Buying Influence in College Athletics: How Much Does It Cost to Put In Your Two Cents?

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INTRODUCTION

On January 20, 2011, the University of Connecticut's ("UConn") athletic department received a scathing letter from major donor Robert Burton.[1] Burton, a highly successful printing industry executive, has donated over $7 million to support both academic and athletic programs at the University.[2] A former college football player and NFL draft pick, Burton shares a love of football with his three sons, one of whom served as team captain for the Huskies in 1999.[3]

1. The portions of Burton's January 19, 2011 letter to former UConn athletic director Jeff Hathaway that are of particular relevance to this Note read:

> "[A]s the largest donor in the UConn football program. . .I told you that I wanted to be involved in the hiring process for the new coach. I also gave you my insight about who would be a good fit for the head coaching position as well as who would not. . .For someone who has given over $7,000,000 to the football program/university, I do not feel as though these requests were asking for too much. . .To be crystal clear, I was not looking for veto power over the next hire; I just wanted to be kept in the loop and add value and comments on any prospective candidates. . .You and your committee of three talked to some coaches and made a critical decision about who you were going to hire without input from knowledgeable people who care about the program. . .You do not have the skills to manage and cultivate new donors or the ability to work with coaches. . .I did not graduate from UConn, but my son Mike and his wife are UConn grads, and UConn did give me an honorary PhD. . .I earned my voice on this subject as your number one football donor/supporter, by naming the Burton Family Football Complex and by giving millions of dollars in scholarship money to UConn's football players and its Business School. . .I supported [the former coach's] football camp as a sponsor and gave thousands of dollars for additional requests for things like artwork at the football complex and an audio system for the player's weight room. . .I am fully qualified to assess coaches and their ability to match up with the university's needs, and I have done so for football programs from Vanderbilt to New Haven, as well as several schools in the Ohio Valley Conference and [the] Big Ten. . .After this slap in the face and embarrassment to my family, we are so upset that we are out of UConn. . .What that means is that we do not want to deal with people like you and your committee, who we do not trust and cannot count on to make the correct decisions or do anything right with our money. . .We want our money and respect back. . .Over the past years, the Burton family has donated over $31 million to support special education and scholarship programs in America. . .It is a shame that UConn will not be on our list going forward."

Letter from Robert Burton, Univ. of Conn. Donor to Jeffrey Hathaway, Former Univ. of Conn. Athletic Dir. (Jan. 19, 2011), *available at* http://www.ctpost.com/sports/item/Burton-s-letter-to-UConn-3855.php [hereinafter Burton letter].

2. Neil Vigdor and Rob Varnon, *UConn booster Burton: Hit man with a heart – and a football addiction,* CONN. POST, Feb. 1, 2011, *available at* http://www.ctpost.com/local/article/UConn-booster-Burton-Hit-man-with-a-heart-and-989760.php - page-1.

3. *Id*. As a student, Burton was the recipient of a full scholarship from his alma

While he has contributed to UConn academics by establishing two endowed scholarship funds, it was Burton's $2.5 million gift towards the construction of a new $50 million on-campus football complex in 2002 that helped launch the program into Division IA, and earned Burton recognition as UConn's most valuable booster.[4] Yet just nine years later, in 2011, on the heels of the most successful season in UConn football's history, Robert Burton asked for his money back.[5]

A booster like Robert Burton is every college athletic program's dream. In 2006, only 19 of the 119 total universities in the Football Bowl Subdivision netted an actual profit from their respective programs.[6] On average, only sixteen universities broke even between 2004 and 2006.[7] With the vast majority ending their seasons in the red, philanthropy has become vital to the success and prestige of college athletic programs.[8] Booster dollars translate to state-of-the-art facilities, top-of-the-line equipment, and cream-of-the-crop recruits. This recipe for athletic success often spills over onto the university's plate as well, as schools reap notable benefits from national exposure.[9] In this age of high-profile Division I football and basketball, where professional-level stakes continue to erode the amateurism of decades past, athletic departments feel pressure when it comes to cultivating and nurturing relationships with major donors.[10]

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mater, Murray State University in Kentucky. He was captain of the Murray State football team, a four-year first team starter, and an All-American selection in his senior year. After graduating, he was a 19th-round selection of the San Francisco 49ers and later signed with the Buffalo Bills.

4. *Id*.

5. *Id*.

6. *See* MATTHEW DENHART ET AL., CTR. FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY, THE ACADEMICS ATHLETICS TRADE-OFF 29 (2009), *available at* http://www.centerforcollegeaffordability.org/uploads/athletics.pdf.

7. *Id*

8. *Id*.

9. For example, after Northwestern University's appearance in the 1996 Rose Bowl, the University boasted a 30% increase in applications for the upcoming academic year. *Id*. at 6.

10. The Knight Foundation Commission on Intercollegiate Athletics, established with the purpose of identifying ways to prevent athletic programs from interfering with the academic integrity of American institutions, referred to the growing competition between colleges for the acquisition of resources as an "arms race." *See* Knight Found. Comm'n on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* 25 (2001), http://knightcommission.org/images/pdfs/2001_knight_report.pdf; James P. Strode, Donor Motives to Giving to Intercollegiate Athletics 1-2 (2006) (unpublished Ph.D. dissertation, the Ohio State University),

And as the Burton letter demonstrates, hell hath no fury like a booster scorned. When UConn's athletic department sought to replace departing head football coach Randy Edsall in early 2011, Burton ignited a feud with UConn athletic director Jeff Hathaway that garnered national media coverage after he was not consulted in the decision. As copies of the very expressive letter were leaked to the press, Burton was pegged as. . .well, a prima *donor*. But are multi-million-dollar boosters like Robert Burton justified in their expectation of influence over a collegiate athletic program?

Part I of this Note will discuss the vital role boosters play in college athletics, and will explain why colleges, universities, and other non-profit organizations have increasingly relied upon the generosity of donors in recent years. Additionally, this section will explore the various motives that drive philanthropic giving, specifically focusing on how power, control, and influence may motivate major donors in college sports.

Part II will redirect towards a discussion of the traditional legal relationships and conflicts arising between donors and institutions, and will stress the importance of clear donative intent in gift agreements. This section will also deconstruct the common law barrier to donor standing – an obstacle that historically prevented the merits of many donor-initiated claims from being heard and resolved.

