315} Therefore, in light of the United States Supreme Court’s decisions in \textit{Lujan}, \textit{Bennett}, and \textit{National Credit Union}, the courts should have applied the three part standing test and its implied private right of action (zone of interests) analysis to \textit{Herzog}.\textsuperscript{316} The analysis that follows applies the three part standing test and the zone of interests analysis to the \textit{Herzog} case.\textsuperscript{317} The main focus of analysis is on the “injury” and zone of interests facets of standing because, based on the facts, the other two portions of the test, causation by defendant’s actions and ability to receive relief, are clearly met if the Foundation is within the zone of interests.

i. Injury

In order to have standing, a plaintiff must personally experi-

\begin{itemize}
\item[311.] See id. at 1000-02.
\item[312.] See id. at 1001.
\item[313.] See id.
\item[314.] The Connecticut Appellate Court did attempt zone of interests analysis, but they also labeled the injury as an interest in the gift itself. See Carl J. Herzog Found., Inc. v. University of Bridgeport, 677 A.2d 1378, 1382 (Conn. App. Ct. 1996), rev’d, 699 A.2d 995 (Conn. 1997).
\item[315.] See supra note 102 for the complete text of section 45a-533 of the General Statutes of Connecticut.
\item[316.] The standing doctrine is not without its critics. See generally Fletcher, \textit{supra} note 81; Kelso & Kelso, \textit{supra} note 79; Sunstein, \textit{supra} note 81.
\item[317.] The three parts of the Article III standing test are injury, causation, and redressability. When there is a statute, the zone of interests analysis is used to determine whether the injury is an interest meant to be protected by the statute. See supra Part I.B.
\end{itemize}
ence an injury to a legal interest that is in the zone of interests protected by the statute.\textsuperscript{318} The Connecticut courts refer to this as a "colorable claim."\textsuperscript{319} In \textit{Herzog}, section 45a-533(a) of CUMIFA\textsuperscript{320} required the University to seek the Foundation's written consent to alterations of the terms the Foundation had placed on its gift.\textsuperscript{321} The Foundation's injury was the violation of its right to have the University follow this process. The injury is direct and personal because the statute describes the nature of the donor's stake in the process.\textsuperscript{322} The personally experienced injury is the denial of the right to be asked to give its written consent to alter a restriction on its gift.

In order to determine whether the written consent provision is within the zone of interests, one can apply the rules that the Supreme Court set out in \textit{Bennett} and \textit{National Credit Union}. That is, do not look at "the overall purpose of the Act in question . . . but . . . [refer] to the particular provision of the law upon which the plaintiff relies"\textsuperscript{323} in his claim, and do not be concerned with a legislative intent to protect the prospective plaintiff.\textsuperscript{324} Applying these rules to \textit{Herzog}, it is clear that the statute's requirement of written consent of the donor to alter gift restrictions is enough to bring the donor into the zone of interests protected by the statute. Section 45a-533(a) specifically makes the donor a part of the process of gift alteration. If the donee wants to change the terms of a gift, the donee must request the donor's written consent or follow section 45a-533(d) and obtain court permission using \textit{cy pres}.\textsuperscript{325} The final legs of the test for standing are easy to meet once one recognizes

\begin{itemize}
\item \textsuperscript{318} See \textit{supra} Part I.B for a discussion of zone of interests analysis as used by Connecticut courts.
\item \textsuperscript{319} See Gay & Lesbian Law Students Ass'n at the Univ. of Conn. Sch. of Law v. Board of Trustees, Univ. of Conn., 673 A.2d 484, 490 (Conn. 1996).
\item \textsuperscript{320} See \textit{supra} note 102 for the text of section 45a-533 of the General Statutes of Connecticut.
\item \textsuperscript{321} It is reasonable to assume that if the University chose not to obtain the written consent of Herzog, section 45a-533(d) of CUMIFA would require the University to apply for a release under the doctrine of \textit{cy pres}, as \textit{cy pres} is the common law rule.
\item \textsuperscript{322} See \textit{supra} Part III.B.3.a for a discussion of the Supreme Court's decision in \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555 (1992), which requires injuries to be personally experienced.
\item \textsuperscript{325} See \textit{CONN. GEN. STAT. § 45a-533(a), (d)} (1997).
\end{itemize}
that CUMIFA gives donors the right to a process and any deviation from the process constitutes an injury under the statute.326

ii. Causation

The second part of the standing test is whether the injury to the plaintiff is caused by the action of the defendant.327 The University clearly did not request the written consent of the Foundation or seek court permission when it allegedly put the scholarship money in with its general funds.328 Thus, the injury to the Foundation's right to the process was caused by the University.

iii. Relief

The third requirement for standing is that the court be able to grant relief.329 In *Herzog*, because the injury is a violation of the right to a process, the relief allowed should be limited to enforcing the process for gift alteration as outlined in section 45a-533 of CUMIFA. That is, standing should be given to donors only to allow them to force the donee either to request the written consent of the donor, or to apply to the court for *cy pres*, as outlined in section 45a-533, subsections (a) and (d), respectively. To allow donors to force donees to observe the process makes sense, given that in most states, Attorneys General often do not have the resources to investigate breaches of charitable trusts.330 The donor is in the best position to know if the donee has violated the statute, and can act as a private attorney general in bringing suit.331

In *Herzog*, the Foundation asked the court for very specific relief, some of which the court could have granted.

