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Strings Are Attached: Shining a Spotlight on the Hidden Subsidy for Perpetual Donor Limits on Gifts

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STRINGS ARE ATTACHED: SHINING A SPOTLIGHT ON THE HIDDEN SUBSIDY FOR PERPETUAL DONOR LIMITS ON GIFTS

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Charitable gifts often come with strings attached. Donors limit their gifts in many ways, typically by restricting an asset's use or purpose, the timing of spending (as in an endowment), and by securing naming rights. Donors also limit their gifts by giving to a charitable intermediary such as a donor-advised fund or private foundation, thereby retaining effective control over the distribution or investment of the donated asset. Donor limits are perpetual in nature. This Article assesses the law of donor limits. The Article explains that non-tax legal rules strongly favor donor limits; they are easy for donors to impose and hard for charities to eliminate. Federal tax rules also favor donor limits by treating most donor-limited gifts the same as unrestricted gifts for purposes of the income and estate tax charitable deductions. As a result, donor limits are common and burden a substantial portion of charitable assets. The Article finds based on a review of Form 990 data that, for one hundred of the leading charities in the United States, 66 percent of their $525 billion in net assets are subject to donor limits, meaning these charities have full control of only 34 percent of assets. For the nineteen private universities in this group, 67 percent of the total endowment is donor limited. This tax law subsidy for dead hand control entails many harms, including to the public interest, charitable autonomy, pluralism, the operational funding of charities, imposition of compliance costs, and subsidizing gains to donors. The Article considers tax reform options for donor-limited gifts. These include treating donor limits as retained rights or return benefits, estate tax reform to discourage giving to intermediaries, curtailing donor-limited gifts from donor-advised funds, and taking donor limits into account for purposes of any new giving incentive, such as a nonitemizer deduction or charitable giving credit. Importantly, under any tax reform approach, the power of donors to impose limits would not change. Donors could continue to limit their gifts in perpetuity as they currently do, but charity, and society, would be relieved from some of the costs of the dead hand.

* Professor of Law, Columbus School of Law, The Catholic University of America; Legislation Counsel, Joint Committee on Taxation, U.S. Congress 2001–2008. It is a privilege to participate in this special symposium volume honoring Ellen Aprill. Professor Aprill is a scholar of the highest caliber, an indispensable voice in nonprofit law, and a mentor to so many. Thank you, Ellen, for all you have done and continue to do. Thanks also to Harvey Dale, Jill Manny, and the NYU Center on Philanthropy and the Law for shepherding an early draft of this paper; the Nonprofit Forum; Ray Madoff and Ben Soskis for thoughts on interim drafts; Helen Flannery for her insights on the data; the *Loyola of Los Angeles Law Review* symposium participants (especially the commentary of Ed McCaffery); and Alejandra Pazzi for research assistance.

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INTRODUCTION

Charitable giving in the United States is widely celebrated and encouraged. Giving totals, announced every year with anticipation and fanfare, provide useful benchmarks of American generosity. In 2021, for example, charities received nearly $485 billion in donations, a hefty sum supported by significant federal tax subsidies.[1] The deduction for charitable contributions for income[2] and estate tax[3] purposes is the main tax benefit, representing $310 billion of government expense over five years.[4]

Americans undoubtedly are generous and spurred on by tax incentives, but donor munificence often comes with strings attached—strings that tie the charity to the donor, and the donor to the donated asset, in perpetuity. These strings can take a variety of forms. Donors might impose a restriction on how property may be used, for example, by requiring that donor funds be spent only for a particular purpose. The purpose could be broad (like to a school for musical education) or narrow (to a school for the study of nineteenth century watercolor techniques). Alternatively, donors might require that a donation be held in an endowment and so not spent right away. Donors might condition a gift on naming rights, for example that a building (or even an entire school) be named for the donor. Or donors might seek to retain effective control of their gift, either by establishing a private foundation and donating funds to their foundation, or by giving to a donor-advised fund (that is housed within a charity) and retaining advisory privileges on when to make grants from the fund and to whom. In short, if donors want to exercise continued influence over the use or disposition of their gifted assets and make less than an outright gift to charity, they have no shortage of choices.

All these types of donor-based limitations on gifts, sometimes known as dead hand control, are a common and accepted part of charitable giving culture and are subsidized by the tax code. The charitable deduction, which is designed to encourage giving, broadly treats

1. Of the $484.85 billion of total charitable giving in 2021, $326.87 billion was individual inter-vivos giving (not all of which was tax deductible), $90.88 billion was giving by foundations, and $46.01 billion was giving by bequest. (The remaining $21.08 billion was giving by corporations.) GIVING USA, THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2021, at 21 (2022).

2. I.R.C. § 170.

3. I.R.C. § 2055(a)(2).

4. This amount is rounded up from $309.5 billion and includes the charitable deduction for estate and gift taxes. STAFF OF THE JOINT COMM. ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2022–2026, 4, 41–43 (Dec. 22, 2022).

donor-limited gifts the same as unlimited gifts—typically allowing a full deduction whether a gift is limited or not. This hidden subsidy for donor limits unsurprisingly means that donor-limited giving is widespread, as donors have no reason not to limit their gifts. Even so, the scale of donor-limited giving is significant. Of the $525 billion in net assets held by one hundred of the largest charities in the United States, charities have full control over only 34 percent of those assets—the remaining 66 percent are donor limited.[5] Thus, while donor limits may seem to be insignificant on a gift-by-gift basis, they add up and, in the aggregate, entail significant costs. When charitable funds are limited, fewer unrestricted funds are available to serve current needs, charities lose autonomy to decide how best to allocate resources, and pluralism in the charitable sector is harmed through the prioritization and institutionalization of the preferences of donors, who are often the wealthiest in society.

While the problem of donor limits and dead hand control is not new, the role of tax law in promoting and subsidizing donor limits is often ignored. The charitable giving tax incentives are meant to promote completed gifts to charity and to provide charities with resources they can use to further their mission, even as that mission evolves. A tax subsidy for donor limits, however, undermines these goals. Ironically, the charitable giving tax incentives play a significant part in fostering a widespread burdening of charitable assets by easy-to-impose donor limitations, which through their imposition mean that donors have not quite given everything away.

This Article considers the merits of the tax law subsidy for perpetual donor limits. Part I surveys the legal landscape for donor limits on gifts. This part defines donor limits, explains that non-tax legal rules strongly protect donor intent in perpetuity, quantifies donor limits as burdening a significant part of all charitable assets, and outlines the role of tax law in relation to donor limits, including concerns about donor control and not subsidizing private donor gains. Part II discusses the harms caused by donor limits and considers whether these harms are outweighed by common explanations for, if not defenses of, donor limits on gifts, such as that donor limits promote pluralism and provide an incentive for donors to give. This part concludes that these defenses of donor limits are wanting for purposes of a tax subsidy, and that the many significant harms donor limits cause warrant serious

5. *See* discussion *infra* Section I.C.

consideration of reform. Part III considers different tax reform approaches for donor-limited gifts. These include treating donor limits as retained rights or return benefits, reforming the estate tax charitable deduction to discourage giving to donor-advised funds and private foundations, and taking donor limits into account for purposes of any new giving incentive, such as a nonitemizer deduction or charitable giving credit. The Article then concludes that limiting the subsidy for donor-limited giving would yield an overall benefit to charity and to the public interest by fostering more giving unconstrained by donor limits and their costs.

I. A FAVORABLE LEGAL LANDSCAPE FOR DONOR LIMITS ON GIFTS

A. Types of Donor Limits

When donors give to charity, the gift can either be outright or subject to some form of limitation. An outright gift to charity is what it sounds like—a gift free and clear of any restrictions or conditions of any kind.[6] For example, a donor writes a check for $100 to the local food bank. The food bank cashes the check. The transaction is complete. The donor has no further concrete expectations regarding the donated funds, for instance as to their specific use, the timing of expenditure, or the manner of investment.[7] The charity need not pay heed to the donor's intent regarding the gift at any time in the future.[8]

By contrast, a gift that is not outright is one that comes with strings attached—strings that bind the donated asset, and so the charity, to the donor in some way. A "string" or, less colloquially, a "limitation" can take a variety of forms, appearing as a specific restriction or condition that attaches to the gift or through continued effective control over the donated asset.

Donor *restrictions* perhaps are the most familiar kind of limitation, both in practice and as a legal term. Donor-imposed restrictions

6. One scholar defines unrestricted giving as "a contribution of money or property that the donor makes without attaching any condition to its subsequent use by the charity." Iris J. Goodwin, *Ask Not What Your Charity Can Do for You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of* Cy Pres *Reform*, 51 ARIZ. L. REV. 75, 98 (2009).

7. Donors obviously remain interested in whether the money is spent effectively, and future donations may and likely do depend on how the charity handles its funds.

8. In one important sense, all charitable gifts are restricted by the purposes of the organization. Thus, the donor to the food bank reasonably expects that the food bank will use the donated funds in furtherance of its mission—and not for some other mission or purpose. *See* discussion *infra* Section II.A. But the gift is not restricted relative to any specific limitation or condition imposed by the donor.

might relate to the purpose for which the gift may be used, the spending of principal or income, the manner of investment or accumulation, a geographical limitation, a naming right, or a time limit.[9]

For example, a gift is restricted as to purpose if a donor earmarks a gift to a university as for need-based scholarships for high-achieving math students. Gifts with a notation of "spend only the income" create an endowment—meaning the charity is not free to spend the principal of the gift but must hold it for investment and spend only the income.[10] A donor may specify in general terms how a gift may be invested, for example in low-risk assets.[11] A restriction may require that the gift be accumulated and not spent at all for a given period—e.g., for twenty years. A geographic restriction might be that a gift be used only in a particular region, such as a county.[12] Restrictions may also be a combination of any of the above—e.g., an endowment for music education for adolescents in county X.

Restrictions can also include restraints on alienation. For example, a donor of artwork to a museum might specify that the donated work may not be sold or loaned and must be placed on regular display.[13] Relatedly, restrictions can direct the disposition of property if a charity violates a restriction's terms. If, for example, the charity attempts a sale in violation of an alienability restriction or property is not used as intended, the donor may specify that the donor's heirs or a third party become the new owners of the donated property.[14]

Donor limitations can also take the form of a condition. A donor might for example impose a condition precedent, such as a matching requirement,[15] which renders the gift incomplete (and nondeductible)

9. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 cmt. b(1) (AM. L. INST. 2021) (describing common restrictions).

10. *Id.* § 4.01 cmt. b(1)(B).

11. *Id.* § 4.01 cmt. b(1)(E) (noting that "donors have extensive power to impose specific restrictions on the management, investment, and expenditure of charitable assets").

12. *Id.* The geographic limitation must, however, serve a charitable class.

13. RICHARD L. FOX, CHARITABLE GIVING: TAXATION, PLANNING, AND STRATEGIES § 23.02 (2022) (donors may seek to prohibit the sale, exchange, or other disposition of artwork and require display in perpetuity); I.R.S. Priv. Ltr. Rul. 93-03-007 (Oct. 20, 1992) (donor-imposed restrictions on continuous display, design of display, and editorial control of publicity); I.R.S. Priv. Ltr. Rul. 2002-02-032 (Oct. 26, 2001) (display and other conditions on use of artwork). Some restraints on alienation may result in disallowance of the charitable deduction, however. *See* Silverman v. Comm'r, 27 T.C.M. (CCH) 1066, 1075 (1968) (three-year prohibition on sale of artwork reduces value of contribution); Rev. Rul. 2003-28, 2003-1 C.B. 594 (three-year prohibition on sale of donated patent reduces value of contribution).

14. I.R.S. Priv. Ltr. Rul. 2004-18-002 (Jan. 23, 2004) (forfeiture to donor's private foundation upon attempted sale by charity).