Part III will introduce the emerging phenomenon of venture philanthropy, a departure from more traditional methods of charitable giving that affords donors the ability to manage and oversee their funds. It will include an analysis of *Smithers v. St. Luke's/Roosevelt Hospital*, a landmark case for donor standing, specifically focusing on what constitutes a "special interest" in a charitable organization.[11]

Finally, this Note will compare and contrast collegiate boosters like Robert Burton with venture philanthropists and other donors who reserve managerial rights for themselves when conferring gifts to institutions. It will conclude by finding that, despite the growing need for financial assistance from donors in collegiate athletics, accepting certain

available at http://etd.ohiolink.edu/send-pdf.cgi/Strode%20James%20Patrick.pdf?osu1148304953 [hereinafter "Strode"].

11. *See* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426 (N.Y. App. Div. 2001).

restricted gifts – those with considerably tight strings attached – may only serve to further erode the integrity and amateurism of the NCAA.

I: MODERN DONORS: THE TREND TOWARDS CONTROL

Due to our nation's current economic climate, American universities, charitable foundations, and other non-profit entities have experienced a significant decline in funding from state and local governments.[12] In response to the downturn, these institutions have been forced to seek alternative financial resources.[13] College athletic departments are especially susceptible to the sting of inadequate funding, as the expenses of the majority of college sports programs substantially outweigh revenues.[14] Approximately 75% of NCAA Division I programs lose money annually, while the expenses necessary to maintain competitiveness continue to increase each year.[15] To close the funding gap, athletic departments have increasingly relied upon philanthropic giving.[16] For instance, in 1965, donations from boosters accounted for 5% of athletic revenues. But today, donors contribute nearly 20%.[17]

Soliciting contributions from donors has become vital to the success and sustainability of not only college athletic programs, but charities and non-profits as well. As such, these institutions continually strive to understand the psychology of philanthropic giving. Philanthropy as we understand it today is a relatively new concept. In the United States, the practice emerged and developed in the 20th century with the establishment of private foundations by industrial giants like Carnegie, Ford, and Rockefeller.[18] Yet these champions of industry did not give with both hands – rather, wealthy donors traditionally utilized private foundations as a means of retaining control over their

12. Strode, *supra* note 10, at 1.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *See generally* INDERJEET PARMAR, FOUNDATIONS OF THE AMERICAN CENTURY: THE FORD, CARNEGIE, & ROCKEFELLER FOUNDATIONS IN THE RISE OF AMERICAN POWER (2012) (discussing how the philanthropic foundations established by the "Big 3" influenced American society and politics in the twentieth century).

charitable gifts.[19] In lieu of donating assets directly to an institution or organization, establishing a private foundation afforded donors the ability to oversee the management and distribution of their funds.[20] Though the practice and advent of philanthropy in our society is far more widespread than it was during Rockefeller's time, donors of the 21st century are becoming increasingly demanding with respect to control and management of their gifts.[21] In the view of one commentator, "society has moved and is continuing to move toward a results-oriented, quasi-commercial, social engineer's conception of charity."[22]

To gain perspective on why this attitudinal shift in philanthropy has occurred, and perhaps begin to understand UConn football booster Robert Burton's outrage, it is helpful to examine the theories behind why people give in the first place. In recent decades, numerous studies have been conducted to measure donor motivation.[23] Specifically, "[t]he instruments developed by sport researchers have focused on a range of motives for giving, from psychosocial constructs such as feelings of loyalty to tangible benefits such as preferential seating for football games."[24] A 2006 study, conducted at a large football-oriented Midwestern university, developed a model that narrowed the range of athletic booster motives to just four: achievement, affiliation, philanthropy, and power.[25] According to the study's results, achievement ranked the highest among the four, leading the researchers to conclude that "donors give money in an effort to fulfill vicarious

19. *See* Alan F. Rothschild, Jr., *How Donors May – and May Not – Exercise Control of Charitable Gifts*, 16 TXNEXEMPT 110 (2004).

20. *Id*. at 10.

21. *Id*.

22. This social shift reflects the quasi-professional shift that has occurred in collegiate athletics. Programs are becoming increasingly "results-oriented," and many commentators argue that big-time Division I football and men's basketball programs are teetering on the verge of commercialization. Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2439 (2005).

23. *See, e.g.*, JOSEPH C. SMITH JR. ET AL., ATHLETIC FUND-RAISING: EXPLORING THE MOTIVES BEHIND DONATIONS 2-3 (1989); E.J. Staurowsky, B. Parkhouse, and M. Sachs, *Developing An Instrument to Measure Athletic Donor Behavior and Motivation*, 10 J. SPORT MANAGEMENT 262, 262-277 (1996); J.M. Gladden et al., *Toward a Better Understanding of College Athletic Donors: What Are the Primary Motives?* 14(1) SPORT MARKETING QUARTERLY 18, 18-30 (2005).

24. Strode, *supra* note 10, at 33.

25. *Id*. at ii.

triumphs concurrent with successful athletic squads."[26] Affiliation, which links charitable giving with a donor's sense of belonging, placed second.[27] The philanthropy motive, which sought to measure the number of donors giving without expecting something in return, ranked third.[28] Power ranked last among the four motives, suggesting that at this particular university, the donors surveyed did not have an especially strong expectation of a quid pro quo relationship with the institution.[29]

The finding that power ranks lowest among donor motives in college athletics is something of an anomaly. Despite its low ranking, researchers and analysts studying donor motivation do not discount power as a viable "hidden" motive. Because the majority of research conducted on donor motivation relies upon the honesty of respondents, it is reasonable that the stigma attached to the "desire for power" deters participants from speaking truthfully.[30] "[I]t may be viewed as faux pas to divulge [that] the reason for engaging in philanthropic behavior is to gain power. People may wish to think that their gift is an altruistic gesture, rather than a selfish act for personal gain."[31] Other studies on philanthropic motivation support the theory that great contribution and great expectation go hand-in-hand. Research conducted by the Center on Philanthropy at Indiana University concluded that, while motives for giving are consistent along the economic spectrum from poor to wealthy, when major donors contribute major dollars toward a purpose of their choice, they "invariably want to shape rather than merely support" that cause.[32]

