Charity Trusts and the Shareholder vs. Stakeholder Debate

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I. INTRODUCTION

In recent years, charity trusts have grown in both donations received and the benefits bestowed.[1] This is also accompanied by the recent trend of the extremely wealthy to pledge the vast majority of their wealth to charity upon their death.[2] This increased philanthropy has obvious benefits; however, it brings a concern about how the charity trusts should operate. When the charity trusts are using their new wealth, they are faced with the decision of following a shareholder or stakeholder approach. As it turns out, this decision may not be left to charity trusts.

In 2002, the Hershey Trust—the charitable trust associated with Hershey Foods—attempted to sell its majority stake in Hershey Foods. The Pennsylvania government intervened and decided that the Hershey Trust could not sell its shares in Hershey Food due to the potential effect on the community.[3] Situations like these present the question of whether state governments should be allowed to interfere with the decisions of other expansive charity trusts—such as the Bill & Melinda Gates Foundation—and dictate what type of approach is followed as charity trusts continue to grow. This Note seeks to address this question.

To accomplish this task, Part II will lay out the necessary background information. This Part will cover the basics of charity trust and the history and fundamentals of the shareholder and stakeholder theories. Then, Part II will proceed to discuss some of the relevant laws governing charity trusts—both state and federal. Furthermore, it will proceed to delve into the facts and results of the 2002 Hershey Trust conundrum. Finally, Part II will set the stage for the potential conflict as charity trusts continue to grow in size.

In Part III, the benefits and disadvantages of the shareholder and stakeholder theory will be weighed and analyzed to see how these two approaches affect charity trusts and which approach would be best for charity trusts to follow. Finally, Part IV assesses how this question should be answered—either by sticking to the current path and letting the states dictate the outcome, or Congress stepping in and legislating the approach for charity trusts to follow.

II. BACKGROUND

This Part lays out a general background of charity trusts, the shareholder and stakeholder approach, and the general steps taken by states and Congress. It also summarizes the Hershey Trust events and the current trend of charity trusts.

A. Charity Trusts: A General Background

A charitable trust is a private foundation that devotes all unexpired interests to one or more charitable purposes.[4] However, even though a charitable trust is created to fund one or more charitable purposes, the trust does not receive a tax-exempt status and is treated

1. *See infra* Part II.A (explaining the benefits of charity trusts).
2. *Id.*
3. *See infra* Part II.D (explaining the situation surrounding the Hershey Trust's 2002 attempt to diversify).
4. *Charitable Trust*, IRS, https://www.irs.gov/charities-non-profits/private-foundations/charitable-trusts (last updated Feb. 17, 2018).

exactly like every other private foundation.[5] The charitable purposes a trust may seek to benefit are also limited by the Internal Revenue Service (IRS) to "religious, charitable, scientific, literary, or educational purposes" and further limited by state law defining what a charitable purpose can be.[6] Despite these limitations, contributions to a charity trust can generate significant income and estate tax benefits.[7] For these reasons (as well as general goodwill), many wealthy individuals have set up or donated to charitable trusts because those donations "may translate into hundreds of thousands of dollars in estate and income tax savings."[8] Furthermore, the general rule is that "outright gifts to charity at death are deductible without limit and reduce the taxable estate."[9] For these reasons, charity trusts have begun to increase in size[10] and that poses the question of whether charity trusts should follow a stakeholder or shareholder approach.

B. Background of Shareholder and Stakeholder Approach

There are two main competing theories that address how a corporation should be run: the shareholder approach and the stakeholder approach.

1. Shareholder Approach

The ideals that have shaped the shareholder theory were established over 200 years ago in Adam West's *The Wealth of Nations*.[11] The shareholder theory is primarily based on the idea that the main purpose of a business is generating profits and increasing shareholder wealth.[12] The shareholder theory heavily relies on the fiduciary duty between the company's directors and the company's shareholders.[13] However, this profits first mentality does not promote companies to act "unethically, immorally, or illegally."[14]

The United States' version of the modern shareholder approach picked up steam in 1970 with Milton Friedman's article, *The Social Responsibility of Business is to Increase its Profits*.[15] Friedman laid out that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so

5. *Id.*

6. *Charity—Sample Organizing Documents—Draft B—Declaration of Trust*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/charity-sample-organizing-documents-draft-b-declaration-of-trust (last updated Apr. 12, 2017).

7. Cathy Pareto, *Estate Planning: Charitable Trusts*, INVESTOPEDIA, http://www.investopedia.com/university/estate-planning/estate-planning8.asp (last visited Feb. 3, 2018).

8. *Id.*

9. *Id.*

10. *See infra* Part II.F (laying out the recent trend of charity trusts).

11. Michael D. Pfarrer, *What is the Purpose of the Firm? Shareholder and Stakeholder Theories*, *in* GOOD BUSINESS: EXERCISING EFFECTIVE AND ETHICAL LEADERSHIP 86 (Taylor & Francis ed., 2010).

12. *Id.*

13. P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence From the Field and the Path Onward*, 41 HOFSTRA L. REV. 399, 401–02 (2012).

14. Pfarrer, *supra* note 11, at 87.

15. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf; *see* H. Jeff Smith, *The Shareholders vs. Stakeholders Debate*, MITSLOAN MGMT. REV. (July 15, 2003), http://sloanreview.mit.edu/article/the-shareholders-vs-stakeholders-debate/ (laying out that Friedman's viewpoint led the way with the shareholder approach).

long as it stays within the rules of the game . . . ."[16] This view takes the approach that "solving social problems is the responsibility of the state."[17] Followers of this theory believe that if businesses use wealth for social and moral developments it "will negatively affect society in the long run."[18] Some even believe that if companies started to become socially involved, their actions would "usurp[] the role of democratically elected officials."[19]

In general, the rule of the shareholder approach is to "advance capital to a company's managers, who are supposed to spend corporate funds only in ways that have been authorized by the shareholders."[20]

2. Stakeholder Approach

Unlike the shareholder approach, the stakeholder theory has its roots "in the late 1970s and early 1980s" when "researchers with backgrounds in philosophy, psychology, sociology, and management began . . . challeng[ing] some of the basic assumptions of classic economics and shareholder theory."[21] This approach is founded on the idea that "taking the interests of all the firm's stakeholders into account, the firm could do 'better' (achieve greater performance) than by simply focusing on shareholder interests."[22] It is hinged on the concept that if a firm creates value for stakeholders, it creates value for shareholders.[23] In general, stakeholders are "individuals and constituencies that contribute, either voluntarily or involuntarily, to [a company's] wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers."[24]

A company can look to increase value through the stakeholder approach by focusing on four major responsibilities: economic responsibility to shareholders, legal responsibility to laws and regulations, ethical responsibility to recognize that a company is a part of a community and has obligations to the community, and discretionary responsibility to engage in philanthropy.[25] The approach, unlike the shareholder theory, emphasizes an ethical responsibility to the community and understanding of the company's impact on the community.[26]

There is some debate about who fits into the stakeholder category, but it is generally agreed that this includes "shareholders, customers, employees, suppliers, and *the local community*."[27] This approach holds that managers are agents to all stakeholders, and they are required to balance the legitimate interests of all stakeholders when making decisions.[28] The long-term goal is to balance profit maximization with long-term success.[29]

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16. Friedman, *supra* note 15 (internal quotations omitted).
17. Pfarrer, *supra* note 11, at 87.
18. *Id.*
19. *Id.*
20. Smith, *supra* note 15.
21. Pfarrer, *supra* note 11, at 88.
22. *Id.*
23. *Id.* at 89.
24. Smith, *supra* note 15 (internal quotes omitted) (citing Post et al., *Managing the Extended Enterprise: The New Stakeholder View*, 45 CAL. MGMT. REV. 5, 8 (2002)).
25. *Id.*
26. *Id.* Also, this is the most important aspect of the stakeholder approach going forward in this Note.
27. *Id.* (emphasis added).
28. *Id.*
29. Smith, *supra* note 15.