15. FOX, *supra* note 13, § 23.03.

until and unless the charity satisfies the condition, at which point the gift may become outright. Alternatively, a condition could be subsequent to the gift, meaning that the gift is considered complete at donation, but if the charity breaches the condition, the charity forfeits the asset back to the donor (or the donor's heirs or assignees) or to a third party named by the donor.[16]

Another form of donor limitation relates to a donor's retention of effective control of an asset, without imposing any specific restriction or condition. Two prime examples of this type of donor limit are gifts to donor-advised fund sponsors and to private foundations. With a donor-advised fund, a donor gives money or property to a sponsoring charity that agrees to set up a fund in the donor's name.[17] The sponsoring charity (the "DAF sponsor") in return allows the donor to have advisory privileges with respect to the assets in the fund.[18] Thus, the donor retains the ability post-donation effectively to decide where the money goes. The donor-advised fund sponsor is an intermediary for the donor's charitable giving—a resting place for the assets until the donor provides advice about distribution. Advisory privileges also can permit the donor to advise how the funds are invested.[19] Thus, with donor-advised fund gifts, although at the time of the gift the assets are not under any specific restriction, the circumstances of the gift are such that the donor and the DAF sponsor expect that the funds will not be distributed for use until the donor provides further (albeit non-binding) instructions.[20]

Similarly, gifts to private foundations, where the donor controls or exerts controlling influence over the foundation, also fall short of outright giving. Again, as with donor-advised funds, even if the donated assets are not subject to a specific restriction or condition, because they are housed in a foundation controlled by the donor, the

16. *Id.* (describing conditions precedent and subsequent). As discussed *infra* Sections I.D.3 and III.B.1, the tax consequences of restrictions and conditions may differ. In general terms, if a restriction meaningfully affects the value of the asset, the deduction is reduced to account for the loss in value. If a condition is considered retention of a "partial interest," the deduction is denied, unless the happening of the condition is so remote as to be negligible.

17. I.R.C. § 4966(d)(2); *see* Roger Colinvaux, *Speeding Up Benefits to Charity by Reforming Gifts to Intermediaries*, 63 B.C. L. REV. 2621, 2626–30 (2022) (discussing general features of donor-advised funds).

18. Colinvaux, *supra* note 17, at 2626–30.

19. *Id.*

20. *See* MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RSCH. SERV., R42595, AN ANALYSIS OF CHARITABLE GIVING AND DONOR ADVISED FUNDS 3 (2012) (noting that donor-advised fund donors appear to have "effective control over grants . . . because sponsoring organizations typically follow the donor's advice").

funds are not yet free to be used independent of meaningful donor constraint. By controlling the foundation, the donor controls decisions as to the use, timing, and investment of the funds, meaning they are effectively subject to donor restrictions.[21]

Donor-limited giving therefore covers a wide range of donor efforts to bind the charity to the donor with respect to a donation.

B. Non-Tax Default Rules Strongly Favor Donor Limits

From origination of a donor limit to protections for perpetual life, default legal rules strongly favor donor limits. As an initial matter, under property law, owners have considerable power to control their property upon disposition or death. Under the centuries-old estate system, owners can divide their ownership into present and future interests (e.g., a life estate and a remainder interest) and impose conditions on the use of their property that are binding far into the future, even with reversion to the owner (or the owner's heirs) upon a failure of the use.[22] Indeed, the power of owners to place limitations on property is greater in donative than in other contexts, as the common law rules against perpetuities and accumulations do not apply to donative transfers.[23] Without question, "[d]onors have wide latitude to impose

21. *See* Colinvaux, *supra* note 17, at 2632–34 (discussing general features of private foundations).

22. For example, a fee simple determinable allows an owner to impose a condition on property, which, if violated, results in forfeiture of the property back to the owner or the owner's heirs. Efforts to dictate the use or disposition of property too far into the future traditionally would be struck down by the common law rule against perpetuities. *See* THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 178 (2d ed. 1984) ("The rule against perpetuities is the principal means which the Anglo-American system of law has employed to limit the power of an individual to control the disposition of his wealth after his death.").

23. *See* Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 ALB. L. REV. 565, 574 (2018) (noting that the rule against perpetuities was developed to protect the free alienation of land but did not apply to charitable trusts). As discussed *infra*, these exceptions developed because charitable transfers were thought not to present the same concerns as private transfers. When property is transferred to charity, the property is converted, in theory, from a private and selfish use to a more public one, relieving the need for rules against perpetual restrictions and accumulations. *See* BERGIN & HASKELL, *supra* note 22, at 224 (noting that charitable accumulations "are limited only by the standard of reasonableness"); *see also* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND: THE THOMAS M. COOLEY LECTURES 114 (1955) ("It has many times been recognized by American courts that a direction for an accumulation for charity is not void because it may continue longer than lives in being and twenty-one years; but that the only restriction which the law imposes on the duration of an accumulation for charity is that a court of equity may supervise it, and in its discretion, may order its termination.").

specific restrictions regarding the purposes to which charitable assets must be devoted."[24]

Relatedly, as a practical matter, donor limitations are easy to impose. Donors need do little more than express their intent in a writing that donated assets are limited. A notation on a check or a communication will suffice. For example, a donor that sends a letter to a university that funds are to be used for need-based merit scholarships,[25] or to "hold the gift as an endowment" or to "spend income only" will create a limitation on use.[26] A gift instrument is little more than a drafting exercise, which can vary in sophistication depending on the donor's inclinations. Thus, gift instruments include "a written record in any form . . . that express[es] a donative purpose," including "a will, deed, grant, contract, conveyance, agreement, or memorandum; a cover letter or a notation on a check; a pledge card or a subscription form; [and] an inscription on tangible property."[27]

Equipped with the power to impose limits, and the ease of doing so, donors are further enabled by rules that protect their intent in perpetuity. Simply stated, "[a] charity must comply with a valid specific restriction on a charitable asset absent release or modification of the restriction."[28] The charity's obligation "is based on the principle that, to the extent a person chooses to donate property to a charity, there normally is an attendant right to have the donor's intention with regard to the use or administration of that property enforced."[29] The obligation continues "even if the charity's fiduciaries come to believe that the asset could be used for a better purpose or administered in a better manner."[30] Further, if a gift instrument is ambiguous, "the controlling

24. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 cmt. b(1)(A) (AM. L. INST. 2021).

25. *Id.* § 4.01 cmt. a, illus. 1.

26. "Inclusion of those or similar terms in a gift instrument, in the absence of additional terms limiting duration or purposes, generally creates a permanent endowment." *Id.* § 4.01 cmt. b(1)(B).

27. *Id.* § 4.02 cmt. b(1); *see also* FOX, *supra* note 13, § 23.01 (noting that "[c]onditions and restrictions are generally embodied in gift agreements, in other contractual arrangements, or under the donor's will").

28. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01(c) (AM. L. INST. 2021); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1206 (2007) ("The treatment of restricted gifts made to corporate charities varies in theory among the states, but not in effect. Generally, the charity has a duty to adhere to the restriction."); *see also* FOX, *supra* note 13, § 23.09 (providing that, "[u]sually, a restricted gift stays restricted and the charitable donee is unable to lift the restriction").

29. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 cmt. a (AM. L. INST. 2021).

30. *Id.* As Professor Susan Gary puts it, "[t]he law requires charities to comply with donors' restrictions." Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and*

consideration in determining the meaning of a donated document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."[31]

A charity's obligation to abide by donor intent is enforceable through duties imposed on the charity's fiduciaries.[32] In the first instance, trust law imposes a duty of obedience on the trustee "to carry out the purposes of the trust."[33] Thus, if a donor imposes a restriction, the trustee's duty includes an obligation to follow the terms of the restriction.[34] Corporate law imposes a similar duty.[35] If a charity fails to adhere to a donor's wishes, the charity is answerable to courts and the state attorney general, who has the power to enforce binding donor restrictions.[36] In addition, although the general common law rule is that donors do not have standing to sue a charity,[37] in recent years, more jurisdictions have liberalized donor standing rules to permit lawsuits for breach of donor-imposed restrictions.[38] Relatedly, well-

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Doing the Right Thing, 85 CHICAGO-KENT L. REV. 977, 995 (2010); *see* Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 880 (1997) (noting that "American law still grants enormous deference to donor-imposed conditions").

31. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003).

32. Gary, *supra* note 23, at 580–81 (noting that the "duty to comply with a donor-imposed restriction seems clear enough, although the legal theories vary"). Applicable law depends in part on whether the charity is in corporate or trust form. Notwithstanding that corporate charities are far more numerous, trust law provides the foundation for the rules enforcing donor intent. In either case the general rule that donor intent must be followed is enforced by imposing legal duties on those in charge of the corporation (charitable managers) or trust (trustees). As Professor Gary notes, the trend is to merge the two areas of law "with the application of corporate fiduciary principles to trustees of charities organized as trusts and the application of trust law modification rules to restricted gifts to nonprofit corporations." Gary, *supra* note 30, at 996–97.

33. Gary, *supra* note 30, at 997.

34. "As long as the trust qualifies as charitable, courts will hold the trustee to these terms no matter how confident the parties are that a better use could be made of the funds." Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1422 (1998).

35. Gary, *supra* note 30, at 997 (noting that case law "applie[s] different legal rationales to reach this result").

36. Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1094 (2005) (noting that, "[i]n most states, the Attorney General is the agent for enforcement of such gifts"); Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the* Cy Pres *Doctrine,* 31 CARDOZO ARTS & ENT. L.J. 1, 5 (2012) ("State attorneys general traditionally have been the only parties with standing to enforce restricted gifts.").

37. *See* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 328 (2004); Leslie, *supra* note 36, at 5 (noting that, "[h]istorically, and in most states today, a donor of a restricted gift has no standing to enforce the restrictions unless the gift instrument reserves to the settlor a right of reversion for breach of a condition").

38. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 6.03 cmt. a (AM. L. INST. 2021) (noting that "a majority of states have statutes that grant standing to a party based on that party's status as a donor to a charitable trust even if the donor did not reserve standing rights"); *see*

advised donors may be able to circumvent the default no-standing rule by providing for standing to sue to enforce a restriction in the written gift agreement, whether the charity is in trust or corporate form.[39]

If the donor restriction takes the form of an endowment, the Uniform Prudent Management of Institutional Funds Act (UPMIFA) governs management of funds and further protects donor intent by effectively requiring ongoing endowment treatment. UPMIFA deems spending above a rate of 7 percent as imprudent—a presumption that may be rebutted.[40]

Notwithstanding all these protections for donor intent, donor restrictions are not immutable. Because a charitable trust is perpetual, rules at common law developed to allow the release of donor restrictions to account for the passage of time. Thus, under the doctrine of *cy pres*, meaning "as close as possible," a charitable trust may stray from a donor's intent. *Cy pres* is, however, a very limited escape valve and traditionally is available only if the intent of the donor has become unlawful, impossible, or impracticable to carry out[41] and not because there is a better use for the funds.[42] Further, a charity may not undertake *cy pres* unilaterally but must obtain court approval and

also Gary, *supra* note 23, at 578 (noting that the Uniform Trust Code "gives the settlor of a charitable trust standing to enforce the trust").

39. Christine W. Hubbard, *Draft Charitable Gifts That Protect Donor Intent and Tax Savings*, 42 EST. PLAN. 26, 34 (2015); RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 6.03 cmt. b(1) (AM. L. INST. 2021). According to the Restatement, "[t]here are no reported cases discussing whether reservation or designation of standing rights to enforce the term of an asset donated to a charity that is a corporation is alone sufficient to establish standing." *Id.* The Restatement notes, however, that the absence of reported cases could simply be because the "ability to reserve or designate standing is uncontroversial" and so not challenged. *Id.* In the trust context, the Restatement provides that "[i]t is uncontroversial that a court will recognize the standing of a donor to enforce the terms governing charitable assets when the document governing those assets reserves standing for that donor." *Id.*

40. *See* Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1314 (2007).