Ample evidence from the world of college sports, including the Burton letter, supports the hypothesis that *some* donors give to athletic programs with an unspoken expectation of access and influence. When that agenda is exposed, however,

26. *Id*. at 82.
27. *Id*. at 83.
28. *Id*. at 83-84.
29. *Id.* at 84.
30. Strode, *supra* note 10 at 85.
31. *Id*.
32. Paul G. Schervish, *Major Donors, Major Motives: The People and Purposes Behind Major Gifts*, *in* 16 NEW DIRECTIONS FOR PHILANTHROPIC GIVING 85, 86 (Dwight F. Burlingame, Timothy L. Seiler, Eugene R. Tempel eds., 1997), *available at* http://www.bc.edu/content/dam/files/research_sites/cwp/pdf/majordonors.pdf.

donors and institutions alike may feel repercussions – be they mere disapproving jeers from the sports community, or full-scale sanctions from the NCAA. In 2005, Logan Young, an athletics booster at the University of Alabama was convicted of bribery in federal court for using his financial influence to seek out top high school recruits for the University.[33] Most recently, and most notoriously, former University of Miami football booster Nevin Shapiro allegedly doled out thousands of proscribed benefits to at least seventy-three Miami football players from 2002 through 2010.[34] It is wholly plausible that the stigma created by these public scandals involving illicit boosters would deter an average donor from admitting even their slightest expectation of access and influence. Nevertheless, as evidenced by research and real-world prototypes, the power motive is not to be discounted.

Yet not all power-thirsty donors cause headaches for their respective institutions and the NCAA. In fact, quid pro quo donations in college sports are not unheard of. Many athletics booster clubs have developed some sort of progressive scale of dollar amounts, guaranteeing perks like special seating, tickets, or even an invitation to the team banquet at the end of the season in exchange for a specified donation amount.[35] But what dollar amount actually buys a donor *influence* over the program?

II: DONOR VS. INSTITUTION: LEGAL RELATIONSHIPS AND DISPUTES

Typically, the process of making a major gift to a college, university, or other non-profit organization does not merely consist of writing, signing and handing over a multi-million dollar check. Accounting for the institution's needs and the

33. Strode, *supra* note 10, at 84.

34. The numerous benefits Shapiro provided to players at the University of Miami included "cash, jewelry, prostitutes, parties in his mansions and on his yacht, elaborate meals and nights out at expensive nightclubs and strip bars, bonuses for athletes' play on the field, special bonuses for injuring players on another team, and, in one instance, an abortion for a stripper a player had impregnated." *U. of Miami's 'Booster Bombshell': 'The Craziest Scandal in NCAA History'*, THE WEEK (Aug. 19, 2011, 1:13 PM), http://theweek.com/article/index/218426/u-of-miamis-booster-bombshell-the-craziest-scandal-in-ncaa-history.

35. *See, e.g.*, *Longhorn Foundation: 2011 Benefits Chart*, TEXASSPORTS.COM, http://www.texassports.com/ sports/lfoundation/spec-rel/benefits-chart.html (last visited Nov. 11, 2012).

donor's preference, gifts may be either designated for a specific purpose or unrestricted.[36] Often, when a donor decides to make a major financial contribution, he intends the gift to be used for a specific purpose.[37] A donor is free to dictate his own specific purpose for a gift, such as the construction of a new building, support for a particular program, or whatever else he chooses.[38] However, the institution is not required to accept a restricted gift that it does not intend to honor.[39] "[I]n practice most major gifts are negotiated agreements between the donor and the nonprofit's executive or board leadership."[40] Institutions recognize the importance of discussing gift restrictions with major donors prior to accepting their contributions, and the necessity of preserving the terms in a written gift instrument to avoid future misunderstandings.[41]

Under the Restatement of Property, donor intent is the paramount consideration when interpreting a gift instrument.[42] The provisions a donor chooses to include in a gift agreement are particularly valuable to the determination of a gift's identity, as remedies available to both donor and donee are contingent upon a court's interpretation of the donative document. If a donor chooses to give an unrestricted gift to an institution, it is presumed that the donor gives with both hands and relinquishes all interest and control upon the gift's completion.[43] In contrast, a trust is created when a donor manifests his will to create a fiduciary relationship between himself and a trustee, and the donor subjects the trustee to a duty to use the trust for a stated purpose.[44] Finally, if a donor chooses to attach express conditions to his gift, the donee's interest may be subject to forfeiture or reversion in the event that the donee fails to meet the requirements or conditions set forth by the donor in the deed

36. Unrestricted gifts are those given without any strings attached and available to use as the institution sees fit. *See* JULIA I. WALKER, NONPROFIT ESSENTIALS: MAJOR GIFTS 3 (2006).

37. *Id*. at 2.

38. *Id*.

39. *Id*. at 4.

40. *Id*.

41. *Id*.

42. RESTATEMENT (THIRD) OF PROPERTY § 10.1 (2003).

43. THE LAW OF TRUSTS AND TRUSTEES § 324.

44. *Id*.

of gift.[45]

When it is uncertain whether the provisions in a gift agreement create a trust or a restricted gift, courts generally favor an interpretation of the former over the latter.[46] As one court explained, "[b]ecause forfeiture is a harsh remedy, any ambiguity is resolved against it."[47] In the event that a condition is breached however, forfeiture is the required legal remedy.[48] Where the language of a document is ambiguous as to donor intent, courts opt to construe the instrument in a manner that will more effectively confer a benefit to the public.[49] However, if a donor clearly manifests his intent to create a restricted gift, that intention will be honored.[50]

In *L.B. Research and Education Foundation v. UCLA Foundation*, a California court grappled with the question of whether a deed of gift constituted a charitable trust or a restricted gift.[51] In that case, a donor had contributed $1 million to UCLA for the establishment of an endowed chair at UCLA's medical school.[52] The plaintiff Foundation claimed that the conditions attached to the gift had been ignored, and filed suit against the University demanding that the funds be transferred to the University of California, San Francisco, School of Medicine.[53] Upon UCLA's motion for dismissal, the court was forced to delineate the differences between a charitable trust and a conditional gift.[54]

Citing the Restatement (Second) of Trusts, the court defined "charitable trust" as the intentional creation of a