C. Laws Governing Charity Trusts

While corporations have generally been left to choose which approach best suits their company, charity trusts have some limitations imposed on them. Historically, these limitations have been imposed by state attorneys general, but Congress has imposed some of its own limitations, primarily dealing with diversification.

1. Power of State Attorneys General

"Attorneys general are charged with the unique and important duty of representing the public's interest in charity."[30] In most cases, it is the attorney general who has the power and standing to "fight" charities and charity trusts.[31] Attorneys general have a well-settled and clear authority to prevent and remedy breaches of fiduciary duty by trustees of charitable trusts and the responsibility to monitor attempts to modify or terminate trusts.[32] These powers go all the way back to the English common law.[33] While attorneys general ensure that the charitable trust is managed in accordance to the donor's intent, they also represent the community and public interests.[34] It follows, then, that the intention of a charity trust is to devote property for the purpose of benefiting the community.[35] Attorneys general also have the power to ensure that all transactions will continue to serve the designated charitable purpose.[36] Attorneys general may also institute actions for violations of the Uniform Prudent Management of Institutional Funds Act (UPMIFA).[37] This Act sets out several requirements for how a charity trust handles its endowment.[38] If an attorney general finds that a charity trust is in violation, the attorney general may enforce it.[39] All in all, an attorney general has expansive powers over charitable trusts if the attorney general finds that the trustees are violating their fiduciary duties.

2. Congressional Act Requiring Diversification

While state attorneys general hold most of the power, Congress has articulated some requirements for charity trusts. In 1969, Congress had concerns that charity trusts were being used by donors to control stock in the donor's company, which was leading to the trust focusing more on supporting the company it held stock in than pursuing its charitable purpose.[40] Therefore, Congress passed the Tax Reform Act of 1969.[41] This Act prohibited a foundation—including charitable trusts—from possessing "more than 20 percent of any

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30. Bob Carlson, *Protection and Regulation of Nonprofits and Charitable Assets*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITY 203 (NAAG, 3d ed., 2013).
31. *Id.* at 203–04.
32. *Id.* at 205.
33. *Id.* at 209.
34. *Id.* at 210–11.
35. Carlson, *supra* note 30, at 210.
36. *Id.* at 211.
37. *Id.* at 214–15.
38. *Id.* at 214–16.
39. *Id.*
40. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 986–87 (2004) (relying on a discussion in Quarrie Charitable Fund v. Comm'r, 70 T.C. 182, 190 (1978) that cites to 115 Cong. Rec. 37, 514–15 (1969)).
41. *Id.*; *see generally* 26 U.S.C. § 4943 (2014).

single business [or] 35 percent if no party related to the donor or trust owns any stock."[42] This Act forced large charity trusts to diversify their primary holdings.[43] However, there was an exception carved out for certain organizations, such as schools, and the trusts that support those organizations.[44] Congress had one organization in mind when it created this exception: The Hershey Trust.[45]

D. Hershey Trust and the 2002 Saga

1. Hershey and the Hershey Trust

In 1909, Milton Hershey—the man famous for creating the Hershey chocolate bar—and his wife, Catherine, created what is now known as the Hershey Trust to found and support the Hershey Industrial School (which is now known as the Milton Hershey School).[46] The Hersheys created the school to house, accommodate, and educate poor orphans.[47] Since the Hersheys did not have any children of their own, upon Catherine's passing in 1915, Milton "transferred thousands of acres of land and all of his stock" in what is now known as Hershey Foods to the Hershey Trust, which was then valued at over $60 million.[48]

Creating the Hershey Trust was not the Hersheys' first philanthropic act. Around 1900 Milton picked up and moved his chocolate factories from Philadelphia to the small town of Derry, Pennsylvania.[49] There, the Hersheys envisioned a utopian-esque town where "no poverty, no nuisances, and no evil" existed.[50] It was going to be the model town where "Hershey provided utilities, schools, clean streets, a bank, stores, an amusement park, a beautiful theater, [and] lush gardens."[51] This perfect town became the site of the Milton Hershey School, and the Hershey-owned town became predominantly owned by the Hershey Trust when Milton transferred his assets in 1915.[52]

The Hershey Trust has adapted and changed through the years since its humble beginnings in 1909.[53] As the school changed so did the interests of the Trust and its beneficiaries to the point where they became unaligned with the interests of the "perfect town."[54] Instead of bolstering the local junior college—which many felt Milton Hershey would have done—the Trust sought and obtained approval to help fund the opening of a

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42. Brody, *supra* note 40, at 987; *see generally* 26 U.S.C. § 4943. This statute guaranteed that charity trusts were following a shareholder approach by ensuring that charity trusts did not take on unnecessary risk or focus on the interests of the parent company it had shares in that could harm the beneficiaries.

43. Brody, *supra* note 40, at 987.

44. *Id.*; *see generally* 26 U.S.C. § 4943.

45. Brody, *supra* note 40, at 987 (relying on a discussion in *Quarrie Charitable Fund*, 70 T.C. at 190 that cites to 115 Cong. Rec. 37, 514–15 (1969)).

46. Brody, *supra* note 40, at 984.

47. *Id.* at 984–85.

48. *Id.* at 986.

49. Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1, 4 (2003).

50. Body, *supra* note 40, at 984 (quoting Milton Hershey).

51. Sidel, *supra* note 49, at 4.

52. *See id.* at 5 (explaining how the Trust manages many of Milton Hershey's charitable endeavors after its creation and the transfer of assets).

53. Brody, *supra* note 40, at 986.

54. *Id.* at 985.