41. Courts apply *cy pres* whether the charity is in trust or corporate form. The (paraphrased) historic three-part test to allow a change required: (1) a gift for valid charitable purposes (2) where the intent of the donor or settlor had become impossible, impracticable, or illegal to carry out and (3) the donor or settlor had a general charitable intent. *See* FREMONT-SMITH, *supra* note 37, at 173–86 (2004). The Uniform Trust Code has added wasteful to the list and omitted the need for courts to find a general charitable intent of the donor. UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2000); *see also* Harvey P. Dale, Embracing the Tension: Enforcing or Modifying Donor Intent 9 (2016) (unpublished manuscript), https://ncpl.law.nyu.edu/wp-content/uploads/2017/03/Tab-C-Dale-paper.pdf [https://perma.cc/4V4U-SPS].

42. "As long as the trust qualifies as charitable, courts will hold the trustee to these terms no matter how confident the parties are that a better use could be made of the funds." Brody, *supra* note 34, at 1422.

involvement of the state attorney general.[43] *Cy pres* therefore is costly and difficult to obtain. And even when a change is allowed, the new purpose or use must take into account the original intent of the donor.[44] As one scholar concludes, in effect, "restricted gifts obtain in perpetuity" with *cy pres* as the only escape—but it is a "narrow and unyielding doctrine"—"a saving device and what is saved is donor intent."[45]

In recognition of the rigidity of the common law doctrines, in recent years, there has been some relaxation of *cy pres*. The Uniform Trust Code allows for termination of small trusts (assets under $50,000), with notification by the trustee to the attorney general.[46] Similarly, for corporations, UPMIFA allows termination for donor restrictions on endowment funds that are at least twenty years old and affect less than $25,000.[47] Notice to the attorney general is required (but approval is not).[48]

Finally, outside the venerable context of specific donor restrictions on gifts (with their longstanding legal protections), more recently, donor limitations have been significantly facilitated through the development of donor-advised funds as a mainstream form of charitable giving. Unlike private foundations, which can be costly to establish and maintain, donor-advised funds are easy to set up and entail no donor costs. Donor-advised funds at the leading provider (Fidelity Charitable) can be established with no minimum initial contribution,[49]

43. "Courts have tended to apply *cy pres* narrowly, giving significant deference to donor intent." Gary, *supra* note 30, at 1023. The Uniform Trust Code takes a liberal approach (new use must be "consistent with the settlor's charitable purposes"). UNIF. TR. CODE § 413(a)(3) (UNIF. L. COMM'N 2000).

44. The literal requirement of "as near as possible" need not be strictly applied. The *Third Restatement of Trusts* acknowledges that courts may require just that the new purpose be "reasonably similar" to the original one. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. D (AM. L. INST. 2003).

45. Goodwin, *supra* note 6, at 78–79, 102. Another doctrine, equitable deviation, allows a charity to ask a court to change an administrative term of a trust. Unlike *cy pres*, equitable deviation directly furthers donor intent. This is because the doctrine generally applies when administrative requirements imposed on the trust by the donor turn out to threaten the donor's original purpose. UNIF. TR. CODE § 412 (UNIF. L. COMM'N 2000). Thus, a change is needed to implement the donor's intent. The Uniform Trust Code also allows equitable deviation if existing terms "would be impracticable or wasteful or impair the trust's administration." *Id.*

46. UNIF. TR. CODE § 414(a) (UNIF. L. COMM'N 2000).

47. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d) (UNIF. L. COMM'N 2006).

48. *Id.*

49. *Benefits of the Giving Account*, FID. CHARITABLE, https://www.fidelitycharitable.org/giving-account/giving-account-details.html [https://perma.cc/C5TE-7ZHG]. By contrast, private foundations are costly to establish, as they require a distinct organization, administration, and filings. *See Ways to Give*, FID. CHARITABLE, https:// www.fidelitycharitable.org/giving-account/compare-ways-to-give.html [https://perma.cc/7WVR-NJTR].

with the cost of administration borne by the DAF sponsor. Once a fund is established, there are no time limits on a donor's advisory privileges, which may be passed from generation to generation.[50]

C. *Donor Limits Affect Substantial Amounts of Charitable Assets*

Unrestricted or outright gifts are likely what most people think of when they think of a gift to charity. Given the strong legal protections for donor limits, and the ease of imposing them, however, it should come as no surprise that donor limits are common and apply to a significant and growing share of donated assets.

While there is no known figure of charitable assets that are subject to donor limitations,[51] the amount of donor-limited assets is substantial. One way to obtain a sample is through the Form 990.[52] The form requires that organizations list the value of their total assets[53] and also separately report net assets with and without donor restrictions.[54] Thus, it is possible to determine the amount and percentage of assets a particular charity holds that are donor "restricted,"[55] including endowments.[56] In addition, the Internal Revenue Service (IRS) also

50. *See* Colinvaux, *supra* note 17, at 2627.

51. *See, e.g.*, Goodwin, *supra* note 6, at 97 n.97 (noting the lack of formal data on the extent to which donor gifts are restricted).

52. The Form 990 is an information return that nonprofit organizations are required to file annually with the Internal Revenue Service (IRS), with a host of exceptions. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2022), https://www.irs.gov/pub/irs-pdf/i990.pdf [https://perma.cc/EXC5-32NL]; I.R.C. § 6033. The Form 990-EZ is the shorter version of the form for smaller organizations—those with gross receipts of less than $200,000 and total assets of less than $500,000. INTERNAL REVENUE SERV., *supra*, at 1.

53. INTERNAL REVENUE SERV., FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 1 (2022), https://www.irs.gov/pub/irs-pdf/f990.pdf [https://perma.cc/Z2K2-LL8K].

54. For reporting purposes, the IRS defines a donor restriction as a stipulation "that specifies a use for a contributed asset that is more specific than broad limits resulting from: [t]he nature of the not-for-profit entity, [t]he environment in which it operates, or [t]he purposes specified in its articles of incorporation or bylaws or comparable documents." INTERNAL REVENUE SERV., *supra* note 52, at 60 (formatting omitted). This definition thus includes the many types of restrictions discussed above—i.e., purpose, investment, geographic, and other limitations. Donors include individuals and grantors such as private foundations. *Id.* A donor restriction may be temporary or permanent in nature. The Form 990-EZ does not require this information.

55. The IRS definition of donor-restricted assets further includes "a donor-restricted endowment fund, which is "[a]n endowment fund created by a donor stipulation." *Id.* The IRS defines endowment as "[a]n established fund of cash, securities, or other assets to provide income for the maintenance of a not-for-profit entity." *Id.* at 61. The IRS notes that "[t]he use of assets of the fund may be with or without donor-imposed restrictions," meaning that endowment assets may be doubly restricted, both as an endowment and separately as to specific use. *Id.* Endowments can be imposed by a donor or by the governing body of the organization. *Id.*

56. For endowments, the IRS requires an additional accounting. INTERNAL REVENUE SERV., *supra* note 53, at 3; INTERNAL REVENUE SERV., SCHEDULE D (FORM 990): SUPPLEMENTAL

requires separate reporting of the value of assets held in donor-advised funds.[57] Thus, altogether, the Form 990 provides a way to quantify the percentage of an organization's assets that are: (1) subject to donor restrictions (as defined by the IRS); (2) in a donor-designated endowment; (3) in a donor-advised fund; and, when combined, (4) subject to a donor limitation (by adding donor-restricted assets, which include endowments, and donor-advised funds).

An examination of the Form 990 data from 2019 for seventy-five of the largest public charities in the United States[58] reveals that, in the aggregate, these charities hold $226.63 billion in donor-restricted assets (per the IRS definition). This is 56 percent of their net assets. When their donor-advised fund assets are included, total assets subject to a donor limitation increase to $231.87 billion, or 57 percent of their net assets.[59]

Among the seventy-five charities, there are nineteen private universities, which in the aggregate held $255.76 billion in endowments for the 2019 reporting year. Of this amount, 67 percent was in donor-limited endowments. Put another way, only 33 percent of these universities' endowment funds were in an endowment designated by the university. The endowments of the fifty-six non-university charities ($32.21 billion total value) were 46 percent donor limited.[60] For the

FINANCIAL STATEMENTS pt. V (2022), https://www.irs.gov/pub/irs-pdf/f990sd.pdf [https://perma.cc/EJ8P-QZU6]. Organizations must report the percentage of endowed funds that are board-restricted (also called a quasi-endowment), which can then be used to determine the endowment funds that are donor-restricted. The Form 990 also requires reporting of the percentage of endowment funds that are permanently (as opposed to temporarily) restricted. Unlike a donor-imposed endowment, with a quasi-endowment "[t]he governing board has the right to decide at any time to expend [the endowed] funds." INTERNAL REVENUE SERV., *supra* note 52, at 70.

57. INTERNAL REVENUE SERV., *supra* note 56, pt. 1. Unlike endowment funds, donor-advised funds are not considered subject to a donor restriction for reporting purposes, so they are not included in the aggregate reporting of "donor restricted assets."

58. The seventy-five charities are taken from the top one hundred U.S. charities in the United States as ranked by *The Chronicle of Philanthropy* newspaper, not including public universities and two religiously affiliated organizations, which are excluded here because many do not file a Form 990. *The Chronicle* bases its ranking on the amount charities raise in cash and stock, which does not include "government grants, donated products, and contributions to donor-advised funds." Michael Theis & Brian O'Leary, *America's Favorite Charities 2021*, CHRON. OF PHILANTHROPY (Nov. 2, 2021), https://www.philanthropy.com/article/americas-favorite-charities-2021 [https://perma.cc/YD3K-ZZ8X]. Totals are rounded to the nearest percentage.

59. *See infra* Appendix A.

60. The endowment assets of one charity, the Shriners Hospital for Children, constitute 28 percent of the total endowment value of all fifty-six public charities, and only 6.66 percent of Shriners Hospital's endowment is donor limited. *See infra* Appendices A and C. When Shriners Hospital is excluded from the dataset, the total endowment that is donor-limited of the remaining fifty-five charities jumps to 61 percent (from the 46 percent noted above).

universities, 88 percent of all donor limits were for an endowment. For the non-universities, 43 percent of donor limits were for endowments, meaning that 57 percent were for donor limits of other types. These data are shown in the Table below.[61]

	Top 75 Public Charities (not including most DAF sponsors)	**56 Non-University Charities**	**19 Private Universities**
Net Assets with Donor Limits (including donor-advised funds as limited funds)	57%	40%[62]	62%
Net Assets with Donor Limits (not including donor-advised funds as limited funds)	56%	35%	61%
% of Donor Limits that are Endowment	81%	43%	88%
% of Donor Limits that are Not Endowment	19%	57%	12%
% of Endowment that is Donor Limited	65%	46%	67%

This list of seventy-five charities does not include most large DAF sponsors.[63] Twenty-five of the largest DAF sponsors for the same reporting period held $113.72 billion in their donor-advised funds.[64] When these twenty-five DAF sponsors are included with the

61. *See infra* Appendices A, B, and C.

62. The Shriners Hospital for Children makes up 11.33 percent of the net asset value of these fifty-six charities. When Shriners is excluded from the dataset, net assets subject to a donor limit for the remaining fifty-five charities increases to 43 percent.

63. *The Chronicle*'s list includes three large donor-advised fund sponsors: Foundation for the Carolinas, the Greater Kansas City Community Foundation, and the California Community Foundation. Theis & O'Leary, *supra* note 58. *The Chronicle* includes these charities and not other DAF sponsors because under *The Chronicle*'s criteria they raise "enough cash support outside their donor-advised funds to be included." Brian O'Leary & Michael Theis, *How the Chronicle Conducted Its 2021 America's Favorite Charities Survey*, CHRON. OF PHILANTHROPY (Nov. 2, 2021), https://www.philanthropy.com/article/how-the-chronicle-conducted-its-americas-favorite-charities-survey/ [https://perma.cc/P684-WWKE].

64. *See infra* Appendix B. This list of twenty-five DAF sponsors includes groups with at least $200 million in contributions for the reporting year. The last charity on *The Chronicle*'s leading public charity list, the Smithsonian Institution, made the list with $203 million in "cash support." Thus, these DAF sponsors are comparable in fundraising to other leading public charities.

seventy-five other top public charities, total net assets subject to a donor limit jumps to 66 percent. Put another way, one hundred of the largest charities in the United States together have full control over just 34 percent of their assets.