45. *Id*.
46. *Id*.
47. L.B. Research & Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710, 714 (2005).
48. GEORGE GLEASON BOGERT, ET AL., THE LAW OF TRUSTS AND TRUSTEES § 324 (2012) ("Courts of equity are hostile to conditions and the harsh forfeitures which they involve.").
49. *Id*.
50. *L.B. Research*, 29 Cal. Rptr. 3d at 714. While the law requires that courts utilize a donor's intention as their compass in determining the meaning of a deed of gift, there is dissention among courts and commentators over the extent to which outside documents and testimony, i.e., extrinsic evidence, may be used to ascertain the donor's intention. The majority fosters the "plain meaning rule," which prohibits extrinsic evidence from being introduced to contradict the plain meaning of the instrument's words.
51. *L.B. Research*, 29 Cal. Rptr. 3d at 710.
52. *Id*. at 712.
53. *Id*.
54. *Id*.

fiduciary relationship between donor and trustee.[55] Additionally, the court identified three elements necessary for its creation: intent, trust res, and charitable purpose.[56] It went on to distinguish a charitable trust from a restricted gift.[57] "The gift will be construed as one of a fee simple subject to a condition subsequent if it is expressly provided in the instrument that the transferee shall forfeit it or that the transferor or his heir or a third party person may enter for breach of the condition."[58]

In ascertaining the intent of the parties, the court was required to rely upon the "writing as a whole," and concluded that the instrument indeed conferred a restricted gift.[59] The court found that the writing demonstrated an intent that the fund revert to a contingent donee in the event that UCLA did not use it for its designated purpose.[60] The court concluded that L.B. Research intended to impose an enforceable obligation on UCLA to use the money in accordance with the stated conditions.[61] The University contested, however, that because the gift agreement did not contain an express forfeiture provision, it could not be construed as a restricted gift.[62] The court responded by noting that, although UCLA's failure to abide by the conditions outlined in the gift agreement would not necessarily constitute a forfeiture for the "entire University of California system,"[63] it would nevertheless constitute a forfeiture for UCLA's medical school, the institution specifically designated by the Foundation as the donee.[64] As *L.B. Research* shows, the manner in which a court construes the language of a gift instrument and interprets donative intent may significantly impact not only the remedies available to a plaintiff donor, but more importantly, whether the merits of the donor's claim

55. *Id.* at 713; RESTATEMENT (SECOND) OF TRUSTS § 11 (1959).
56. *L.B. Research*, 29 Cal. Rptr. 3d at 713-15.
57. *Id.*
58. *Id*. at 714; RESTATEMENT (SECOND) OF TRUSTS § 11 (1959).
59. Id. at 715-16.
60. *Id*.
61. *Id*. at 715 (citing City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859 (1999)).
62. *L. B. Research*, 29 Cal. Rptr. 3d at 715.
63. *Id.* at 715-16.
64. *Id*. at 716 ("Because UCLA's loss will be UC San Francisco's gain, the nature of this forfeiture supports rather than defeats L.B. Research's position and does not require adoption of a view antagonistic to the donor's charitable intent.").

will survive a defendant's motion to dismiss.[65]

Though this concept seems to contradict the deference given to donor intent discussed in the previous section, a donor lacks standing at common law to enforce the terms of a completed gift, unless he or she expressly reserves the right to do so.[66] This provision may appear in an instrument as a right of reverter or as a right to redirect.[67] Therefore, hypothetically, to effectively bring a private lawsuit and reclaim his funds, Robert Burton's deed of gift to UConn would have had to contain both a provision reserving him the right to be consulted during the coach selection process, and a reversion. If a gift instrument does not contain such language, an aggrieved donor's only hope for recourse rests with the attorney general, who, at common law, has the authority to enforce the provisions of a donative instrument.[68]

The power delegated to the attorney general to enforce charitable gifts stems from the English common law notion of the Crown as *parens patriae*.[69] Historically, the Crown bore the exclusive responsibility to "facili[tate] the alleviation of suffering among its most vulnerable subjects," and, as an agent for the Crown, the attorney general was burdened with the duty of enforcing charitable gifts.[70] This state interest in the enforcement of charitable funds resonates today, as the common law remains an important source of authority for state attorneys general to enforce donor intent.[71] "Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose."[72]

In recent decades, however, the attorney general's role in the enforcement of charitable gifts has been criticized as antiquated and inadequate.[73] The offices of attorneys general

65. *Id*. at 716-17.
66. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959).
67. *Id.*
68. RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).
69. Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society Vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1136 (2005) [hereinafter Goodwin].
70. *Id*.
71. *Id*.; RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).
72. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959).
73. Goodwin, *supra* note 69, at 1138.

are notoriously understaffed and underfunded, and the duties of this public official extend far beyond mere oversight of charitable gifts.[74] But while the expansion of individual standing to bring enforcement suits would potentially alleviate this problem, courts have been reluctant to grant standing to private parties for fear of unnecessary lawsuits that would likely drain charitable assets.[75] Because public benefit is the essence of a public charity, it is rational to conclude that these organizations "must be protected from harassment and loss."[76] Thus, courts have been wary to open their doors to private parties who lack a tangible stake in the charitable property.[77]

Some state courts, however, have opted to relax standing requirements as they pertain to *beneficiaries* of a charitable trust or gift on a subjective basis by implementing the special interest doctrine.[78] A court may invoke the special interest doctrine to determine whether a plaintiff's affiliation with a charity entitles him to standing.[79] Factors that the court weighs include: the act(s) spurring the cause of action, the remedy sought by the plaintiff, fraud or misconduct by the charity or its directors, the nature of the benefitted class and its relationship to the charity, and the attorney general's availability or effectiveness.[80]

Had the court in *L.B. Research and Education Foundation v. UCLA Foundation* interpreted the donative instrument as a trust rather than a restricted gift, the Foundation's opportunity for judicial remedy would have been diminished – at least in some capacity. The Foundation would have been required to conjure additional arguments and justifications to establish its standing without the aid of the attorney general. The court presented those potential arguments *sua sponte*, and determined that even if the language of the donative document were read to construct a charitable trust, the Foundation would nonetheless be entitled to individual standing to sue because it satisfied the qualifications of an