Penn State University Medical School in the small town.[55] After that decision, a flock of new people moved to the community and the junior college ended up closing.[56] This was followed by the tearing down of the historic Cocoa Inn and the closing of the free amusement park to build a commercial one.[57] This all led the community to feel that the Trust and company no longer cared for the community's well-being.[58] Throughout this time, the Trust continued to accumulate wealth, far exceeding the expenses of operating the school.[59] So much so that in 2002, the Trust had a reserve fund of $850 million after meeting all of its annual expenses.[60]

2. The Hershey Conundrum

In 1980, the Trust first faced the issue of diversification when 80% of the Trust's portfolio was in Hershey Foods.[61] Due to Hershey Foods restructuring itself and conducting a series of stock buybacks in the 1990s, the Trust condensed its holdings in Hershey Foods to only 52% of the Trust's portfolio.[62] Even though the Trust attempted to diversify, the Trust's ownership in Hershey Foods was still valued at $2.6 billion in July of 2001.[63] The attorney general's office of Pennsylvania started to voice its concerns over the Trust's lack of diversification, even having one of its officers suggest diversifying to the Trust's board at a meeting.[64] The Trust "understood this to mean that in order to avoid exposure for breach of fiduciary duty, they should consider selling their controlling interest in Hershey Foods."[65] Before then, the Packard Foundation, whose charitable purpose was funding local schools' art programs, had suffered a drastic loss of $7.8 billion, which further demonstrated the need to diversify.[66] If Hershey Trust suffered a similar loss, it would halt any expansion plans to the school and may even affect the Trust's ability to carry out its charitable mission.[67] In May 2002, the Trust rejected a proposal by Hershey Foods to gradually buy back the Trust's stake in Hershey, and in July 2002, the Trust publicly announced that it would explore selling its controlling share in the company on

55. *Id.*
56. *Id.*
57. *Id.*
58. Brody, *supra* note 40, at 985.
59. *Id.* at 988.
60. *Id.*
61. *Id.* at 989.
62. *Id.* (explaining that after Hershey Foods restructured itself and conducted four stock buybacks, Hershey Trust owned thirty-one percent of Hershey's total shares but seventy-seven percent of the voting shares).
63. Brody, *supra* note 40, at 988–89 (stating that the valuation of the Trust's ownership in Hershey Foods was reported on the IRS Form 990 filed on July 31, 2001).
64. *Id.*
65. *Id.* at 990. Note this is a demonstration prior to the fiasco laid out in *infra* Part II.C.1 of how much power attorneys general have over charity trusts.
66. *See* Peter Sinton, *Charity Crunch/Some Foundations Hit by Losses, Others Enriched by New Money*, SFGATE (July 22, 2001), http://www.sfgate.com/bayarea/article/Charity-Crunch-Some-foundations-hit-by-losses-2896747.php (reporting on the recent slide of $7.8 billion dollars by the Packard Foundation whose portfolio was primary Hewitt-Packard stock).
67. Daniel Gross, *Hershey Barred: How Pennsylvania Officials Screwed Poor Kids Out of $1 Billion by Stopping the Sale of the Candy-Maker*, SLATE: MONEYBOX (Sept. 18, 2002), http://www.slate.com/articles/business/moneybox/2002/09/hershey_barred.html.

the open market.[68]

3. The Community's Reaction

Even with the apparent need to diversify the Trust's holdings, the public reacted negatively to the Hershey Trust's announcement.[69] The community mobilized quickly with yard signs labeled "Derail the Sale" popping up all over the small town, petitions being signed to remove the Trust's board members, and the board of supervisors for the town voted to change the town's official name to "Hershey."[70] The attachment—or, depending how you look at, entitlement—of the community is summed up in the following quote by a resident of the Hershey community: "I don't see why a town should be ruined so underprivileged kids can be privileged."[71]

When looking at the events as a whole, the public outcry makes plenty of sense given the company's close ties to the community.[72] The town had the usual fears of "job loss, reduction in the local tax base, and the diminishment of the town's stature" that would happen if the company was acquired and relocated.[73] Most of all, the community feared that a sale would harm their "unique" culture.[74]

4. The Pennsylvania Government Gets Involved

The community's outrage did not go unnoticed because the Pennsylvania government quickly intervened.[75] Most notably, Attorney General Mike Fisher, who had just recently pushed the Trust to diversify, publicly opposed any potential sale of the Trust's holding in Hershey saying that "he had not meant that they should sell the company."[76] With the help of the attorney general, the legislature began drafting a bill that would require a charitable trust to consider the implications that a sale of investments would have on the welfare of any affected communities.[77] Specifically, a sale would need final approval by the attorney general and the judicial branch.[78]

With this proposed bill in hand, the attorney general filed suit with the Pennsylvania Commonwealth Court, known locally as the Dauphin's County Orphan's Court, to halt any sale of the Trust's shares without court approval.[79] Fisher relied on the common law that allowed the attorneys general to "inquire into the status, activities and functioning of public

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68. Brody, *supra* note 40, at 989; Sidel, *supra* note 49, at 12 (explaining that the reason the Trust choose to go to the open market was that they could receive a much higher premium on the shares than what Hershey Foods was offering during the gradual buy back period, which in turn would mean more money for their beneficiaries).

69. *See* Brody, *supra* note 40, at 990–91 (discussing the negative reaction by the town and different local government entities).

70. *Id.*

71. *Id.* (citing quote of a local resident from Steven Pearlstein, *A Bitter Feud Erupts Over Hershey Plant: Plan to See Candy Empire Divides a Company Town*, WASH. POST, Sept. 2, 2002, at A1).

72. Gross, *supra* note 67.

73. *Id.*

74. *Id.*

75. Brody, *supra* note 40, at 990 (detailing the actions of the State legislature and attorney general).

76. *Id.* at 990–91; Gross, *supra* note 67.

77. Brody, *supra* note 40, at 990.

78. *Id.* This law equates to a required stakeholder approach that is enforceable by both the judiciary and the attorney general.

79. *Id.*

charities."[80] He held the view that the real beneficiaries of the Trust—and any trust—were the general public "to whom the social and economic advantages of the trust accrue."[81]

On September 4, 2002, the Orphans' Court granted a preliminary injunction against the sale of the Trust's shares in Hershey.[82] The court held its power over trusts to be "exclusive, and therefore necessarily as extensive as the demands of justice."[83] The court relied on the sense of community and invoked Milton Hershey's reason for creating the Trust in the first place.[84] The court concluded by noting that the proposed action by the Trust is "excessive and unnecessary for any foreseeable need of the Trust."[85]

The Trust appealed this ruling, but the commonwealth court affirmed the decision.[86] However, Judge James Colins, who wrote the majority opinion for the appellate court, later "commented: 'If we create this doctrine that the attorney general becomes sort of a super trustee, we're putting all the public at risk to the next person who might benefit from the position.'"[87]

5. End of the 2002 Saga

In the end, Hershey folded to the pressure of the community and government, choosing not to further appeal the preliminary injunction and halting all negotiations for the sale of its shares in Hershey.[88] The decision not to sell came on the eve of the commonwealth court's decision, where Hershey received offers for its stock, the largest of the offers was from Wm. R. Wrigley, Jr. Co.—the gum manufacturer—for a deal of stock and cash valued at $12.5 billion and a contractual promise to maintain jobs in and support the Hershey community.[89]

There were two stark reactions to the Trust's decisions: one from the community and one from the Hershey Foods executives.[90] The public relished that their "cash cow [was] safe."[91] The executives of the company, on the other hand, were "furious" because they feared lawsuits from shareholders.[92] Furthermore, in the aftermath, the Pennsylvania government passed the aforementioned bill requiring charitable trusts to consider the implications a sale of investments would have on the welfare of any affected communities

80. *Id.*; *see supra* Part II.C.1 (detailing the power of state attorney generals in regard to charity trusts).