In addition, donor-limited giving through private foundations and donor-advised funds is a significant and growing share of all charitable assets. Together, they now receive 37 percent of charitable gifts by individuals,[65] up from 30 percent the year before,[66] and hold more than $1.26 trillion of assets.[67] All told, donor-advised fund gifts account for 22 percent, or more than one in every five dollars given to charity by individuals each year.[68]

In short, by any measure, the extent to which charitable giving in the United States is burdened by donor limits is not trivial, either as an absolute amount or as a percentage of assets held.

D. Donor Limits and the Tax Law

Sections I.B and C explained that donor-limited giving is facilitated by favorable default non-tax rules and is widespread, amounting to 66 percent of the net assets of the nation's top charities. This section discusses the ways federal tax law has mainly accommodated donor-limited giving, with some important exceptions.

1. General Rule on Donor Limits

When Congress enacted the federal income tax deduction for charitable contributions in 1917, federal tax law inherited the prevailing legal landscape that gave donors broad power to impose limits on their gifts and that required charities to follow donor intent. Congress generally intended to incentivize giving but did not define a deductible "charitable contribution" other than to say that it is a contribution of money or property to or for the use of an organization that qualifies as

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65. Helen Flannery, *Donor-Advised Funds Now Take in a Fifth of Individual Charitable Giving*, INEQUALITY.ORG (Apr. 19, 2023), https://inequality.org/great-divide/donor-advised-funds-popularity/ [https://perma.cc/ZST2-93PZ] (reporting for the year 2021).

66. *See* CHUCK COLLINS & HELEN FLANNERY, INST. FOR POL'Y STUD., GILDED GIVING 2022: HOW WEALTH INEQUALITY DISTORTS PHILANTHROPY AND IMPERILS DEMOCRACY 20 (2022), https://ips-dc.org/wp-content/uploads/2022/07/Report-Gilded-Giving-2022.pdf [https://perma.cc/DS3W-3N8L].

67. NAT'L PHILANTHROPIC TR., 2022 DONOR-ADVISED FUND REPORT 12 (2022), https://www.nptrust.org/wp-content/uploads/2022/12/2022-DAF-Report.pdf [https://perma.cc/DQ35-JQDZ].

68. Flannery, *supra* note 65. This is up from one-seventh a year earlier. Colinvaux, *supra* note 17, at 2624.

a charity.[69] Whether specifically intended or not, donor-limited gifts, as understood at the time, surely met that broad definition. Thus, as a starting point, all gifts to charity—donor-limited or not—were treated the same for charitable deduction purposes.

Today, donor-limited giving remains largely on an equal footing with unlimited giving. As discussed below, most typical donor limits, on use and spending (as in an endowment or donor-advised fund), are routinely ignored for tax purposes.[70] There are some important caveats, however. Policy concerns about retained donor control and gains extracted from donations for the benefit of donors led Congress to refine what is allowed as a deductible gift.[71] A succinct statement of the law today might be that, for favorable—meaning the best—tax treatment, a charitable transfer must be (1) a completed gift of (2) the donor's entire interest (3) to a public charity (4) where any restriction, or return benefit, is immaterial or insubstantial. Accordingly, as this statement indicates, several important tax law doctrines impact donor-limited giving and require explanation.

2. Completed Gift Rule and Donor Control

First is the completed gift rule. Treasury regulations specify that a gift is not to an organization unless it is complete—meaning, unless the donor has given up dominion and control.[72] This makes sense intuitively. If the point of the giving incentive is to foster a transfer of ownership from private hands to charitable ones, then the owner-donor must actually make a transfer. If the donor retains dominion and control of the asset, the asset is not relinquished to the public good; there is no gift for tax purposes and no charitable deduction.[73]

Thus, at the outset, charitable transfers are defined in terms of the absence of donor control. Fundamentally, the charity and not the donor must be the legal owner. A promise to pay or a pledge does not qualify

69. I.R.C. § 170(c) (defining charitable contribution).

70. *See* discussion *infra* Section I.D.6.

71. Brody, *supra* note 30, at 920–28.

72. Treas. Reg. § 1.170A-1(a)–(b) (allowing charitable deductions only for amounts "actually paid during the taxable year"); Pauley v. United States, 459 F.2d 624, 627 (9th Cir. 1972) (noting that retention of "dominion and control exercisable against the donee" makes gift incomplete and nondeductible).

73. Treas. Reg. § 1.501(c)(3)-1(a)(4). Only the charity, not the donor, is organizationally committed to serving the public interest in perpetuity. *Id.* Once property is donated to a qualified charity, the property must forever be dedicated to public purposes. *Id.* This is secured by a requirement that charities provide, in organizational documents, that upon dissolution all assets will be distributed for charitable purposes. *Id.*

as deductible because neither provides a charity with actual legal dominion over the asset.[74] The completed gift rule thus also confirms common sense notions about unrestricted or outright giving. With unrestricted giving, the donor's connection to the donated asset is severed completely; there is no doubt that the gift is "to" the charity; the donor has not retained any rights.

3. Partial Interest Rule

The partial interest rule provides that if a donor retains a partial interest in the donated asset, then no charitable deduction is allowed (whether for income or estate and gift tax purposes).[75] For example, if the donor owns the entire property (the fee simple), the donor must give the entire property (the fee simple).[76] A retained right may be ignored if the right is insubstantial.[77] A completed gift of a partial interest therefore is not sufficient for deduction purposes.

The problem with a partial interest gift is that the private interest of the donor must co-exist with the public interest of the charity, and the two interests might not always align.[78] Relatedly, some donor restrictions, especially those involving forfeiture, could be said to involve the "right to use property."[79] A right to use property already is treated "as a contribution of less than the [donor's] entire interest," and no charitable deduction is allowed.[80] The partial interest rule also reflects the difficulty of determining (and valuing) exactly what a donor

74. Rev. Rul. 68-174, 1968-1 C.B. 81 (ruling that a "mere promise to pay at some future date . . . is not a 'payment' for purposes of deducting a [charitable] contribution").

75. I.R.C. §§ 170(f)(3), 2055(e)(2), 2522(c)(2).

76. Strictly applied, this means that the donor may not fragment the property by, for example, giving a present interest (e.g., a fee simple determinable) and retaining a future interest (a possibility of reverter). The regulations, however, allow a deduction for a fee simple determinable if the likelihood of the forfeiture event is so remote as to be negligible. Treas. Reg. § 1.170A-7(a)(3); *see also* I.R.C. § 2055; Treas. Reg. § 20.2055-2(b).

77. Rev. Rul. 75-66, 1975-1 C.B. 85 (noting that a deduction for donation of land with retained right to use the land to train a hunting dog is allowed because the retained right was not substantial); I.R.S. Prv. Ltr. Rul. 81-52-072 (Sept. 30, 1981) (noting that a retention of investment control is not a substantial retained right); I.R.S. Priv. Ltr. Rul. 93-03-007 (Oct. 20, 1992); I.R.S. Priv. Ltr. Rul. 2002-02-032 (Oct. 26, 2001); I.R.S. Priv. Ltr. Rul. 2002-23-014 (Mar. 11, 2002) (noting that retention of artwork display rights is not a substantial retained right).

78. There is no better example than in the main exception to the partial interest rule: contributions of conservation easements, an area rife with problems. Normally, the contribution of an easement when the donor also owns the underlying fee would be a contribution of a partial interest and no charitable deduction would be allowed. If the easement is exclusively for conservation purposes, however, then the deduction is allowed (generally equal to the difference in the value of the property before and after the contribution). I.R.C. §§ 170(f)(3)(B)(iii), 170(h).

79. I.R.C. § 170(f)(3)(A).

80. *Id.*

has contributed to charity when a donor still has rights in the asset, and even whether the donor has in fact given something of value to charity.[81] Thus, the partial interest rule avoids case-by-case answers to these questions by drawing a bright line against donor entanglement when it takes the form of a partial interest.

4. Private Foundations Disfavored

Another check on donor-limited giving is marked by the distinction within section 501(c)(3) between public charities and private foundations.[82] As described in Section I.A, the private foundation in essence is a donor-controlled charity that makes grants of the donor's contributed funds and lasts in perpetuity. Because charitable use assets are subject to continued donor control through the donor's (or family) ownership of the foundation, there is a heightened risk that the assets will be used to serve the private purposes of the donor and not the public interest.[83] Accordingly, Congress imposed an extensive regulatory regime on foundations, including excise taxes on self-dealing with donors and other insiders, the use of charitable assets for private purposes (including to benefit donors), and excess holdings in a business (often, the donor's).[84]

Apart from anti-abuse concerns, Congress recognized that foundations are intermediaries. Unlike an outright gift to a working charity, gifts to foundations may result in an unwarranted delay in the distribution of funds (sometimes called a delay in benefit),[85] and excessive accumulation while the funds remain under the donor's effective control.[86] Congress therefore imposed an annual distribution requirement

81. *See* Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, LAW & CONTEMP. PROBS., Fall 2011, at 29; Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH L. REV. 755, 757 (2013).

82. All section 501(c)(3) organizations are either a public charity or a private foundation. The default status is private foundation. Public charity status is based on the type of entity (a school, hospital, or church) or whether the organization is publicly supported. I.R.C. § 509 (defining a private foundation as any 501(c)(3) organization unless an exception applies).

83. Colinvaux, *supra* note 17, at 2632–34.

84. These private foundation rules relate to abuses of the public trust that are more likely to occur when donors retain control of their assets. As anti-abuse rules, they are less a response to donor limits on charitable use than to concerns about asset diversion away from a charitable use. *See generally* Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52, 52 (2000).

85. Colinvaux, *supra* note 17, at 2632–34.

86. *Id.*

on foundations of an amount meant to approximate the foundation's income.[87]

Congress further addressed the delayed benefit problem in private foundations by discouraging private foundation giving. Congress capped gifts to private foundations at a lower level than gifts to public charities and provided for a reduced deduction for gifts of property.[88] At the same time, in codifying private foundation tax treatment and the payout rule in particular, Congress accepted that foundations may have perpetual life;[89] thereby endorsing this form of donor-limited giving, albeit subject to extensive regulation.[90]

5. Material Donor Restrictions

The completed gift and partial interest rules and limits on private foundations are prescriptions intended to address concerns about donor-limited gifts. Whether a gift is complete or is of the donor's entire interest, however, may require case-by-case analysis. Thus, Treasury and the IRS developed standards for determining whether donor limits are material or substantial so as to affect the allowance of the deduction. For example, if a donor requires that a gifted asset would revert to the donor upon the happening of an event, the gift may survive the partial interest rule if the occurrence of the event is "so remote as to

87. Today the requirement is that private non-operating foundations pay a minimum of 5 percent of the value of their non-charitable use assets in qualifying distributions each year. I.R.C. § 4942.

88. Revenue Act of 1964, Pub. L. No. 88-272, § 209, 78 Stat. 19, 43–47 (codified as amended in scattered sections of 26 U.S.C.); *see* James J. Fishman, *The Private Foundation Rules at Fifty: How Did We Get Them and Do They Meet Current Needs?*, 17 PITT. TAX REV. 247, 256–57 (2020). In passing the legislation, the Senate Finance Committee stated, "frequently[,] contributions to foundations do not find their way into operating philanthropic endeavors for extended periods of time." S. REP. NO. 88-830, at 60 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 1673, 1732. The House Ways & Means Committee report contained similar language. *See* H.R. REP. NO. 88-749, at 53 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 1313, 1361.