74. *Id*. at 1139.
75. Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 756 (N.Y. 1985).
76. Goodwin, *supra* note 69, at 1140.
77. *Id*.
78. *Id*. at 1141.
79. *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).
80. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959).

interested party.[81] Conceptually, a lawsuit brought by a party that demonstrates the requisite special interest in an institution's objectives is less likely to be frivolous.[82] For this reason, courts have become increasingly comfortable granting standing to beneficiaries and other interested parties who seek "to uphold the best interests of the charity."[83] Despite this kink in the general rule, when it comes to *donor*-initiated suits, courts have, for the most part, elected to continue to apply the common law decree that the attorney general is the designated enforcer of charitable gifts.[84] Moreover, state legislatures typically have refused to afford statutory relief to individual donors vexed by the standing problem.[85]

Prior to the creation of a concise set of uniform laws, an ambivalent mix of trust law, corporate law and contract law governed disputes arising between donors and institutions.[86] The inconsistent application of these doctrines proved to be "disadvantageous for both the donors and the charitable institutions receiving their gifts."[87] For instance, governing boards and trustees typically enjoyed greater freedom under a corporate standard, but were confined to very strict parameters under trust law.[88] As a result of these judicial

81. *L.B. Research*, 29 Cal. Rptr. 3d at 717-18.

82. *Id*.

83. Goodwin, *supra* note 69, at 1142, 1148 ("In the past, the courts automatically accorded [founders and endowers] a power of 'visitation' to supervise their gifts once given, treating the reservation of visitorial power as inherent in the endowing of a corporate charity. The early cases based the doctrine on the power everyone has to dispose, direct, and regulate his own property. Today, we do not recognize that property given by a donor to charity remains in any sense 'his own.' Nevertheless, there was a rationale for allowing such rights. A founder had a natural reason to know and care about the charity's operations. Also, permitting him to sue would not expose the charity to vexatious litigation from indifferent members of the public.").

84. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f. (1959) ("Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose."); *But see* L.B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710 (2005), where court deemed plaintiff donor was entitled to standing as a responsible individual with a legitimate interest in the charitable trust.

85. Goodwin, *supra* note 69, at 1143; *See, e.g.*, Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 996 (1997).

86. Rachel M. Williams, Note, *Transitioning from UMIFA to UPMIFA: How the Promulgation of the Uniform Prudent Management of Institutional Funds Act Will Affect Donor-Initiated Lawsuits Brought Against Colleges and Universities*, 37 J.C. & U.L. 201, 205 (2010) [hereinafter Williams].

87. *Id*.

88. Douglas M. Salaway, *UMIFA and a Model For Endowment Investing*, 22 J.C.

inconsistencies, much of the pertinent case law was reduced to "a series of seemingly disjointed cases that made it difficult for governing boards and their attorneys to predict judicial judgment."[89]

On the plaintiff donor's end, the odds of choosing a winning offensive strategy to enforce the terms of his or her gift were equally dubious, and the problem was compounded by the fact that "donors did not have, and still do not have, standing to sue a charity for non-compliance with donor-imposed restrictions."[90] Despite the slim chance that a court would hear the merits of their claims, many donors turned to the courts for remedy, only to have their claims dismissed for lack of standing.[91] And still, in the limited number of instances where a donor was able to get a foot in the door and voice his or her grievances, it was the court's tendency to extend protection to the defendant institution.[92]

To encourage uniformity and consistency in the governance of donative funds, forty-eight states and the District of Columbia, have adopted statutes based upon regulations created and endorsed by the Uniform Law Commission.[93] The Uniform Management of Institutional Funds Act ("UMIFA"), which was the first uniform law constructed to guide the investment and management of charitable gifts, was drafted in 1972.[94] UMIFA was

& U.L. 1045, 1064 (1996) [hereinafter Salaway].

89. *Id*. at 1065.

90. Williams, *supra* note 86, at 207; RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f, (1959) ("Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose.").

91. *Id*. at 228 ("The most highly litigated issue seems to be whether there is donor standing to bring a lawsuit to object to the use of funds or enforce a restriction.").

92. *See* Trustees of Dartmouth Coll. v. Quincy, 258 N.E.2d 745, 753 (Mass. 1970) (Supreme Judicial Court of Massachusetts, Norfolk court refused to enforce a donor's gift restrictions despite the fact that the donor expressly intended for those provisions to be mandatory); *See also* Wilbur v. Univ. of Vt., 270 A.2d 889 (Vt. 1970) (Supreme Court of Vermont held that a university's violation of the terms of a gift agreement "[did] not entitle the settlor or his successor to enforce" the restrictions outlined in the instrument).

93. UNIFORM LAW COMMISSION, http://www.uniformlaws.org (last visited Oct. 11, 2011) (The Uniform Law Commission "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.").

94. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

revolutionary in that it established, for the first time, "uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as 'endowments' to those institutions."[95]

The Uniform Law Commission drafted UMIFA to ameliorate conflicts and strike a balance of interests between plaintiff donors and defendant institutions regarding donative intent and gift restrictions [96] To accommodate charitable institutions bestowed with gifts bearing impracticable provisions, UMIFA permitted the release of donor-imposed restrictions in certain circumstances.[97] Conversely, to safeguard donor intent, particular regulations imposed by UMIFA could be limited or even annulled by a written agreement between the parties.[98] In general, the overarching aim of the Uniform Law Commission in drafting UMIFA was to ensure that "funds held by charitable institutions [were] managed and used prudently and according to the donor's intentions without deterring the operation of the charity or unduly restricting its ability to respond to changes in the world."[99]

In 2006, the Uniform Law Commission gave UMIFA a facelift, revamping and updating the laws governing the management and investment of institutional funds by promulgating the Uniform Prudent Management of Institutional Funds Act ("UPMIFA").[100] While UPMIFA's primary objective is not unlike that of UMIFA's, the new Act "modernized" its predecessor in several respects.[101] Notably, the 2006 revision sought to liberalize the conditions under which donor-imposed restrictions can be modified by a

95. *Prudent Management of Institutional Funds Act Summary*, UNIFORM LAW COMMISSION, http://uniformlaws.org/ActSummary.aspx?title=Prudent%20Management%20of%20Institutional%20Funds%20Act (last visited Oct. 11, 2011).