81. Brody, *supra* note 40, at 990.

82. *In re* Milton Hershey School Trust, 807 A.2d 324, 335 (Pa. Commonw. Ct. 2002) (including the orphan's court order at the end of the majority decision); Brody, *supra* note 40, at 992.

83. *In re* Milton Hershey School Trust, 807 A.2d at 330 (referring to the orphan's court order).

84. *Id.* (referring to the orphan's court order) (noting that Milton Hershey created the Hershey Trust and started the Milton Hershey School out of a sense of giving back to the community).

85. *Id.* at 334 (referring to the orphan's court order).

86. *Id.*

87. Brody, *supra* note 40, at 994 (quoting Judge Colins in Brett Marcy, *Stating Their Case; Judges Ponder Moves to Block Sale of Hershey*, PATRIOT-NEWS, Sept. 12, 2002, at D1).

88. *See id.* (laying out the events that led to the Hersey Trust deciding not to sell).

89. *Id.*; Gross, *supra* note 67 (explaining that on the day of the decision Hershey's share dropped to $65, which was a $24 loss from the $89 per share offer from Wrigley, which cost the Trust about one billion dollars).

90. Brody, *supra* note 40, at 994–95.

91. *Id.* at 995.

92. *Id.* at 994–95 (explaining that the offer from Wrigley reflected a 42% premium on the share price and should have been presented to shareholders).

and giving final approval of any sales to the attorney general and the court.[93]

E. Hershey's Recent Sale

As much as it seems that the Pennsylvania government's actions halted any hope for diversification of the Hershey Trust in 2002, the Trust has made efforts to diversify.[94] Since 2002, many scholars and financial experts have called for the board to diversify.[95] These opinions are based on the idea that the "portfolio that is meant to rescue needy children is being exposed to needless risk that could be diversified away without compromising expected returns."[96]

The Trust now controls about eighty percent of Hershey Foods—up from the 77% voting share they had in 2002—and the Trust is valued at $13.8 billion.[97] On August 24, 2017, the Hershey Trust announced that it would be selling 1.5 million shares of Hershey back to the company and an additional three million shares to Morgan Stanley.[98] This modest diversification netted the Trust only $475 million and does not affect the Trust's control over Hershey.[99] This sale comes a little over a year after the Trust rejected a $23 billion dollar cash-and-stock bid from Mondelez International, Inc., which would have combined two of the largest chocolate manufacturers in the world.[100] While there is no indication that the Attorney General or the judicial branch reviewed the sale or voiced an opinion, they still have the final say in whether or not the Trust's shares are sold.[101]

With this in mind, all that can happen now is to wait and see if the Trust continues to sell Hershey shares, if it does so at a higher volume, and what Pennsylvania does in response.[102]

F. The Recent Trend

Milton Hershey did something uncommon in the early twentieth century when he

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93. 20 PA. CONS. STAT. § 7203(c)(6) (2014); Prudent Investor Rule Expands Class of Beneficiaries Letter No. 19, 2002 WL 35581193, Dec. 6, 2002; Brody, *supra* note 40, at 995–96.

94. Bob Fernandez, *Selling at the top? Hershey Trust unloads $475M in chocolate firm's stock*, THE INQUIRER (Aug. 24, 2017, 10:50 AM), http://www.philly.com/philly/business/comcast/selling-at-the-top-hershey-trust-sells-475m-in-chocolate-firms-stock-20170824.html (explaining the Hershey Trust's recent sale of Hershey's stock); Maggie McGrath, *A Sweet Scheme: How A 108-Year-Old Vision Makes Hershey Look Beyond Profit*, FORBES (Dec. 12, 2017), https://www.forbes.com/sites/maggiemcgrath/2017/12/12/a-sweet-scheme-how-a-108-year-old-vision-makes-hershey-look-beyond-profit/#31c6e73b22aa.

95. *See generally* Brody, *supra* note 40; Sidel, *supra* note 49.

96. Michael Corkery, *Cadbury-Hershey: Too Much Risk for the Trust's Kids?*, WALL ST. J. (Nov. 24, 2009), http://blogs.wsj.com/deals/2009/11/24/cadbury-hershey-too-much-risk-for-the-trusts-kids/ (quoting Harvard Law Professor Robert Sitkoff's answers pertaining to the Hershey Trust).

97. Fernandez, *supra* note 94; McGrath, *supra* note 94.

98. Fernandez, *supra* note 94; McGrath, *supra* note 94.

99. Fernandez, *supra* note 94; McGrath, *supra* note 94.

100. Craig Giammona, *Fate of Hershey Megadeal Lies With Scandal-Plagued Trust*, BLOOMBERG (June 30, 2016, 5:58PM), http://www.bloomberg.com/news/articles/2016-06-30/fate-of-megadeal-for-hershey-rests-with-scandal-plagued-trust.

101. *Id.*; *see* Fernandez, *supra* note 94 (explaining the deal without mentioning any involvement from the Attorney General or the judicial branch); McGrath, *supra* note 94.

102. *See* Lauren Hirsch & Greg Roumeliotis, *Hershey Trust Reaches In-Principle Reform Agreement*, REUTERS (July 22, 2016, 5:15 PM), http://www.reuters.com/article/us-hershey-settlement-idUSKCN1022LF?il=0 (explaining the current situation of the Hershey Trust).

donated most of his personal assets to a charitable trust,[103] but that is not as uncommon in the early twenty-first century.[104] Now, thanks to the recent philanthropic trends and income and tax benefits, 173 of the wealthiest people in the world have pledged the bulk of their wealth to different charities upon their death.[105] While this pledge only carries with it a moral obligation,[106] the charitable funds that these individuals donate to while still alive are also incredibly expansive.[107] The largest of these is the Bill & Melinda Gates Foundation, which has approximately $40 billion in assets.[108] To put that in perspective, the Hershey Trust is also one of the largest charitable trusts, and its assets are valued at approximately $13.8 billion, not even half of the assets of the Gates Foundation.[109] As charity trusts, like the Gates Foundation, continue to expand so will the amount of people that directly and indirectly benefit from their contributions to society as a whole as well as specific communities. As society and these communities become accustomed to these benefits they will start to feel entitled to them. This is exactly what happened in 2002 to the Hershey Trust.[110]

III. Analysis

This Part will discuss the role the shareholder and stakeholder approaches play with charity trusts and analyze the benefits and disadvantages of the two theories, how they have and will continue to play a role with the Hershey Trust, and how they affect expansive charity trusts. This analysis will be couched in the long debate about whether a shareholder or stakeholder theory is the appropriate approach to running a business. However, these theories are not one size fits all.