89. At the time the spending rule was imposed, many in Congress wanted to go further and limit the life of private foundations (and so also of perpetual donor control). A percentage of asset payout was a compromise, and initially was set at a higher percentage than five. I.R.C. § 4942; *see* Troyer, *supra* note 84, at 44–45. Notably, before imposition of the private foundation payout, the common law property rule against accumulations had a counterpart in the Internal Revenue Code. Prior to 1969, the Code imposed an excise tax on unreasonable accumulations of charitable assets. *Id.*

90. The Treasury Department recommended that a foundation's governing body face limits after twenty-five years. Specifically, the Treasury Department said that, as time passes, the benefits of family control wane and the dangers increase. The proposed remedy was to require that after twenty-five years no more than 25 percent of the foundation's governing body could be made up of the donor or related parties. STAFF OF S. COMM. ON FINANCE, 89TH CONG., TREASURY DEPARTMENT REPORT ON PRIVATE FOUNDATIONS 9–10 (Comm. Print 1965). Congress did not adopt this recommendation.

be negligible."[91] A donor restriction on alienability also has been held to be insubstantial depending upon the length of the restriction and the nature of the asset.[92]

In addition, Treasury regulations contain standards for determining when donor restrictions are material for purposes other than the charitable deduction.[93] Whether a community foundation qualifies as a public charity and not a private foundation depends in part on whether donors place material restrictions on donated funds.[94] Similarly, a private foundation may terminate (and escape a termination tax) if it transfers all of its assets to a public charity, meaning "all of its right, title, and interest in and to all of its net assets,"[95] which can be achieved only if there are no material restrictions on the assets.[96]

In defining a material restriction, the regulations rely on a facts and circumstances test, but also notably provide that conventional donor limitations, such as limits on the charitable purpose, endowment restrictions, and naming rights, are nonmaterial.[97] On the other hand, advisory privileges to designate grant recipients may be a material restriction depending on a host of factors.[98] For example, negative factors pointing to materiality include if the charity creates an expectation that a donor's advice will be followed, if a fund is advised only by the donor, and if donor advice is followed "substantially all of the time."[99]

91. Treas. Reg. § 1.170A-7(a)(3).

92. *See supra* note 13.

93. Several of the top one hundred charities sampled and described in Section I.C are community foundations, which all hold substantial assets in donor-advised funds. See *infra* Appendices A, B, and C.

94. Treas. Reg. § 1.170A-9(f)(11)(ii)(B). This policy is reinforced by another rule that requires the governing body of the community foundation to adopt a power (called the variance power) that allows the foundation to deviate from donor intent. Treas. Reg. § 1.170A-9(f)(11)(v)(B). For a discussion of the variance power, see Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145 (2003). The variance power requirement thus relaxes the rigors of *cy pres* by providing a way around dead hand control. For additional discussion of the public charity status of community foundations, see Roger Colinvaux, *Defending Place-Based Philanthropy by Defining the Community Foundation*, 2018 B.Y.U. L. REV. 1, 9–21 (2018).

95. Treas. Reg. § 1.507-2(a)(6).

96. Treas. Reg. § 1.507-2(a)(7).

97. Treas. Reg. § 1.507-2(a)(7)(iii)(A)–(D).

98. Treas. Reg. § 1.507-2(a)(7)(iv)(A)(3).

99. *Id.* Donor advisory privileges that attach to donor-advised funds have these negative factors. Nonetheless, they have been held to be non-substantial, in large part because the charity sponsor does not have to follow the donor's advice. Nat'l Found., Inc. v. United States 13 Cl. Ct. 486, 493 (Cl. Ct. 1987) (holding that the donor-advised fund sponsor had full dominion and control over donor-advised assets). The National Foundation decision did not involve the material restriction rules of the regulations, however.

6. No Subsidy for Return Benefits

Finally, tax rules protect against subsidizing donor gains. As a general principle, federal tax law requires that tax benefits to donors should be based on the net amount transferred to the charity and that the donor should not retain or receive a substantial benefit from the contribution.[100] A donor gain is not a gift; not an act of personal sacrifice worthy of subsidy.

Thus, under the quid pro quo rule, a donor must take the value of any return benefit received from a contribution into account when determining the charitable deduction by subtracting the value of the benefit from the amount transferred to charity.[101] For example, if a donor receives tickets to an event or a tote bag in exchange for a contribution, the donor reduces the amount of the contribution by the value of the return benefit.[102] Substantial return benefits result in disallowance of the deduction.[103]

Tangible benefits like tickets and tote bags represent the straightforward case of an identifiable return benefit; but return benefits sometimes are difficult to value or opaque, making the law harder to apply. In such cases, a return benefit could result in a complete loss of the deduction or could be ignored entirely. For example, if a donor contributes real estate, and in return the charity agrees to build a road when developing the real estate that provides a benefit to the donor, then a deduction can be barred altogether as a substantial return benefit.[104] This could also be viewed as a conditional gift, with the road building an implicit condition on the charity's acceptance of the donation.

Most conventional donor limits are ignored for return benefit purposes or deemed as having only an insubstantial effect on the value of the donated asset. The right to name a building and other forms of donor recognition, for example, typically are ignored as not

100. For discussion of the return benefit rules and the meaning of contribution, see Roger Colinvaux, *Failed Charity: Taking State Tax Benefits into Account for Purposes of the Charitable Deduction*, 66 BUFF. L. REV. 779, 785–95 (2018) (discussing the longstanding principle that a gift should not include gains to the donor).

101. *Id.* at 790.

102. De minimis return benefits are ignored. Rev. Proc. 90-12, 1990-1 C.B. 471.

103. United States v. Am. Bar Endowment, 477 U.S. 105, 116 (1986) (providing that "[a] payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return").

104. Ottawa Silica Co. v. United States, 699 F.2d 1124, 1132 (Fed. Cir. 1983) (holding that a substantial return benefit means there is no charitable deduction).

substantial, even if donors clearly value and benefit from the recognition.[105] Similarly, donor-limited timing restraints like an endowment or an advisory privilege are also ignored, whether because the donor limit is considered not to be a partial interest, a return benefit, or impacting the value of the donated asset.[106]

7. Summary

In summary, the tax law contains a patchwork of rules that limit tax benefits when donors retain too much control over or benefit from donations to charity. However, so long as a donor limitation is not a tangible return benefit, retained right, or partial interest, donors can impose limits on gifts for their benefit. If a donor wants a right to name a building in perpetuity or to limit the use of property as "for the study of fifteenth-century property law statutes," or as an endowment, the donor may do so and claim a full deduction for the face amount of the donated funds. Further, donors who are determined to retain effective control over donated property can find a way notwithstanding the completed gift, partial interest, or quid pro quo rules. Use of private foundations and donor-advised funds for charitable giving are leading examples.

II. WEIGHING THE TAX SUBSIDY FOR DONOR LIMITS ON GIFTS

Part I of this Article explained that the law facilitates and protects donor limits on their gifts. As a result, donor limits now burden a substantial portion of all charitable assets and apply to an increasing share of charitable gifts. These limits are perpetual, subject to release only by the donor or through *cy pres* or other protracted process.[107] In addition, tax law treats most donor-limited gifts the same as unrestricted or outright gifts for purposes of the charitable deduction.[108] When this equivalent treatment is combined with non-tax rules that strongly

105. *See generally* William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 CIN. L. REV. 45 (2011) [hereinafter Drennan, *Where Generosity and Pride Abide*]; William A. Drennan, *Conspicuous Philanthropy: Reconciling Contract and Tax Laws*, 66 AM. U. L. REV. 1323 (2017); Linda Sugin, *Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms*, 79 OHIO ST. L.J. 121 (2018).

106. I.R.C. § 170(f)(18); RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 (AM. L. INST. 2021) (describing common restrictions).

107. *See* discussion *supra* Section I.B. Advisory privileges in the donor-advised fund context are perpetual but may be terminated by the sponsoring charity.

108. As noted, private foundation giving is the exception.

favor donor limits, the result is a legal preference and tax subsidy for perpetual donor limits on gifts.

Yet, despite this reality, the charitable deduction is rarely thought of, or discussed critically, as a subsidy for perpetuity.[109] Instead, the literature on donor limits indicates a somewhat weary acknowledgement (if not embrace) of the status quo that donors can largely do what they want to limit their gifts, with reform considerations relegated to relaxing *cy pres* or other similar approaches.[110] The prevalence and intractable nature of donor limits, however, raises questions of tax policy. This part of the Article therefore considers the merits of a tax subsidy for perpetual donor limitations.

A. Contrary to Public Benefit

Perhaps the most important concern about donor limits on gifts is that, all things equal, they do not serve the public interest. By their nature, donor limits restrict a charity's use of an asset. Donor limits represent a decision by one person, at one point in time, about a charitable use. That decision then is made a priority, notwithstanding that other, better, uses may be available for the asset, as determined by fiduciaries with responsibility for the charity's mission.[111]

There is a helpful analogy to property law's distaste for direct restraints on alienation. If an owner imposes a restraint on the sale of their property (e.g., "I devise my house to A, but the house is not to be sold"), the restraint is struck down as void and against public policy.[112] The reason is that restraints on sale forever constrain the resource from

109. Two main exceptions are Sugin, *supra* note 105, at 153–58, and Drennan, *Where Generosity and Pride Abide*, *supra* note 105, at 50–90, who both focus on naming rights. Another exception of a different sort, where perpetuity is the policy goal, is the charitable deduction for conservation easements. I.R.C. § 170(h)(2)I (requiring perpetuity of restrictions for a conservation use as a condition of the deduction). For discussion, see Nancy McLaughlin, *Tax Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA. TAX REV. 1 (2017).

110. Gary, *supra* note 23, at 584 (noting that "much of the scholarship in this area involves thoughts about loosening or tightening the application of [the doctrines of *cy pres* and deviation], to make adjustments of restrictions by a charity more or less likely").

111. Goodwin, *supra* note 36, at 1098 (noting that a donor's vision of charitable use may quickly become outdated and "anachronistic"); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 21 (1992) (noting that the longer a restriction, the more the world "diverges from the [donor's] expectations"); Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3, 8–10 (1990) (noting that time-limited spending restrictions are a "conservative drag on future resources").

112. 3 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 29.03 (2023) ("The force of the rule against restraints on alienation is everywhere recognized in the United States . . . .").

moving to new owners, and perhaps to the highest and best use of the asset, to society's ultimate benefit.[113]

Similarly, donor limits fix a use in time and restrain the movement of charitable resources, until and unless the limit is released. And even though the asset is dedicated to a charitable use, the donor limit bars the asset's movement to a similar use or to a different time of spending.

This is not a new concern. Professor Susan Gary argues that donor limits present a tradeoff between "maximum social benefit from the [asset] or the exact effectuation of the donor's intent."[114] Professor Evelyn Brody similarly argues that, over time, the donor's scheme is more likely to lose its relevance, become less socially worthwhile, and public benefits will arise that the donor could not have anticipated.[115] Other commentators make similar points.[116] The *Restatement of the Law* confirms that courts will uphold donor limits even when there is no present need for the limitation.[117] These are but a sample of the commentary, and all are echoes of arguments made decades before.[118]

In short, it has long been understood that perpetual donor limits on charitable assets hinder the movement of charitable resources,

113. Luke Meier & Rory Ryan, *Aggregate Alienability*, 60 VILL. L. REV. 1013, 1014 (2015) ("By enforcing private agreements to trade these [property] rights, resources flow to the party in the best position to do something beneficial with that resource. This result is in society's interest as a whole."); JESSE DUKEMINIER ET AL., PROPERTY 232 (10th ed. 2022) ("Restraints on alienation may hamper the ability of the property regime to see to it that each resource is eventually possessed by the person or entity that can put it to its highest and best use.").

114. Gary, *supra* note 23, at 608 (quoting an author from a 1939 article, concluding that "[t]his issue continues to lie at the heart of the question of who should control charitable gifts," and urging the importance of a "public benefit standard, so that the public can have a greater voice when adjustments to restricted charitable gifts are needed").

115. Brody, *supra* note 28, at 1269–70.

116. Professor Rob Atkinson urges relaxation of donor limits to allow for "the direction of charitable assets into more publicly beneficial uses." Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice to Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RSRV. L. REV. 97, 162 (2007). Atkinson concludes that fiduciaries should in appropriate cases decline to enforce the duty of obedience. *See also* Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1775 (2003) (stating that the duty of obedience is in tension with consideration of the public interest). Professor Allison Tait argues that there is "a strong potential for the terms of the restricted funds and gifts to become outdated due to shifts in institutional needs, the state of [existing knowledge], and the social landscape." Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1665 (2015).