96. Williams, *supra* note 86, at 208.

97. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

98. *See, e.g.*, UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3, 4, 5 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 3(e), 4(a), 4(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2006); UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972) (The UMIFA considered any writing that "establishes the terms of the gift" to be an authoritative "gift instrument.")

99. Williams, *supra* note 86, at 208.

100. RESTATEMENT (SECOND) OF TRUSTS § 348, cmt. f, (1959).

101. Williams, *supra* note 86, at 208.

charitable institution.[102] Under the original provisions of UMIFA, an institution was unable to rely upon the courts for legal modification or release of donor-imposed restrictions.[103] While a restriction can be modified or released by merely obtaining written consent from the donor, in practice, "obtaining donor consent can be impossible, at worst, or extremely burdensome, at least."[104] To rectify this matter, the Uniform Law Commission chose to supplement UPMIFA's provisions with the trust doctrines of cy pres and equitable deviation.[105] The incorporation of these doctrines was intended not only to broaden the scope of judicial remedy available to institutions paralyzed by donor-imposed gift restrictions, but also to foster "an approach that favors modification over release to protect donor intent."[106]

Yet despite the Uniform Laws' mutual missions to mitigate conflicts between donors and institutions, in the years since its original enactment and its 2006 revitalization, donors have rarely relied upon UMIFA or UPMIFA in bringing lawsuits against colleges and universities. Rather, donors who actually see their claims survive to trial have reverted to more traditional principles of contract law, trust law, or corporate law to back the substance of their suits.[107] The use of these legal doctrines "precludes the use of UMIFA's principles of interpretation in any way because contract, trust, or corporate law will be applied in a manner

102. *Id.* at 209.

103. *Id.*

104. *Id.* at 214.

105. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006); JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS, 701 (3d ed., Foundation Press 2007) (1998) (Using cy pres, a court is able to modify, in some way, a donor's instruction on the use or purpose of a gift. However, any modifications sought by an institution as to the purpose of a donor's gift must be consistent with the donor's intent as articulated in the gift instrument. A court's decision to apply the doctrine of cy pres in trust law is dependent upon the charitable institution's ability to demonstrate: (1) that the gift was given "to a charitable organization for a charitable purpose"; (2) that it is "impossible, impractical or illegal to carry out the donor's stated charitable purpose"; and (3) "that the donor had general charitable intent."); Williams, *supra* note 85, at 217 ("Equitable deviation applies under virtually the same circumstances as cy pres, except that it applies not to the purpose of a fund but to the means used to carry out that purpose.").

106. Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1328 (2007).

107. *Id.*

corresponding to the parties' characterization of the case."[108] In the vast majority of cases, however, donors are unable to advance the ball far enough to even utilize an offensive strategy. Lack of standing is an aggrieved donor's most formidable opponent, and as a result, the substantive issues underlying a donor's claim for enforcement of the terms of a gift are rarely adjudicated. In order for the merits of donor-initiated lawsuits to be heard and remedied, donors first must find a way to clear the hurdle of standing. As demonstrated by the Supreme Court of Connecticut's decision in *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, however, the Uniform Laws are of little utility.

In 1997, the Supreme Court of Connecticut reaffirmed the preeminence of the common law standard when it held that the Carl J. Herzog Foundation lacked standing to enforce the terms of its $250,000 gift to the University of Bridgeport.[109] For some time prior to the cause of action, the Carl J. Herzog Foundation (herein "Foundation") gave money to Bridgeport University (herein "University") to provide need-based merit scholarships to disadvantaged students demonstrating an interest in the medical field.[110] On August 12, 1986, the Foundation wrote a letter to the University agreeing to participate in a "matching grant program" that essentially extended their previously established donor-donee relationship.[111] In the letter, the Foundation expressly outlined its intent that the funds go to "disadvantaged students for medical related education on a continuing basis."[112] Several weeks later, on September 9, 1986, the Foundation received an acceptance letter from the University in which it agreed to a $250,000 grant match arrangement.[113]

Over a period of two years, both parties fulfilled their respective obligations.[114] The University raised the agreed-upon sum of $250,000, and the Foundation matched it, paying $144,000 in June 1987 and $106,000 approximately one year later.[115] In accordance with the Foundation's wishes, the

108. *Id*. at 229.
109. Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 996 (1997).
110. *Id.* at 996.
111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.
115. *Herzog Found.*, 699 A.2d at 996.

grant money was used to provide scholarships to students enrolled in the University's nursing program.[116] In June 1991, however, the University closed its nursing school.[117] The Foundation filed suit against the University requesting a "temporary and permanent injunction [and] ordering the defendant 'to segregate from its general funds matching grants totaling $250,000.'"[118] The Foundation also demanded an accounting for the fund and insisted that it be reestablished in conformance with the purposes expressed in the original gift instrument.[119] The complaint further asserted that if the University could not satisfy the terms of the original agreement, the funds were to be redirected to the Bridgeport Area Foundation.[120]

Herzog Foundation presents one of the rare examples where a plaintiff donor attempted to premise both the substance of its claim as well as its entitlement to standing on a state's adoption of UMIFA.[121] In its complaint, the Foundation articulated its belief that the institutional funds had been intermixed with University's general funds, and that the money was not being used in accordance with the terms of the gift instrument.[122] Following the trial court's initial dismissal of the Foundation's suit for lack of standing and the appellate court's subsequent reversal, the Supreme Court of Connecticut decided to hear the case.[123] The question before the court was whether the state legislature, by adopting UMIFA, intended to arm charitable donors with standing to enforce the terms of a completed gift when the gift instrument in question "contained no express reservation of control over the disposition of the gift."[124]

Reiterating the Restatement (Second) of Trusts and citing case law from an array of jurisdictions, the court reaffirmed the common law principle that unless a donor expressly

116. *Id*.
117. *Id*.
118. *Id*. (citing the statement of facts presented by the lower court in Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 677 A.2d 1378, 1380 (1996), *rev'd,* 699 A.2d 995 (1997)).
119. *Id*.
120. *Id*.
121. *Herzog Found.*, 699 A.2d at 996. (In this specific case, the Connecticut Uniform Management of Institutional Funds Act, or "CUMIFA").
122. *Id.* at 996.
123. *Id*.
124. *Id*. at 997.