For example, take a business that has come to the conclusion that it can no longer afford to manufacturer products domestically.[111] It has been manufacturing products in a small Mid-western town for over 30 years and has many long-term employees.[112] The company has sold products in the United States, but over the past 10 years the company has shifted to only selling products in foreign markets.[113] The company's executives have determined that the cost-effective solution is to move manufacturing to another country.[114] Once this decision is made, the company needs to determine how it wants to transition its

103. Sidel, *supra* note 49, at 4–6.

104. *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TRUST, https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/ (last visited Feb. 28, 2018) (reporting that in 2016 Americans gave $390.05 billion to charity, which is a 4.2% increase from 2015).

105. *See Home*, THE GIVING PLEDGE, https://givingpledge.org/Home.aspx (last visited Feb. 28, 2018) (included on the list are Michael Bloomberg, Warren Buffet, Bill & Melinda Gates, and Mark Zuckerberg).

106. *About the Pledge*, THE GIVING PLEDGE, https://givingpledge.org/About.aspx (last visited Feb. 28, 2018).

107. *See generally Foundation Stats*, FOUND. CTR. (Oct. 2014), http://data.foundationcenter.org/#/foundations/all/nationwide/top:assets/list/2014 (relying on data from 2014 that lays out total assets and grants given by the largest charitable foundations).

108. BILL & MELINDA GATES FOUNDATION, CONSOLIDATED STATEMENT OF FINANCIAL POSITIONS 2 (2016).

109. McGrath, *supra* note 94.

110. *See generally* Brody, *supra* note 40; Sidel, *supra* note 49.

111. Smith, *supra* note 15.

112. *Id.*

113. *Id.*

114. *Id.*

business to another country. It could follow a shareholder approach and, essentially, "cut and run."[115] It could also take a stakeholder approach and establish remaining ties to help the community after moving its business.[116] As this Part will demonstrate, this is a decision that not just for-profit corporations have to make but also charity trusts.

A. Role the Theories Play with Charity Trusts

A charity trust may not typically be thought of as a business, but it is a private foundation.[117] While its decisions focus on charitable non-profit ventures,[118] the trust still makes business decisions with how they spend their money. Furthermore, unlike a traditional for-profit business whose beneficiaries are the shareholders, a charitable trust's beneficiaries are those the laid out charitable purpose benefits. The beneficiaries of the trust are comparable to the shareholders of a company because the trust *must* consider the beneficiaries' interests. Therefore, when making a decision of where or how to carry out a trust's charitable purpose, the trust must consider whether to take a shareholder or stakeholder approach.

B. Benefits and Disadvantages of Taking a Shareholder Approach

As laid out in Part II, the main purpose of the shareholder approach is to increase shareholder wealth.[119] If a corporation chooses to take a shareholder approach, there are both benefits and disadvantages.

1. Benefits of Taking a Shareholder Approach

As the general standard for how businesses operate in the United States, the shareholder theory is widely accepted because of the many benefits it provides.[120] However, the theory is well-rooted in the decision-making process. Following a shareholder theory has the benefits of providing clear goals for managers to achieve, being required to some extent by law, and allowing for long-term success.

First, the shareholder approach provides a clear goal for managers: increasing share value, which, in turn, increases shareholder wealth.[121] While this goal may have the appearance of being narrow in scope, other interests (such as those covered by the stakeholder theory) are considered but with the intent of using those interests to benefit the shareholder.[122] This focus on the shareholders—one specific party—provides clear decision making guidelines to managers.[123] Furthermore, the approach requires that

115. *Id.*

116. Smith, *supra* note 15.

117. *Charitable Trust*, *supra* note 4.

118. *See id.* (explaining the purpose of a charity trust).

119. *See supra* Part II.B.1.

120. Smith, *supra* note 15.

121. *Id.*

122. Terence Tse, *Shareholder and Stakeholder Theory: After the Financial Crisis*, 3 QUALITATIVE RES. IN FIN. MKTS. 51, 53 (2011).

123. *See* David Levy & Mark Mitschow, *"I Paid for this Microphone!": The Importance of Shareholder Theory in (Teaching) Business Ethics*, 1 LIBERTARIAN PAPERS 1, 7–8, 11 (2009) (discussing the emphasis on the shareholder as an advantage of the shareholder theory).

managers do so within the boundaries of the law.[124]

Companies also have a legal obligation to, in part, follow a shareholder approach.[125] If a company does not pursue the interests of its shareholders, it opens itself up to liability for a breach of fiduciary duty.[126] Shareholders can sue the company for this breach.[127] Typically, laws covering the duties of a company require it to take a shareholder approach.[128]

Finally, the shareholder approach ensures the long-term success of the company.[129] Due to the nature of shareholders' involvement with the company, when a manager fails to perform his or her duties they are replaced with someone who will.[130] This process ensures that there are managers in place who will guarantee the company survives.[131] Also, because the main interests being considered are by those who own the company, it is in the interests of the shareholders that the company survive and remain profitable.[132]

Overall, the shareholder approach has many indirect benefits to stakeholders that stem from the goal of maximizing shareholder wealth.

2. Disadvantages of Taking a Shareholder Approach

The shareholder theory's disadvantages revolve around it being an outdated theory, not being adaptable to the modern business world, and having a narrow scope of focus.

The shareholder theory is seen as a theory of the past because of its focus on increasing wealth.[133] While many argue that it is the current norm, there is evidence that this perception is based solely on tradition.[134] Outside the business community, the shareholder theory does not meet the current norms of society, being touted as a reason for greed.[135] While a somewhat superficial critique of the theory, society not supporting the theory's continued use can be influential to businesses determining what approach to use.

Furthermore, while the shareholder approach lays out exactly what is to be considered, to thrive in the modern business world managers must "consider the relationships with other corporate groups appropriately."[136] A successful company must look outside the relationship between it and its shareholders.[137] This concept places strict limitations on the

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124. *Id.*

125. *See id.* at 5 n.4 (explaining the fiduciary duty owed to the shareholders).

126. *Id.*

127. *Id.*

128. *See* Levy & Mitschow, *supra* note 123, at 5 (explaining the new legislation [i.e. Sarbanes-Oxley] in place that requires managers to honor their shareholders' interests).

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. *Id.* at 11 (explaining that this perk of the shareholder theory will also ensure that all interested parties continue to benefit from the success of the company—not just shareholders).

133. Smith, *supra* note 15.

134. *See id.* (debunking the general perception that shareholder theory is widely accepted and used by businesses).

135. *See id.* (arguing for a shift to stakeholder theory so that the business decision-making matches societal norms).

136. Fabian Brandt & Konstantinos Georgiou, *Shareholders vs. Stakeholders Capitalism*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY COMP. CORP. GOVERNANCE AND FIN. REG. 1, 58 (2016), http://scholarship.law.upenn.edu/fisch_2016/10.

137. *Id.*

shareholder approach.[138]

The narrow scope also emphasizes a short-term approach to decision making.[139] This is due to the oversight and power the shareholders have on managers.[140] As investors, shareholders are looking for a return—such as increasing the share price—and it is short-term decisions that have the most impact on the price,[141] not more beneficial long-term decisions.[142] This provides the incentive for managers to take the quicker, safer, and easier route of sticking to short-term decisions.[143] This process threatens the long-term viability of the corporation.[144]

The general theme of the disadvantages of the shareholder theory focus on the theory being outdated and not workable in the modern business world.