117. *See, e.g.*, RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 reporter's note 20 (AM. L. INST. 2021) (finding that courts have upheld restrictions requiring accumulation when there was "no present need for the object of the accumulation") (citing 1994 Michigan case).

118. *See* Gary, *supra* note 23, at 586 (quoting a 1939 article about *cy pres* reform, questioning "whether maximum social benefit from the fund or the exact effectuation of the donor's intent should be the criterion of the court").

prioritizing the preservation of donor intent over an evolving public interest. Once a donor limit is in place, protection of the limit becomes a distinct goal of the law, regardless of whether the limit is in the public interest.[119]

B. Harm to Charitable Autonomy

A related concern about donor limits on gifts is that they undermine the independence of charitable organizations. Publicly subsidized charities are required—pursuant to legally enforceable duties—to follow donor limits rather than develop and pursue their own ideas of the public good. Thus, for every donor-limited gift, charities lose independence and flexibility to decide what is in the public interest, which can dampen creativity and innovation. Instead, charities, with respect to donor limits, become passive vehicles for implementing donor intent in perpetuity. The donor effectively rents out space in the charity forever with subsidized, limited donations. Donor limits thus compromise a charity's flexibility in imagining (or reimagining) its mission.[120]

This constraint on charity independence was illustrated recently in the wake of giving by MacKenzie Scott. Since 2019, Scott has donated over $14 billion (and growing) in unrestricted donations to nonprofit organizations.[121] Her philanthropy stands out because her gifts

119. Limits imposed through donor-advised funds and private foundations are different in that preservation of the advisory privilege or family control are not legal priorities. In the case of donor-advised funds in particular, the sponsoring charity is not required to follow donor advice. Fairbairn v. Fid. Invs. Charitable Gift Fund, No. 18-cv-04881-JSC, 2021 U.S. Dist. LEXIS 36799, at *12 (N.D. Cal. Feb. 26, 2021). Nonetheless, DAF sponsors follow donor advice as a matter of course, making adherence to donor advice an essential priority of this mode of charitable giving. *See* discussion *supra* note 20 and accompanying text.

120. In this vein, Professor Brody argues that perpetuities reinforce private aims and can convert a public-facing institution into one that serves a private will. *See* Brody, *supra* note 30, at 922 (quoting philanthropist Julius Rosenwald, who argued that perpetuities undermine the charitable institution by "express[ing] a lack of confidence in trustees"). Similarly, Professor Atkinson notes "the superiority of charitable autonomy to dead hand control." Atkinson, *supra* note 116, at 162. *See also* Brian Galle, *Pay It Forward? Law and the Problem of Restricted-Spending Philanthropy*, 93 WASH. U. L. REV. 1143 (2016). In this vein, Professor Galle laments the opportunity cost of perpetual restrictions, noting that if spending is time limited, the charity, and so society, is deprived of the benefits of learning from its mistakes. *See id.* Professor Galle also critiques time-limited giving on the ground that the future will be more prosperous, so it shortchanges the present generation to wait.

121. Thalia Beaty & Glenn Gamboa, *New MacKenzie Scott Website Details $14 Billion in Gifts*, ASSOCIATED PRESS (Dec. 15, 2022, 12:31 PM), https://apnews.com/article/business-philanthropy-amazoncom-inc-cd1001a49c168f1d01c99ade96c5c671 [https://perma.cc/9LW8-7VYB].

have no restrictions[122] and she does not use intermediaries, choosing to give directly instead of through a foundation or donor-advised fund.[123] A study by the Center for Effective Philanthropy (CEP) on Scott's grants found that about two-thirds of charity leaders point to the unrestricted nature of the grant as crucial for their ability to expand "programmatic work to new geographies or new populations, or to fund capital expenses" and that charity leaders reported "a new sense of empowerment and agency that they believe has positively affected their organizations, their fundraising ability, and their own personal leadership."[124] Another study, also by the CEP, concludes that "[s]hort-term, restricted funding creates challenges for nonprofit leaders in planning; in expanding their programming; in hiring and retention; and in investing in strengthening the capacity of their organizations."[125] Scholars reach similar conclusions, namely that restricted

122. Beaty & Gamboa, *supra* note 121. Philanthropy headlines praised her approach, which appears in press reports as counter cultural and practically unprecedented. One study of Scott's giving explains that it is contrary "to philanthropic conventions," noting that "[r]estricted giving has been the prevailing approach for foundations." ELLIE BUTEAU ET AL., CTR. FOR EFFECTIVE PHILANTHROPY, FOUNDATIONS RESPOND TO CRISIS: LASTING CHANGE? 7 (2021), http://cep.org/wp-content/uploads/2021/11/CEP_Foundations-Respond-to-Crisis_Lasting_Change.pdf [https://perma.cc/FUF9-PMJW].

123. *Id.* This is in contrast to the giving habits of many other billionaires, who make headlines by funding a donor-advised fund or private foundation. *See, e.g.*, Martin Levine, *Chan Zuckerberg's LLC and DAF Philanthropy: Another Giant Step in the Wrong Direction*, NONPROFIT Q. (Sept. 12, 2018), https://nonprofitquarterly.org/chan-zuckerbergs-llc-and-daf-philanthropy-another-giant-step-in-the-wrong-direction/ [https://perma.cc/DN53-4BEL] (detailing the giving of Mark Zuckerberg and Priscilla Chan through a foundation, a donor-advised fund, and a 501I(4) organization); *Philanthropy 50 Donors' Giving to and from Their Foundations and Donor-Advised Funds in 2022*, CHRON. OF PHILANTHROPY (Feb. 14, 2023), https://www.philanthropy.com/article/philanthropy-50-donors-giving-to-and-from-their-foundations-and-donor-advised-funds-in-2022 [https://perma.cc/5EFS-AUYM] (describing gifts of several billionaires to foundations and donor-advised funds).

124. BUTEAU ET AL., supra note 122, at 14, 34. In the study, charities explain how unrestricted giving strengthens the institution, especially as a contrast to current trends that foster donor limits. One charity leader notes that the process for determining how to use Scott's unrestricted grant was more inclusive, involving staff, volunteers, and community members. ELLIE BUTEAU ET AL., CTR. FOR EFFECTIVE PHILANTHROPY, GIVING BIG: THE IMPACT OF LARGE, UNRESTRICTED GIFTS ON NONPROFITS 23 (2022), https://cep.org/wp-content/uploads/2022/11/BigGiftsStudy_Report_FNL.pdf [https://perma.cc/86DA-R38Z] at 23 ("I don't think we've ever had a decision-making process be so inclusive because of constraints of other funders. This gift was so open-ended. Nothing really was off-limits that we could use it for. We rarely get that kind of funding."). Another leader says the shift to unrestricted support exemplified by Scott "frees up time for our day-to-day operations," adding that with restricted funding, "I have to spend so much time dealing with restrictions that it's almost like I need to hire a person just to keep up with the restrictions." BUTEAU ET AL., supra note 122, at 14.

125. BUTEAU ET AL., *supra* note 122, at 7–8. In a similar vein, one nonprofit leader says: "The ability to be creative, nimble, and responsive is possible only with unrestricted funding . . . . Without it, organizations like mine will forever scramble to live up to our missions." Nicholas Turner, *My Organization Is a Testament to Why Unrestricted Funding Matters*, CHRON. OF PHILANTHROPY

gifts "constrain management autonomy" so as to "stifle creativity and innovation.[126]

C. Compliance Costs and Resource Burdens

Another concern is that donor limits, while costless to donors, impose compliance costs on charities. If a gift is restricted in some way, donor funds must be segregated and tracked, and donor intent must be interpreted, and, not so occasionally, litigated.[127] One scholar notes that "[t]he litigation itself is part of the problem for charities."[128] More pervasively, donor limits become embedded in a charity's operations. According to one scholar, "the duty of care suggests that some procedure should be established for ensuring and monitoring compliance with the terms of a recipient organization's basket of restricted gifts."[129] Monitoring costs are ongoing, as fiduciaries must follow not only the donor restrictions, but also assess them for continued validity. If a restriction becomes invalid, "a fiduciary has a *duty* to seek court application of the doctrine of *cy pres* or the doctrine of deviation when such relief is appropriate."[130]

Relatedly, fiduciaries must also investigate donor limits before accepting them and "must determine that the specific restriction is

(Dec. 16, 2021), https://www.philanthropy.com/article/my-organization-is-a-testament-to-why-unrestricted-funding-matters [https://perma.cc/YS24-WJZS]. Another nonprofit leader urges that what nonprofits need most is a "commitment of unrestricted dollars over a longer timeframe so that we can focus on our mission and not fundraising." Hilary Pennington, *Foundation CEOs Need to Send the Message That Unrestricted Giving Is the New Normal*, CHRON. OF PHILANTHROPY (Oct. 26, 2020), https://www.philanthropy.com/article/foundation-ceos-need-to-send-the-message-that-unrestricted-giving-is-the-new-normal [https://perma.cc/R9NH-HUG2].

126. John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 697, 705 (2007); *see also* Goodwin, *supra* note 6, at 79 (finding that restricted gifts have "a significant effect on an organization's ability to respond to change within the context of its overall mission").

127. Debra E. Blum, *Charities Deal with a Stream of Lawsuits from Disenchanted Donors*, CHRON. OF PHILANTHROPY (Apr. 21, 2013), https://www.philanthropy.com/article/charities-deal-with-a-stream-of-lawsuits-from-disenchanted-donors/ [https://perma.cc/RZ3A-VEVU]. High profile lawsuits in recent years include *Robertson v. Princeton University*, No. C-99-02, 2007 WL 7687561 (N. J. Super. Ct. Ch. Div. Oct. 25, 2007) (describing how the descendants of Charles and Marie Robertson sued the university to redirect Marie Robertson's donated funds to the Robertson Foundation made for the benefit of Princeton University as originally intended by the donor), and *In re Barnes Foundation*, 683 A.2d 894 (Pa. Super. Ct. 1996) (analyzing how the Barnes Foundation sought to amend the Foundation's terms in order to move Alfred C. Barnes's art collection to a different location).

128. Sugin, *supra* note 105, at 158; *see* Tait, *supra* note 116, at 1667 (arguing that reform of perpetual limits has "the potential to reduce litigation time and cost").

129. Eason, *supra* note 126, at 711–12.

130. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 cmt. C (AM. L. INST. 2021) (emphasis added).

valid and that acceptance of the gift or bequest . . . would not breach the duty of loyalty or the duty of care."[131] In addition, "[m]ajor gift contracts are governed by agreements that can run one hundred pages . . . . These agreements are expensive to negotiate and create rights to private enforcement of charitable gifts that expose charities to future costs."[132] Fiduciaries may need to consult legal counsel, the attorney general, or seek instruction from a court. Such assessments of donor limits consume limited charity resources and, in many cases, mean that charitable dollars that "could otherwise be used to carry out the charity's mission [are] diverted to pay lawyers and court costs."[133] Donor restrictions "encourage the build-up of bureaucracies."[134]

In addition, because donor limits are constraining and hard to get rid of, their presence tempts fiduciaries to breach their duty by ignoring the restriction. One scholar refers to this as "charitable unilateralism," a "dubious, if not dangerous, path around dead hand control."[135] Another scholar acknowledges that the rigidity of donor limits, when combined with lax enforcement by the attorney general, can lead charities to "self-help,"[136] which is a euphemism for a breach of fiduciary duty.[137]

D. Crowding Out Unrestricted Gifts

A related concern with donor-limited gifts is that they crowd out other necessary spending, which can lead to scarcity of operating funds at the cost of innovation and pluralism. As Professor Gary argues, the more that gifts are subject to donor limits, the likelier it is that "the amount of unrestricted money may be insufficient to take care of the charity's existing needs. As more donors choose restricted over unrestricted gifts, money to support operating expenses and general program expenses becomes harder to find."[138] That 57 percent of

131. *Id.* § 4.01 cmt. D.
132. Sugin, *supra* note 105, at 159 (referring specifically to naming rights contracts).
133. Gary, *supra* note 23, at 589.
134. Brody, *supra* note 30, at 923 (quoting philanthropist Julius Rosenwald); *see also* Sugin, *supra* note 105, at 159 ("contractualization weakens charities" by making them more private).
135. Atkinson, *supra* note 116, at 144.
136. Goodwin, *supra* note 6, at 82.
137. *See* Atkinson, *supra* note 116, at 143 (noting that an intentional breach of the duty of obedience may not be as bad as it sounds, assuming that a court otherwise would have authorized the action).
138. Gary, *supra* note 30, at 1030; *see also* Goodwin, *supra* note 6, at 106 (noting that donor limits can become "anachronistic, while other needs arise only to go unmet").

the net assets of seventy-five of the largest charities in the United States are subject to donor limits bears this out.