retained a right of control expressed as a restricted gift, the state attorney general was vested with the exclusive authority to bring an action to remedy the mishandling of a trust.[125] The court concluded that the Connecticut legislature did not intend for the Uniform Act to supplant the common law.[126] Specifically, the court cited a comment authored by UMIFA's drafters, which stated: "The donor has no right to enforce the restriction, no interest in the fund and no power to change the [] beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect."[127] As such, the Foundation was denied standing.[128]

Although donors sought to find relief in UMIFA and UPMIFA, the uniform laws have been of little utility to aggrieved donors seeking to direct and control the use of a completed, unrestricted gift. A plaintiff donor lacks standing at common law to enforce the terms of a completed gift unless he expressly reserves the right to do so in the gift instrument negotiated with the donee institution. Thus, to avoid conflicts regarding the terms of a gift agreement, it is imperative that before completing a donation, the terms and expectations of the gift are discussed and settled by the parties. If an institution or organization willingly accepts a restricted gift, however, they become legally obligated to enforce and abide by the terms of that gift.[129]

III: VENTURE PHILANTHROPY, SPECIAL INTERESTS AND A BREAKTHROUGH FOR DONOR STANDING

Despite the growing trend towards gift control and oversight, the law remains partial to unconditional, no-

125. *Id*. at 998.
126. *Id*. at 999-1000.
127. *Herzog Found.*, 699 A.2d at 1001.
128. *Id*. at 1002.
129. Regardless of the amount, some restricted gifts are simply too cumbersome for institutions to accept. In 1907, Swarthmore College received coal lands and mineral rights worth an estimated $1-$3 million from wealthy Quaker Anna T. Jeanes. At the time, Swarthmore's entire endowment was only worth $1 million. Ms. Jeanes conditioned her gift, however, stating in her will that Swarthmore would only receive the land if the college permanently "discontinue[d] and abandon[ed] all participation in intercollegiate athletics, sports and games." Unwilling to sacrifice its athletic programs, Swarthmore refused the gift. *See* Will Treece, *The Football Controversy Through the Ages*, SWARTHMORE COLLEGE DAILY GAZETTE (Oct. 7, 2009), http://daily.swarthmore.edu/2009/10/07/athletics/.

strings-attached philanthropy.[130] This intersection – where a donor's desire for control meets the law's preference for unrestricted giving – has spawned numerous legal battles. In spite of the law's persistent efforts to foster the notion of unrestricted philanthropic giving and stifle the growing interest in gift control and oversight, donors and charitable foundations began seeking alternatives to conventional giving. "Venture philanthropy" is a term used to describe private donors' and foundations' inclination in recent years to adopt strategies and methods employed in the for-profit world.[131] Instead of relinquishing control upon the completion of a charitable gift, a venture philanthropist's contribution to a non-profit organization may be premised on specific terms and conditions agreed upon by the parties.[132] Often, the donor retains the ability to provide business advice to the organization or serve in a managerial capacity.[133]

In 1971, decades before the term "venture philanthropist" was coined, Brink Smithers made a $10 million gift to Roosevelt Hospital[134] ("the Hospital") in New York City for the establishment of an alcohol rehabilitation center.[135] Per his zealous advocacy of new treatment mechanisms and his generous monetary gift, Mr. Smithers "affected a revolution in the treatment of alcoholism and brought about the professionalization of the field."[136] In his initial letter of intent to the Hospital, Mr. Smithers reserved significant responsibilities for himself as a donor, such as requiring that specific "project plans and staff appointments have his approval."[137] It was Smithers' fervent intent to maintain an active role in the program. Interestingly, despite Mr. Smithers' wealth of *personal* experience as a lifelong alcoholic, he lacked any *professional* qualifications in the medical field.[138] The Hospital nevertheless accepted the gift with its

130. Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2439 (2005).

131. Rothschild, *supra* note 19, at 110.

132. *Id*. at 110-11.

133. *Id*.

134. Roosevelt Hospital later merged with St. Luke's to become "Roosevelt/St. Luke's Hospital."

135. *Smithers*, 723 N.Y.S.2d at 426. Mr. Smithers was not only a pioneer as a venture philanthropist, but also in his conviction that alcoholism was a disease.

136. Goodwin, *supra* note 69, at 1096.

137. *Smithers*, 723 N.Y.S.2d at 427.

138. Goodwin, *supra* note 69, at 1096.

terms, and Smithers' vision culminated in the founding of the Smithers Alcoholism Treatment and Training Center ("Smithers Center") in New York City.[139]

In response to adverse economic conditions, including Medicaid budget cuts, the Hospital began to consider making changes to its alcohol rehabilitation program.[140] Specifically, it contemplated the sale of an Upper East Side in-patient facility.[141] Mr. Smithers, maintaining an active role in the management of the program, vigilantly opposed the sale of the Upper Eastside house and contested that it was "integral to the program under the terms of his gift."[142] Despite the escalating tension between Smithers and the Hospital regarding the gift's donative intent, the house was not sold during Smithers' lifetime.[143] After Smithers' death in 1995, however, the Hospital moved forward with its plan, and Mrs. Smithers, administratrix of her late husband's estate, sought the help of the attorney general to prevent the sale.[144] Dissatisfied with the attorney general's handling of the matter, Mrs. Smithers pursued judicial remedy in 2001.[145]

The *Smithers* decision constitutes a turning point in donor-initiated litigation because, for the first time, the traditional obstacles to donor standing were circumvented. Although the New York Court of Appeals acknowledged the state attorney general's role in the enforcement of charitable gifts, it nevertheless chose to raise, *sua sponte*, whether the attorney general's delegated right was *exclusive*.[146] The court determined that the plaintiff administratrix, Mrs. Smithers, had standing *consistent* with that of the attorney general to pursue her gift enforcement claim against the defendant hospital.[147]

In its analysis, the court looked to *Associated Alumni of General Theological Seminary v. General Theological Seminary*, a decision rendered by the New York Appellate Division and later affirmed by the New York Court of Appeals

139. *Smithers*, 723 N.Y.S.2d at 427.
140. Goodwin, *supra* note 69, at1097.
141. *Smithers*, 723 N.Y.S.2d at 428-29.
142. Goodwin, *supra* note 69, at 1097.
143. *Smithers*, 723 N.Y.S.2d at 428-29.
144. *Id*. at 430-32.
145. *Id*.
146. *Id*. at 431-32.
147. *Id*.