3. Shareholder Theory Analysis of Whether to Relocate Business

Returning to the example of the business deciding to move its manufacturing to another country, its executives have the valid choice of taking a shareholder approach.[145] If it took this approach, the company would close its plant and provide only what the law requires to its employees and, possibly, the community.[146] It would be a "waste of shareholders' money" to expend company funds on retaining unneeded employees or contributing to the community, "since the investments would never be returned."[147] In general, the company needs to not waste money in an effort to increase profitability.[148]

C. Benefits and Disadvantages of Taking a Stakeholder Approach

As established in Part II, the main purpose of the stakeholder approach is to consider and benefit the interests of those directly and indirectly effected by the company.[149] As with the shareholder approach, the focus on the interests of the larger community has both benefits and disadvantages for the company.

1. Benefits of Taking a Stakeholder Approach

Beyond the sense of morality, the stakeholder theory benefits companies by allowing them to achieve success while also making decisions that assist the community. For example, the stakeholder theory allows flexibility in decision making.[150]

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138. *See id.* (explaining generally why a company must look outside itself to succeed).

139. *Id.*

140. *See id.* at 59 (explaining how shareholders have ability to fire managers if they are performing to their standards).

141. Brandt & Georgiou, *supra* note 136, at 59.

142. *Id.* A more beneficial long-term decision will not have as much impact on the current stock price than a beneficial short-term decision, which would influence the stock price sooner.

143. *Id.*

144. *Id.*

145. *See supra* Part II.B.1.

146. Smith, *supra* note 15.

147. *Id.*

148. *See id.* (explaining what this fictional company should do if taking a shareholder approach to the problem).

149. *See supra* Part II.B.2.

150. *See* Tse, *supra* note 122, at 57 (laying out the different benefits of the stakeholder approach, which can lead to more flexible decision-making).

Companies being able to consider a variety of interests allows them to have more flexibility when making decisions. However, many arguments against stakeholder theory[151] assert that the theory does not allow for managers to account for real-world situations.[152] This puts the stakeholder approach in a box, but it is still a business approach.[153] The main goal of the approach is to maximize the value creation of the corporation—including profitability.[154] With this in mind, companies who follow a stakeholder approach are given much more freedom than those following a shareholder approach.[155] This freedom gives managers the room to make decisions that are still best for the company but that also tend to benefit society.[156] Therefore, the stakeholder theory does not put decision makers in a box and require then to only pursue one goal.[157] Following this theory allows directors flexibility in making decisions that provide benefits to more than just the company, without limiting the benefit to the company.[158]

2. Disadvantages of Taking a Stakeholder Approach

While the stakeholder theory may look to the common good, this approach comes with costs to the company. Generally, there are too many interests to take into account, and the theory is not clear on how to use the stakeholder's reactions. Similarly, managers are unsure of the theory's effect on their fiduciary duties.

First, stakeholder theory requires that the business takes into account multiple interests.[159] General stakeholder theory requires that managers "understand all moral standards and recognize all moral impacts before" deciding to act.[160] Trying to understand and take into account so many interests can cause paralysis among managers and proves to be impractical.[161] These multiple interests also bring with it a threat that no one will hold the managers accountable.[162] Since the managers are "accountable" to every stakeholder, they are really accountable to no one at all. This brings with it the threat of managerial self-dealings.[163] Allowing this to happen would completely negate the purpose of the stakeholder theory.

Unlike shareholder theory, the stakeholder theory does not have a clear objective.[164]

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151. *See infra* Part III.C.2 (discussing the arguments against the stakeholder theory).

152. Brandt & Georgiou, *supra* note 136, at 58–59.

153. *Id.* at 58.

154. *Id.*

155. *Id.*

156. *Id.* at 58–59.

157. *See* Brandt & Georgiou, *supra* note 136, at 58–59 (breaking down the decision making process of someone following the stakeholder theory).

158. *See* Tse, *supra* note 122, at 57 (explaining how a review of ten studies that tested the stakeholder approach revealed that seven of them reported stakeholder management was positively related to the firms' financial success).

159. *Id.* at 58 (explaining how having multiple interests can create confusion).

160. Levy & Mitschow, *supra* note 123, at 5 (emphasis removed).

161. *Id.* Furthermore, when comparing growth rates of stakeholder focused European businesses to shareholder focused United States businesses, the costs of analysis paralysis are illustrated. *Id.* at 5 n.5.

162. *See* Levy & Mitschow, *supra* note 123, at 5 (describing the past decades of corporate scandals show that managers have difficulty meeting their moral obligation to the owners and new legislation has been put in place "to force managers to honor their responsibilities to shareholders." Therefore, "it is unlikely that managers will meet moral obligations to shareholders and other parties.") (emphasis removed).

163. Brandt & Georgiou, *supra* note 136, at 58.

164. *Id.* at 57.

The theory is vague as to how the company should approach the stakeholders' reactions.[165] Therefore, the theory remains somewhat silent on how to change the course of business based on the stakeholders.[166]

Furthermore, the stakeholder theory does not allow managers to properly carry out their fiduciary duties to shareholders.[167] As discussed,[168] managers owe a fiduciary duty to their shareholders.[169] If managers do not act to benefit these shareholders, they open the company up to liability for the effect on shareholder value.[170] This legal reality makes wide-spread adoption of a true stakeholder approach impractical.[171]

Finally, the stakeholder approach presents the "famous problem" of the "so-called '[s]takeholder [p]aradox.'"[172] Since the managers are accountable to all stakeholders, the managers have a "multi-fiduciary position" that requires them have the same fiduciary duty to all stakeholders as they have to the shareholders.[173] This causes a breakdown of the fiduciary duty because it requires one party to act solely in the interest of another.[174] Under the stakeholder theory, it cannot work, since the managers still have the duties to the shareholders whose interests do not necessarily align with those of the stakeholders.[175] Even within the group of stakeholders, interests are not likely to align.

The common theme among these disadvantages of the stakeholder theory is that it leaves managers with little direction and too many obligations to varying interests.

3. Stakeholder Theory Analysis of Whether to Re-locate Business

If following a stakeholder approach, the company moving manufacturing out of the country would foremost consider the interests of the stakeholder "as an end in themselves."[176] Under this analysis, the company would have an obligation to its long-term employees and the community where it was located for thirty years.[177] The company would be expected to exert some effort to retain its employees—even at the expense to the shareholders.[178] Among other obligations, it may require the company to assist the community in attracting new business to replace the hole being left by moving the manufacturing plant.[179] Essentially, if following the stakeholder theory, the company would need to leave its employees and the community in at least the same place as it found

165. *See* Tse, *supra* note 122, at 58 (explaining that while there are plenty who advocate for a stakeholder approach, there are not many studies that show how to make it operational).