By contrast, Gary says "[t]he fewer restrictions placed on funds received by a charity, the greater flexibility the charity will have in meeting its operating costs, developing new programs, and managing all of its funds in an efficient manner."[139] In this regard, charitable giving is like a zero-sum game—there will only be so much support for charity from donations in any given year. The higher the percentage of support that is donor limited, the less is available for unrestricted use.

This highlights the often-expressed concern of charity leaders that restricted giving is too much the norm in the giving landscape. MacKenzie Scott's giving again provides a window into the issue. According to one recent study, "her giving has energized proponents calling for more unrestricted giving," and "nonprofit leaders have for years advocated for more unrestricted giving and lamented the challenges restricted funding poses."[140] One study noted that unrestricted grants by foundations "remained stuck, before 2020, at around 20 percent, despite years of advocacy by nonprofit leaders who lamented the challenges posed by a lack of flexible funding."[141]

Similarly, the COVID-19 pandemic highlighted frustrations with the inflexibility of restricted assets.[142] As the crisis unfolded, more than eight hundred foundations pledged to "[l]oosen or eliminate the restrictions on current grants" and to "[m]ake new grants as unrestricted as possible."[143] Similarly, one report noted that charities had been calling for "decades . . . to provide more unrestricted funding."[144]

139. Gary, *supra* note 30, at 1030; *see also* Tait, *supra* note 116, at 1667 (noting that relaxing donor limits would "benefit both nonprofit institutions and the public by increasing institutional access to restricted gift funds").

140. Maria Di Mento, *MacKenzie Scott's Donations Boosted Beneficiaries and Avoided the Pitfalls Some Feared, New Study Says*, CHRON. OF PHILANTHROPY (Nov. 15, 2022), https://www.philanthropy.com/article/1199uintuple-scotts-donations-boosted-beneficiaries-and-avoided-the-pit
falls-some-feared-new-study-says [https://perma.cc/7Z44-MJXT].

141. BUTEAU ET AL., *supra* note 124, at 7–8.

142. *See* Turner, *supra* note 125 (noting that "[t]he pandemic led to an increase in unrestricted giving, but foundations need to make it a permanent and primary part of their giving strategy").

143. Pennington, *supra* note 125; *A Call to Action: Philanthropy's Commitment During COVID-19*, COUNCIL ON FOUNDS., https://cof.org/news/call-action-philanthropys-commitment-during-covid-19 [https://perma.cc/98E4-FHCZ]; Alex Daniels, *Foundations Under Pressure*, CHRON. OF PHILANTHROPY (Mar. 31, 2020), https://www.philanthropy.com/article/foundations-under-pressure/ [https://perma.cc/T7NK-QNHU]. One commentator urged that this pledge become "the new normal." COUNCIL ON FOUNDS., *supra*.

144. BUTEAU ET AL., *supra* note 122, at 28.

Pushback against restricted giving by foundations in particular has led some to advocate for multi-year general operating dollars, or "MYGOD."[145] This is "funding that is not restricted to use for a particular program or expense" that "nonprofit leadership may use . . . at their discretion to further their mission."[146] While many of these comments are directed at restricted foundation grants, they highlight not only the norm for foundation giving as restricted, but also the need for operating funds and concerns about restricted funding generally.

These concerns are reflected in reporting standards issued by the Financial Accounting Standards Board (FASB). In 2016, the FASB revised its nonprofit reporting standards to get more and better information about the degree to which nonprofit asset holdings were restricted. The FASB said that more data on restricted holdings would allow stakeholders to evaluate the "[a]vailability of resources to meet cash needs for general expenditures . . . [and] [l]iquidity and financial flexibility."[147] In other words, according to FASB, the ratio of donor-limited assets to unrestricted assets is instructive to stakeholder assessments of a charity's viability. This is especially notable given the finding in Section I.C that donor limits entail a significant percentage of charitable assets.[148]

E. A Subsidy for Donor Gains

Another concern about subsidizing donor limits on gifts is that doing so runs contrary to the general principle that the charitable deduction should be for the net gift. As explained in Section I.D, a main attribute of the tax incentive for charitable gifts is to *avoid* subsidizing donor gains. The amount of the charitable deduction is based on the amount donated less return benefits to the donor. And no deduction is allowed when donors retain rights or a partial interest in property or receive a substantial return benefit.

145. *Id.* at 4.

146. *Id.* at 9.

147. FIN. ACCT. STANDARDS BD., ACCOUNTING STANDARDS UPDATE NO. 2016-14: NOT-FOR-PROFIT ENTITIES (TOPIC 958) 4 (2016), https://www.fasb.org/document/blob?fileName=ASU%20 2016-14.pdf [https://perma.cc/9YSP-B46L].

148. *See supra* notes 59–63 and accompanying text. Of the $484.85 billion in gifts in 2021, 28 percent was to intermediaries (15 percent to donor-advised funds and 13 percent to foundations), and 9 percent was bequests. GIVING USA, *supra* note 1, at 29–30, 57; NAT'L PHILANTHROPIC TR., *supra* note 67, at 15 (reporting $72.67 billion in contributions to DAF sponsors in 2021).

Perpetual donor limits, however, undoubtedly benefit donors. The benefits vary in kind and degree.[149] Some benefits involve activities that are normally incident to ownership. These include active management of charitable assets and control or effective control of donated monies through private foundation and donor-advised fund giving. These donor benefits can be passed on for generations.

Other types of benefits are less tangible. When donors mandate certain forms of donor recognition such as naming rights,[150] presumably there is a significant benefit to the donor's vanity—as a form of personal advertising,[151] which may in turn provide an economic benefit for the donor's business or other interests. In the case of the renaming of Avery Fisher Hall (a prominent New York City symphony space) to David Geffen Hall, for example, the charity settled with the original naming donor by purchasing back the naming right for $15 million, clearly a right of significant value.[152] With a use or timing restriction, donors benefit by knowing that funds will be dedicated to the donor's preferred use in perpetuity. When donors impose conditions on the use and display of artwork, the donor gains a personal benefit—having their personal preferences and choices honored in perpetuity by a museum.

Donors also benefit from unrestricted giving—by enjoying the "warm glow" engendered by a selfless act of giving for the benefit of others.[153] Warm glow is a psychic benefit that is ignored in determining the charitable deduction. Warm glow, however, is to a considerable degree the point of the charitable deduction and a byproduct of a truly completed gift. By contrast, when a donor generates a benefit from imposing a limit, this is a selfish benefit, derived because the

149. Tait, *supra* note 116, at 1704–10 (describing the many forms of donor benefits associated with charitable giving, including "naming opportunities, event invitations, social introductions, . . . board positions," social status, an "individual sense of self-definition," and strengthening "personal identity").

150. Naming rights could be described as akin to a private taking. For example, if the government mandated that a privately owned building bear the name of a president (living or dead), this would likely be considered a permanent physical occupation of a portion of the privately owned property—effectively destroying the owner's ability to use or enjoy the space occupied by the president's name. For this, the government would have to pay just compensation.

151. One reason these types of benefits are not recognized currently for purposes of tax law is that in many cases the donor benefit is more psychic than material and thus difficult to measure. Yet, even so, the psychic benefits of many donor restrictions are likely of much higher value to donors, measured subjectively, than run of the mill economic return benefits, such as tickets to a fundraising gala or a tote bag, which the law does take into account.

152. Sugin, *supra* note 105, at 153.

153. Tait, *supra* note 116, at 1711.

donor did not make an outright gift. A donor limit means that the donor retains or gets something, whether it is formally characterized as a right, an interest, a privilege, or dead hand control. This is a subsidized private gain, and not generally consistent with the goal of the charitable deduction to encourage sacrifice and outright giving to charity.

F. Undermining Pluralism

Against these many concerns about donor limits, it is important to evaluate the perhaps leading explanation in their defense, namely that donor limits foster pluralism in the charitable sector.[154] Thus, donors "and their unique perspectives, goals, and ideas are universally acknowledged as key contributors to the diversity and pluralism underlying our robust nonprofit sector."[155] Similarly, restricted gifts "ensure the diversity of the projects and programs within the charitable sector, as well as social and ideological innovation within the larger liberal polity," and "represent private preferences as to the public good that donors are seeking to realize through the charitable sector."[156]

These are important insights—donors undoubtedly advance pluralism and diversity by asserting their charitable preferences through their gifts. Indeed, facilitating donor choice and pluralism are central goals of the tax incentives for giving. The charitable deduction is not a subsidy for specific, tangible objectives but rather is intended to promote private development of the public good, often meaning donor devised and funded causes.[157] Accordingly, the charitable deduction has often been described as like a matching grant, whereby donors are able to enlist the support of the government in their private giving choices.[158] Relatedly, private charities often reflect donor values in their creation and operation and so allow for the private formation of the public interest.

154. For example, Professors Eason and Goodwin, while both acknowledging the harm from donor limits, raise pluralism as an affirmative defense. Eason, *supra* note 126, at 705; Goodwin, *supra* note 6, at 81. Both scholars also suggest reforms to donor limits, just not to the tax subsidy. *See id.* at 123 (suggesting fifteen-year time limits). *See generally* Eason, *supra* note 126 (urging a robust negotiation by charities in the gift agreement).

155. Eason, *supra* note 126, at 705.

156. Goodwin, *supra* note 6, at 76; *see also id.* at 122 ("While innovation and diversity spring from many sources in the charitable arena, it is in donors, as they condition their gifts with restrictive language, that innovation and diversity find their guarantee.").

157. *See* Roger Colinvaux, *The Importance of a Participatory Charitable Giving Incentive*, 154 TAX NOTES 605, 612 (2017).

158. Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983).

Pluralism in charitable organizations and ideas, however, is primarily and amply assured by allowing a broad conception of the public good to flourish through open-ended, flexible applications of public and exempt purposes as expressed in section 501(c)(3), the section of the tax code that defines which organizations may attain public benefit status. Under that section, charitable exemption is allowed to "religious, charitable, scientific, . . . literary, or educational" organizations.[159] This rubric has provided exemption for more than 1.43 million organizations,[160] including, as Professor Mayer discusses in this Issue, allowing 501(c)(3) status even to hate groups.[161] In other words, pluralism is advanced primarily by the government's light touch when it comes to defining public purposes, not by a subsidy for perpetual donor limits. Further, any pluralist-diversity defense of donor limits must grapple with the harm those same limits impose on charitable growth, independence, and development of the public good over time, which can harm pluralism.