The plaintiff requested a temporary and permanent injunction, ordering the defendant to "segregate from its general funds matching grants totaling $250,000," an accounting for the use of the fund from the date of receipt until present, and a reestablishment of the fund in accordance with the purposes outlined in the

---

326. As discussed *infra*, standing should be limited to the narrow purpose of enforcing the process outlined by CUMIFA.
327. See *supra* Part I.B and *supra* note 79 for a discussion of the causation component of standing.
328. See *supra* Part II.A for the facts in *Herzog*.
329. See *supra* Part I.B and *supra* note 79 for a discussion of the relief component of standing.
330. See Blasko et al., *supra* note 42, at 48.
331. See Bennett v. Spear, 520 U.S. 154, 164-65 (1997) (stating that purpose of "any person" language in the statute was to have private attorney general enforcement).
gift instrument, and, in the event that those purposes could not be fulfilled, to revert the funds and direct them to the Bridgeport Area Foundation, which is prepared to administer the funds in accordance with the original agreement. ??

Because CUMIFA gives a donor only the right to enforce a process, the Connecticut courts could not have granted the last part of the Foundation's request, returning the gift. The donor does not control the gift itself. The gift remains in the charitable sector and the donor's only right is to force the donee to observe the process for releasing gift restrictions that CUMIFA outlines. However, the court could have granted the injunction and then forced the University to request the Foundation's consent to use the money for a different purpose. If the Foundation refused to give consent or the University refused to ask for written consent, the court could have forced the University to obtain a release through cy pres. ??

d. Analyzing the donor's legal interest as the right to a process resolves the concerns over donor standing that the Connecticut courts raised

Allowing donor standing to enforce the process CUMIFA requires to obtain a release from a gift restriction offers a solution which addresses the concerns raised by all of the Connecticut courts. It protects donors because it reduces the risk that donees will violate the statute with impunity. Limited standing addresses the potential tax issue by preventing the donor from retaining property rights in the gift. ?? In this regard, this solution is consistent with the legislative history that addresses tax issues under

---


333. Of course, if a court applied cy pres, it would be free to disregard the donor's wishes. Thus, although donors have standing to sue under CUMIFA, they have no control over the outcome of the case. However, the point of the process is to have some recognition that donors have an interest in a fair process and an interest in knowing the fate of the gift. This approach is in keeping with the Supreme Court's decision in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993). The City of Jacksonville had a law which required a yearly set aside of city contracts for minority businesses (ten percent of the total amount of city contracts). See id. at 658. The Supreme Court struck down the policy, although it was not clear whether any of the plaintiffs would have received the contracts from bidding on the set asides. The Court recognized their interest in a fair process. See id. at 664-66. The Court labeled the process as the "opportunity to compete." Id. at 666.

334. Although this was not a problem for the Foundation, because foundations are tax exempt organizations, other donors might face such a tax problem. See supra Part III.A.3 for a discussion of the irrelevance of the tax issue to the Foundation.
CUMIFA.335

This solution also protects donees because it should make donors inclined to continue to make charitable donations, knowing that their wishes will be protected under CUMIFA. Limited standing does nothing to alter the common law of charitable trusts that still exists after CUMIFA’s enactment, especially the rule that, once they make a completed gift, donors have no right to the gift itself unless reserved in the gift instrument.336 This solution also makes the gifts themselves more stable. That is because, although donors cannot use CUMIFA to enforce the gift itself, if they can be sure their wishes will be considered, they may not be inclined to include reversionary interests in the gift instrument.337

CONCLUSION

A donor who has made a completed gift to a charitable institution should have limited standing to sue under section 45a-533 of CUMIFA if the gift contains restrictions that the charitable institution has disregarded. In *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, the Connecticut courts mischaracterized the donor’s legal interest as an interest in the gift itself. The Connecticut Supreme Court then held that donors have no standing to sue under CUMIFA. The supreme court’s analysis has several weaknesses, including ignoring the plain language of the statute, relying on both questionable precedent and scant legislative history, and allowing the University to ignore the statute with impunity.

The legal right CUMIFA gives donors is not a right to the gift itself, as the Connecticut courts stated. Instead, CUMIFA creates a legal interest in a process by which donees are able to alter the restrictions on charitable gifts. If a donee violates a donor’s legally protected interest in the process, CUMIFA allows donors a right to sue, but the donor is limited to suing to enforce the process the statute outlines. Recasting the legal right CUMIFA creates for donors is a compromise solution that addresses the concerns the Connecticut courts expressed. It protects donees by making the gifts they receive more stable. That stability is two-fold. First, donees would be free from the worry that donors who make completed charitable gifts will be able to use CUMIFA’s provisions to revoke
gifts without warning.\textsuperscript{338} Second, when donors believe that CUMIFA protects their wishes, they may be less inclined to insert reversionary clauses into their gift instruments. Thus, donees can be assured that courts will try to find a way for them to keep gifts where the restrictions are obsolete. Recasting the legal right also protects against the tax concerns the Connecticut court expressed. Limited standing does not create donor control over the gift itself and tax deductions are thus protected. Finally, donors should gain satisfaction from the fact that donees will no longer be allowed to disregard the terms of CUMIFA with impunity.

\textit{Paula Kilcoyne}

\footnotetext{338. A reversionary clause in the gift instrument would provide such advance warning to donees. See \textit{supra} note 6 for a discussion of reversionary clauses.}