166. *Id.*

167. Levy & Mitschow, *supra* note 123, at 5 n.4.

168. *See supra* Part III.B.1 (discussing the benefits of the shareholder theory).

169. Levy & Mitschow, *supra* note 123, at 5 n.4.

170. *Id.*

171. *Id.*

172. Brandt & Georgiou, *supra* note 136, at 57 (citing that the "stakeholder paradox" was found by *Goodpaster*).

173. *Id.*

174. *Id.*

175. *See id.* (stating that the fiduciary duty "cannot work if the fiduciary has . . . duties to more than one party").

176. Smith, *supra* note 15 (emphasis removed).

177. *Id.*

178. *Id.*

179. *Id.*

them.[180]

D. Hershey Trust: How Shareholder and Stakeholder Theory Played a Role

While the Hershey Trust situation is an exceptional example,[181] it provides a great illustration of a trust that was historically stakeholder focused, then shifted to amass large amounts of wealth for its "shareholders," before having a stakeholder approach forced upon it in 2002. Walking through these shifts in approach demonstrate the effect that each theory has on a charity trust, and why the large charity trusts of the modern age should be aware of the approach they take.

1. Hershey Trust's Historical Approach

When Milton Hershey moved to what is now known as Hershey, Pennsylvania, he ran his company with a stakeholder approach, long before that type of approach was discussed by businesses.[182] The utopian-esque community started around the company's headquarters and factories exemplifies what it means to consider the interests of the community—especially since he created the community to house his employees.[183] This idealistic stakeholder approach led to the establishment of the Hershey Trust and Milton Hershey giving the Trust the bulk of his assets.[184] After Milton's death, the Trust continued to benefit the community at-large and consider their interests as Hershey Foods continued to grow.[185]

However, as the Trust entered into the modern day, it started to seek to benefit its "shareholders"—the children at the Hershey School who were the primary beneficiaries of the Trust.[186] The Trust overlooked what may have been best for the community as it expanded the size of the school, established a medical school in the town, and let many of the old establishments which benefited the community more than the students go.[187] This shift sought to grow the Trust's value, which primarily benefited its "shareholders."[188]

2. The 2002 Conundrum Approach

This shift in approach led to the 2002 announcement that the Trust was looking to sell its shares of Hershey.[189] The Trust had decided that what was best for its "shareholders"

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180. *See id.* (explaining what the stakeholder theory would require this fictitious company to do).

181. As discussed *supra* in Part II.D, the Hershey Trust is an exceptional example because of the amount of voting shares the Trust holds in one company and the specific effect Hershey Corporation and Hershey Trust has on the town of Hershey, Pennsylvania.

182. *See* Sidel, *supra* note 49, at 4 (discussing the decision to move to Derry, Pennsylvania and what Hershey did for the community).

183. Brody, *supra* note 40, at 984 (discussing Milton Hershey's decision to move his plants and the ideas behind the town he started).

184. *See id.* at 984–85 (discussing that the Trust was established to provide for orphaned children and give back).

185. *See id.* at 986 (discussing how at first the Trust had the school grow with the community).

186. *See id.* (demonstrating that as the Trust choose to grow the school, its interests became unaligned with that of the community).

187. *Id.*

188. *See* Brody, *supra* note 40, at 988 (discussing the vast amount of wealth the Trust had gained over the years).

189. Gross, *supra* note 67.

was diversifying its holdings.[190]

The community and the Pennsylvania government disagreed with this decision, mainly because of the direct and indirect benefits that they were receiving from the Trust and Hershey Foods presence in the town.[191] Taking a wholly stakeholder approach, everyone but the Trust seemed to feel that they were its real beneficiaries and deserved a say in what the Trust did.[192]

In the end, even though the Trust received an offer which would have kept plants and jobs in the community, the Pennsylvania government succeeded in forcing a stakeholder approach on the board of the Trust.[193] The government passed a law that will continue to require charity trusts to consider the impact they have on the community with the approval of the attorney general and the courts.[194] This forced approach is somewhat terrifying in light of the fact that the "shareholders" that the Trust sought to benefit are orphaned children.

3. Hershey Trust: Going Forward

As the Trust considers further diversification, it will be faced again with the decision to follow a shareholder or stakeholder approach. With fifteen years between the offers in 2002 and the sale in 2017, it appears that the outrage against selling the Trust's stake in Hershey has quieted. It may now be the time to continue to diversify away the needless risk, which would not compromise the expected returns.[195] However, the Pennsylvania law that requires the Trust to follow a stakeholder approach may stand in its way.[196]

E. Charity Trusts: Shareholder vs. Stakeholder

Unlike Pennsylvania, the U.S. government has no such law requiring charity trusts to follow a stakeholder approach. Instead, Congress has passed a law that requires a charity trust to diversify its holdings so as not to risk losing money for its beneficiaries—the "shareholders."[197] However, as charity trusts who have diversified continue to amass large coffers—such as the Gates Foundation—they must consider the effects that both shareholder and stakeholder theories could have on them.

For example, imagine the company, who is potentially moving its plant overseas, is a

190. Brody, *supra* note 40, at 989; Sidel, *supra* note 49, at 12.

191. *See* Brody, *supra* note 40, at 990–91 (relying on the reaction of the community as being entitled to the benefits and the attorney general holding the stance that the general public were the real beneficiaries of the Trust).

192. *Id.* and accompanying parenthetical.

193. *See id.* at 994–95 (laying out events that led to Hershey Trust deciding not to sell). The Pennsylvania government was obviously biased in a pro-state perspective. It arguably did not force a true stakeholder approach since it sought only to benefit itself and its constituents. However, while that may have been the government officials' intent, the government actions forced the Hershey Trust to consider the interests of its stakeholders, thereby forcing the stakeholder approach onto the Trust.

194. 20 PA. CONS. STAT. § 7203(c)(6) (2004); Prudent Investor Rule Expands Class of Beneficiaries Letter No. 19, 2002 WL 35581193, Dec. 6, 2002; Brody, *supra* note 40, at 995–96. However, it does not appear that the attorney general and judicial branch used this power with the Hershey Trust's recent sale. Fernandez, *supra* note 94; McGrath, *supra* note 94.

195. Corkery, *supra* note 96 (quoting Harvard Law Professor Robert Sitkoff as well as several other answers from Sitkoff pertaining to the Hershey Trust).

196. Giammona, *supra* note 100 (reporting on the recent buy-out offer and pointing out that the law still stands in the way).

197. 8 U.S.C. § 4943 (2014) (laying out the duties of a charity trust).

charity trust who has invested a lot of money into a specific community. This trust decides that it wants to focus its efforts elsewhere. Should the charity trust be forced to, like the Hershey Trust, consider the effect on the stakeholders, or should it just consider the interests of its "shareholders"—the direct beneficiaries of the trust?