in 1900.[148] In that case, various alumni of General Theological Seminary had given funds to the institution for the purpose of endowing a professorship.[149] In the gift instrument, the alumni attached certain conditions to the endowment, specifically reserving a right of nomination in the event that the chair became vacant.[150] When conflict arose between the alumni association and the institution regarding those conditions, the alumni filed suit against the Seminary.[151] The lower court held that, due to the plaintiff's retention of the right of nomination, it was entitled to standing as a donor.[152] After allowing the alumni association standing, the court was able to address the merits of the plaintiff's claim and determined that the Seminary had indeed violated the provisions of the gift agreement.[153]

Although the New York Court of Appeals upheld arguably the most important aspect of the lower court's ruling in *Associated Alumni* regarding a donor's right to standing, it altered the remedy, ordering specific performance from the defendant institution rather than monetary refund.[154] The New York Court of Appeals reasoned that in order for a gift to be refunded to a donor, a right of reversion must be an express provision in the gift instrument.[155] Because such a condition was not included in the alumni association's deed of gift, merely returning the money to the donor was an improper remedy, as doing so would virtually dissolve the trust.[156] Due to its reservation of nomination, however, the court held that the alumni association had sufficient standing to maintain its action for the gift's enforcement.[157]

In rendering the *Smithers* decision, the court reasoned that, although Mr. Smithers had not retained a reversion, he nevertheless "retained a supervisory role with respect to [his] gift and indeed had served in this supervisory role," not

148. *Id*. at 432.
149. Assoc. Alumni of the Gen. Theological Seminary of the Protestant Episcopal Church in the United States of Am. v. Gen. Theological Seminary of the Protestant Episcopal Church in the United States, 163 N.Y. 417, 420 (1900).
150. *Id*.
151. *Id*.
152. *Id*. at 422.
153. *Id*. at 421-22.
154. *Id*. at 422.
155. *Assoc. Alumni*, 163 N.Y. at 421-22.
156. *Id*.
157. *Id*. at 422.

dissimilar from the right of nomination reserved by the donors in *Associated Alumni*.[158] The court articulated that Smithers' retention of an oversight role was therefore enough to arm his estate with standing to enforce the terms of his gift.[159] Furthermore, the court justified Mrs. Smithers' right to standing by distinguishing her from other disinterested plaintiffs the common law standard intended to shun.[160] Unlike those plaintiffs who may bring "vexatious litigation" against a charity despite having no tangible stake in the outcome, the court noted that Mrs. Smithers had served a critical function in monitoring the Hospital's compliance with the terms of the gift.[161] Additionally, the court observed that Mrs. Smithers had demonstrated far greater interest and diligence in the matter of preserving her late husband's mission than did the attorney general.[162]

CONCLUSION

Relying upon the logic of S*mithers*, major donors in college sports inarguably demonstrate special interest and dedication to the success and prosperity of their chosen institution. Furthermore, certain donors and boosters indeed have the qualifications and experience to make educated, rational, informed decisions regarding the direction of an athletic program. Robert Burton, for example, played football both collegiately and professionally, and may have been justified in stating that "[he is] fully qualified to assess coaches and their ability to match up with [UConn's] needs."[163] Advocating venture philanthropy in the realm of collegiate athletics would theoretically allow these interested parties – armed with a vision for a program's success – to permissively buy access, influence, and power through monetary contributions.

Irrefutably, Burton's contribution to UConn Football enhanced the program. The new facility became a

158. Goodwin, *supra* note 69, at 1155.

159. *Smithers*, 723 N.Y.S.2d at 434.

160. *See id*. at 435 (asserting that "Mrs. Smithers herself. . .ha[d] her own special, personal interest in the enforcement of the Gift restrictions imposed by her husband, as [was] manifest from her own fundraising work on behalf of the Smithers Center and the fact that the gala that she organized and that the Hospital ultimately cancelled was to be in her honor as well as her husband's.").

161. *See* Goodwin, *supra* note 69, at 1155.

162. *Id*.

163. Burton letter, *supra* note 1.

cornerstone of the program, and was a catalyst for its rise to prominence. Hiring an adept, qualified coach is equally vital to shaping a successful program. Yet there remains a palpable discrepancy between the two – while we encourage and commend major donors for the facilities they construct and the equipment they provide, there is something unsavory about allowing a major donor to explicitly "buy" influence over coaching decisions at the collegiate level.[164] Put differently, if the NCAA is indeed attempting to preserve the integrity and amateurism of college athletics, then there may be something inherently wrong with fostering a model of venture philanthropy and allowing boosters to reserve supervisory and nomination rights in college athletics.

On the other hand, the watchful eye of the NCAA may serve as a sufficient restriction allowing venture philanthropy to improve intercollegiate competition, athletic facilities, and coaching staffs during an economic downturn when institutions need it most. The cost of staying competitive in Division I athletics continues to rise each year. Given the instability of our nation's current economic climate, colleges and universities will be forced to solicit contributions from donors in order to sustain their athletic programs and maintain a presence in the Division I arms race. As research on donor motivation demonstrates, there is indeed a growing market for major donors seeking access and influence in college sports. If philanthropy's trend towards control continues, it is plausible that institutions may be inclined to accept restricted gifts from major donors seeking to be consulted in athletic department decisions.

Conceptually, collegiate donors like Robert Burton are not all that different from Brink Smithers. Each had a special interest in their respective institutions' goal, and had a vision for how to best attain that goal. The only difference between these men is that Brink Smithers *expressly* retained the right to oversee his dollars at work. Unfortunately for disgruntled donors like Burton, however, this is the only difference that *legally* matters. Until colleges and universities become more

164. Burton never expressly stated in his letter that he believed his monetary contributions to UConn would allow him to select the next football coach. His complaints related in large part to the lack of stewardship shown by UConn. Though most institutions recognize the importance and value of nurturing and cultivating relationships with their major donors, the fiduciary duty and stewardship owed to a donor upon the completion of an unrestricted gift is premised entirely on good faith.

willing to accept restricted gifts from donors seeking influence and oversight, athletic departments and administrative boards retain the right to leave their donors – even multi-million dollar donors like Robert Burton – out in the cold when it comes to decision-making.