Consider the Gates Foundation who "supports grantees in all 50 states and the District of Columbia."[198] While it does a lot of work internationally, domestically the Gates Foundation "seeks to ensure that all people—especially those with the fewest resources—have access to the opportunities they need to succeed in school and life."[199] The Gates Foundation employs 1,453 employees and pays out large grants domestically all over the country.[200] These grants help schools and school districts, farmers, libraries, reducing homelessness, and many more admirable objectives.[201] All of these grantees are beneficiaries of the Gates Foundation, meaning that they are "shareholders" of the foundation. Annually, these "shareholders" receive billions of dollars directly,[202] which also indirectly benefits the community at large. Beyond the amount of money flowing into the community, these grants directly benefit the community, with the largest example being the funding of public schools.[203] However, what happens if the Gates Foundation decides to invest its money elsewhere? What happens if it has a bad year and needs to limit the amount in grants it gives out to a specific cause? While it is not as entrenched in a community as the Hershey Trust, must it consider the effect to the at-large community that is indirectly benefiting from better schools or one of the other charitable investments the Gates Foundation has made?

IV. RECOMMENDATION

It may seem like the obvious answer that charity trusts should first consider the interests of its beneficiaries—therefore taking a shareholder approach to decision-making. However, in the extreme example of the Hershey Trust, the state of Pennsylvania stepped in and forced a stakeholder approach onto the Trust.[204] While the Pennsylvania law was written specifically for the Hershey Trust and has a high bar to meet,[205] there is nothing stopping Pennsylvania[206] and other states from enacting laws that would, more broadly,

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198. *Who We Are: Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., http://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet (last visited Feb. 28, 2018).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (stating that $4.6 billion were given directly to grantees in 2016 and $4.2 billion in 2015).

203. *See Awarded Grants*, BILL & MELINDA GATES FOUND., https://www.gatesfoundation.org/How-We-Work/Quick-Links/Grants-Database#q/issue=K-12%20Education&sort=amount (last visited Feb. 28, 2018) (specifying that, among other grants benefiting schools, teachers, and students, the Gates Foundation since before 2009 has given $85,447,155 to Hillsborough County Public Schools, $30,549,921 to The College-Ready Promise in Los Angeles, $33,526,325 to Pittsburgh Public Schools, and $1,954,041 to Memphis City Schools).

204. *See* Brody, *supra* note 40, at 991–94 (laying out the reaction from the state).

205. *See* 20 PA. CONS. STAT. § 7203(C)(6) (2004) (establishing that there must be a special relationship or special value between the asset and the community, which is clearly written due to the uncommon ties between Hershey the company and Hershey, PA).

206. An interesting note here is that one of the Gates Foundation's largest beneficiaries is Pittsburgh Public Schools in Pennsylvania. *Awarded Grants*, *supra* note 203. The current Pennsylvania prudent investor rule does

require charity trusts to consider the effects on the community before halting donations to beneficiaries. With the success Pennsylvania had with the Hershey Trust—and, more importantly, the inaction from Congress and other interested parties afterwards—states may see this as an opportunity to secure and keep funding for important state goals, such as education.

From a federal standpoint, there are two routes that can be taken: continue to leave the decision to the states or step in and regulate.

A. Should It Be Left to the States?

Historically, laws governing trusts have been primarily state made and state enforced.[207] Up to this point, Congress has, with minimal intrusion,[208] allowed states to be the primary regulators of charity trusts.[209] States are arguably more in tune with the needs of its citizens and overall community. Leaving the decision of whether charity trusts should take a stakeholder or shareholder approach to the individual states would then lead to laws that reflect the values of those states. Currently, this is the route that has been chosen—whether intentionally or not—and the easiest choice to continue to make.

B. Should Congress Get Involved to Regulate Charity Trusts?

When every state is allowed to take its own approach it leads to a variety of different laws and standards. This provides for a complicated legal landscape. However, it also allows states to act in their own interests, which for charity trusts leads to laws like those in Pennsylvania.[210] This type of approach impedes charity trusts' autonomy. It can limit a charity trust's ability to follow their stated charitable objective.[211]

Congress has already passed laws which re-enforce a charity trust's duty to their beneficiaries.[212] Congress could intervene now and amend its current law to further enforce this duty to follow a shareholder approach with decision-making.[213] While it would still be beneficial to consider the interests of the community, a charity trust should first consider the interests of its beneficiaries. This would not result in a complete overhaul of the current

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not appear that it would require the Gates Foundation to consider the implications on the community because there is not necessarily that "special" relationship. 20 PA. CONS. STAT. § 7203(c)(6). However, that does not mean the Pennsylvanian government would not try to make an argument because education plays an important role in the community, which could create that "special" bond.

207. *See* Carlson, *supra* note 30, at 203–05, 210–11 (explaining the history of state attorney generals' duties and states' power in regard to charity trusts).

208. See 26 U.S.C. § 4943 (2014) for an example of when Congress has placed regulations on charity trusts.

209. Carlson, *supra* note 30, at 203–05, 210–11 (explaining the history of state attorney generals' duties and states' power in regard to charity trusts).

210. *See supra* Part II.D (explaining how the Pennsylvania government went in and dictated the Hershey Trust's decision making process).

211. *See* Levy & Mitschow, *supra* note 123, at 5 (explaining how a stakeholder theory can interfere with a business pursuing their stated objectives).

212. *See* 26 U.S.C. § 4943 (laying out the requirements for a trust to diversify its portfolio as to not expose the trust's beneficiaries to excessive risk); *supra* Part II.C.2 (discussing federal law requiring diversification of charity trust portfolios).

213. Without going into too much detail, Congress would have the power to regulate in this area, as it has the power to regulate diversification of charity trusts, because of the effect that charity trusts—especially expansive ones like the Gates Foundation and Hershey Trust—have on interstate commerce. *See* U.S. CONST. art. I, § 8, cl. 3.

laws, but rather a small amendment that would require charity trusts to consider the interests of its beneficiaries before any other interest.

This approach is favorable over leaving the issue to the states because it will clearly resolve the issue. While states up to this point have generally favored the shareholder approach through inaction that does not mean it will always be that way. Many charity trusts are now filling traditional state roles, such as funding public education.[214] All it will take is for the Gates Foundation, or one of the other expansive charities, to shift their focus and donations away from one state to spark a similar reaction to that of Pennsylvania in 2002. This could lead to a state enacting more stringent laws once the money has left or threatened to leave. While it is an extreme example, the Hershey Trust conundrum of 2002 paints a picture of the entitlement that states and smaller communities have towards the indirect benefits of charity trusts.[215] Therefore, Congress should step in and amend the law before states start changing theirs.

V. Conclusion

The recent trend of expansive philanthropy is beneficial to society as a whole. However, if what happened in Pennsylvania in 2002 is allowed to happen elsewhere, we may see this trend slow down or come to a halt. While in a more traditional business setting there can be more debate about if a shareholder or stakeholder approach is best, when it comes to a charity trust the beneficiaries must come first. Regardless of if Congress acts, other states should not follow Pennsylvania's lead. A charity trust should be allowed to conduct business in the way that it finds is most beneficial to its "shareholders."

214. *See supra* Part II.F (laying out the expansive donations of the Gates Foundation and how the donations are funding programs such as public education).

215. *See supra* Part II.D (laying out the details of the Hershey Trust conundrum of 2002).