In addition, the argument that donor limits foster pluralism grows ever weaker as the charitable deduction becomes scarcer. Changes to the tax law in 2017 significantly shrunk the number of taxpayers eligible to claim the charitable deduction from roughly 26 percent to 9 percent of the taxpaying population.[162] This means that the deduction now represents the charitable choices of the wealthiest segment of the population, which is not particularly representative of the diversity of the country.[163] In the context of the estate tax, the charitable deduction is yet more rarified, representing in 2020 less than a tenth of one percent of people who died that year.[164] A subsidy for donor limits

159. I.R.C. § 501I(3).

160. INTERNAL REVENUE SERV., TAX-EXEMPT ORGANIZATIONS, NONEXEMPT CHARITABLE TRUSTS, AND NONEXEMPT SPLIT-INTEREST TRUSTS, FISCAL YEAR 2021 (2022), https://www.irs.gov/pub/irs-soi/21dbs02t14eo.xlsx [https://perma.cc/2TH6-G7RU]. This number does not include organizations not required to file an application for exemption with the IRS, such as churches. *Id.*

161. Lloyd Hitoshi Mayer, *Nonprofits, Taxes, and Speech*, 56 LOY. L.A. L. REV. 1291, 1306 (2023).

162. C. EUGENE STEUERLE ET AL., TAX POL'Y CTR., DESIGNING AN EFFECTIVE AND MORE UNIVERSAL CHARITABLE DEDUCTION 1 (2021), https://www.urban.org/sites/default/files/publication/103824/designing-an-effective-and-more-universal-charitable-deduction_1.pdf [https://perma.cc/WA2Z-AVZW]. As an itemized deduction, only those taxpayers who itemize can claim the full charitable deduction, which is currently about 9 percent of taxpayers. *See id.*

163. *See* Roger Colinvaux, *Fixing Philanthropy: A Vision for Charitable Giving and Reform*, 162 TAX NOTES 1007, 1008 (2019).

164. *The Tax Policy Center's Briefing Book: How Many People Pay the Estate Tax?*, TAX POL'Y CTR. (May 1, 2020), https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/V2UN-GGV7]; *see Estate and Gift Tax FAQs*, INTERNAL REVENUE SERV. (Oct. 18, 2022), https://www.irs.gov/newsroom/estate-and-gift-tax-faqs [https://perma.cc

therefore is a subsidy for preserving the charitable choices of society's wealthiest, in perpetuity. If pluralism is the goal, a subsidy for perpetual donor limits runs counter to that end.

G. A Double Subsidy

The other leading explanation for favoring donor limits (in addition to pluralism) is that donor limits are necessary as a kind of giving incentive. This argument has historic roots. As noted in Section I.B,[165] charitable transfers were excepted from the rules against perpetuities and accumulations, which gave donors a power in the donation context "far beyond that which is possible anywhere else in the law."[166] The reason was that allowing donor dead hand control was seen as a kind of giving incentive to encourage owners to part with their property for public good. The law struck a historic bargain, saying to donors: "If you will dispose of your property within the broad area known as charity, then a public benefit is presumed; and, in exchange for that public benefit, you are permitted to determine the future disposition of your property without limitation as to time."[167]

This reasoning of dead hand control as giving incentive is reflected in the early nineteenth-century Supreme Court decision *Trustees of Dartmouth College v. Woodward*.[168] In that case, the New Hampshire legislature sought to change the charter of Dartmouth College without consent of the college's trustees. Writing for the Court, Chief Justice Marshall opined that the charter was "a contract for the security and disposition of property," funded by a donor with the expectation that the donor's wishes would be fulfilled.[169] Marshall noted "that one great *inducement to these gifts* is the conviction felt by the

/87F3-4SQ7] (noting that, in 2020, the estate tax exclusion is $11.58 million, and this amount is adjusted annually for inflation through 2025 before dropping to $5 million in 2026).

165. *See supra* notes 22–23 and accompanying text.

166. *See* SIMES, *supra* note 23, at 111, 114 ("It has many times been recognized by American courts that a direction for an accumulation for charity is not void because it may continue longer than lives in being and twenty-one years; but that the only restriction which the law imposes on the duration of an accumulation for charity is that a court of equity may supervise it, and in its discretion, may order its termination."). Simes disparaged dead hand control as a "socially undesirable" objective that allows "the vanity of the dead capitalist [to] shape the use of property forever." *Id*. at 111, 117.

167. *Id.* at 116. Simes viewed this claim skeptically. Writing in the 1950s, he questioned whether a presumption of public benefit to donor restrictions was sound. *Id.* at 117–32. Citing the peril that donor choices might serve more private than public ends, he recommended a time limit of roughly thirty years on donor restrictions in the form of a broader *cy pres* doctrine. *Id.* at 139.

168. 17 U.S. (4 Wheat.) 518, 644 (1819).

169. *Id.*

giver, that the disposition he makes of them is immutable"[170] and "that the charity will *flow forever in the channel* which the givers have marked out for it."[171] In other words, the donor's intent controlled from beyond the grave.[172]

Dartmouth College set the stage for the idea that if donor intent is not honored, "there will be a chilling effect upon future charitable giving."[173] The *Restatement of the Law* echoes this view, citing the decision for "the importance of honoring restrictions on charitable assets to encourage donations."[174] Naming rights, for example, are seen by courts as helpful to encourage gifts.[175]

Yet, while the *Dartmouth College* case and the historic bargain help to explain the general law's unflinching deference to donor intent, they do not explain why the *tax law* subsidizes donor limits. In other words, perpetual donor limits, viewed historically at least, are on their own terms a distinct giving incentive. A federal tax law subsidy for donor limits then becomes a second benefit, or double subsidy. These two "inducements," however, should be viewed as distinct. Federal tax law offers generous income and estate tax incentives for charitable contributions, calculated as a percentage of a gift's value. The federal government bears this cost through reduced income and estate tax revenue, a form of cash back to the donor. The inducement provided by the tax incentives is tax savings, not perpetual donor limits.[176]

170. *Id.* at 647 (emphasis added).

171. *Id.* (emphasis added); *see* Tait, *supra* note 116, at 1673–74 (discussing the *Dartmouth College* case and characterizing its historic implications as a "charitable bargain" that "consisted of individuals dedicating resources to public benefit in return for a way to implement the charitable vision of the individual" and as "an exchange of resources for immortality").

172. Tait, *supra* note 116, at 1675 (explaining that after the *Dartmouth College* decision, courts "reaffirmed and propagated the legal notion . . . that charitable organizations owed donors adherence to their intent as a matter of contract, ultimately helping to justify support for both charitable giving and the primacy of donor intent").

173. Eason, *supra* note 126, at 697; *see also* Dale, *supra* note 41, at 17 (noting the tension between the charity's use of funds in reliance on the variance power versus not chilling a donor's willingness to give).

174. RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 (AM. L. INST. 2021).

175. Sugin, *supra* note 105, 149–51; *see also* RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01 cmt. B (AM. L. INST. 2021) ("Courts have also recognized that the ability to perpetuate one's name as a benefactor of a charitable institution or enterprise serves charitable purposes because it motivates charitable donations."). The Restatement also cites an Ohio case holding that restraints on alienation in the charitable gift context are allowed as an incentive for giving, so long as the court has the power to remove the restraint. *Id.*

176. *See* Roger Colinvaux & Ray D. Madoff, *Charitable Tax Reform for the 21st Century*, 164 TAX NOTES FED. 1867, 1867 (2019) (noting that in some cases the benefit to the donor can amount to 74 percent of the gift's value).

At best, the tax subsidy for perpetual donor limits seems an unintentional artifact of history. The charitable deduction inherited without comment the pre-existing dead hand inducement for donors. There is no evidence to suggest, however, that Congress believed that a subsidy for donor limits on gifts was or should be an integral part of the *tax incentive*. In fact, as discussed in Section I.D, a main function of the tax law since 1917 has been to police and restrict donor control of charitable assets and to limit the ability of donors to take a deduction for donor gains.

In short, the argument that perpetual donor limits are a necessary inducement for giving, even assuming it has merit, bears little to no relation to whether the *tax law* should separately subsidize donor limits.

H. Weighing the Subsidy

The two common justifications for donor limits just discussed—promoting pluralism and dead hand control as a giving incentive—do not justify a tax subsidy, especially when weighed against the myriad costs. Donor limits have another explanation, however, based on efficiency and equity.

By definition, a donor limit is part of a gift for a charitable use. A donor, in theory, could set up their own charity (as a trust or foundation) for the same purpose as the donor-limited gift. Thus, in lieu of a specific use restriction (e.g., "for the study and advancement of medieval literature"), a donor could establish a narrowly purposed charity or trust (e.g., an educational charity "for the study and advancement of medieval literature") and fund the charity with an unrestricted gift.[177] Notably, the two gifts, one restricted and one unrestricted, are identical—a permanent fund for the study of medieval literature. Viewed that way, a donor-limited gift is efficient because it allows the donor to take advantage of an existing charity and its infrastructure and may avoid the creation of small and narrowly focused charities, which also, by virtue of their size, may be more costly to operate and more likely to fail.[178] The restricted and unrestricted gift are also the

177. *See* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114–15 (1993) (noting that "restraints the law allows to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial").

178. However, the ease of imposing donor limits allows a donor also to shift the costs of the limit onto the donee charity, and, by essentially forcing the charity to protect the limit, helps protect

same value, in that a gift of $1 million with a donor limit on use has the same facial value as a gift of $1 million to a narrowly focused charity. This argues for equivalent tax treatment.

The above analysis also helps to highlight that all charitable gifts are in some sense donor-limited gifts, even when "unrestricted." This is because all charitable gifts are to a charity, and therefore must be devoted exclusively to charitable purposes.[179] Given this, it could be argued that to question a subsidy for donor limits is to question the charitable intent of donors. This also is at bottom a rephrasing of the pluralism defense of donor limits—namely, if donor limits are *disfavored* relative to unrestricted gifts, that could in general terms mean a preference for a broad charitable vision over a narrow one.[180] Thus, under this argument it is easier, and presumably preferable, for the tax law to maintain neutrality between donor-limited and unrestricted gifts by ignoring most donor limits and instead focusing on the fact that gifts to a charity accomplish the goal of perpetual charitable use, however that use is defined.

This defense of donor limits may be the best explanation for the tax law's benign approach. Even so, the harms from a tax subsidy for perpetual donor limits are not easily ignored. As discussed, they include subsidizing donor gains, the inefficient use of resources, crowding out unrestricted giving, undermining the independence of charities, perpetuating the choices of the wealthiest in society, and the compliance costs associated with maintaining donor restrictions.

At bottom, by treating unrestricted and donor-limited giving the same, the tax law encourages and subsidizes perpetual donor intent. This fosters a practice with harmful effects—and not just in the margin. Donor-limited giving, in one form or another, is fast becoming the default mode of giving, if it is not already. As discussed in Section I.C, a significant portion of charitable use assets, including 66 percent of the $525 billion held by one hundred top charities, is donor limited and not freely available to serve present needs or to be deployed to anticipate future problems. And giving to intermediaries is

against failure, even though failure of the donor's use for another charitable use might be in the long-term public interest. *See* discussion *supra* Section II.A.

179. *See* RESTATEMENT OF THE L.: CHARITABLE NONPROFIT ORGS. § 4.01(a) (AM. L. INST. 2021) ("An asset held by a charity is restricted to the charity's overall purposes . . . ."); *see also* Gary, *supra* note 23, at 581–84 (discussing whether a charity that changes its purposes is bound by its former purposes as restrictions on assets held prior to the purpose change).

180. *See* discussion *supra* Section II.F.

increasingly dominant. In 2021, donor-advised funds accounted for one in five charitable gifts by individuals, and together with private foundation gifts constituted 37 percent of all individual giving.[181] In short, charitable assets are captive—strings are attached.

III. REFORM OPTIONS FOR DONOR-LIMITED GIFTS

The charitable deduction for income and estate tax purposes is meant to be an incentive for charitable giving, not for keeping. The costs of donor limits and the hidden tax subsidy for perpetuity are significant and should not be ignored. Given the tax law's role in incentivizing completed transfers to charity, promoting the public good, protecting the independence of charities from donor control, and considering the many costs associated with perpetual donor limits on gifts, it is reasonable to consider whether the tax law should continue to favor, and subsidize, donor limits, which is also to subsidize donor gains. This part of the Article considers reform options to donor-limited gifts, first to summarize non-tax-based reform proposals, and then to explore tax reform options.

A. Cy Pres *and Other Non-Tax Reforms*

As noted in Section II.A, a steady stream of commentary over decades questions the public benefit of perpetual donor limits. Most reform efforts focus on relaxing the stricture of donor intent, primarily through changes to *cy pres* and the doctrine of equitable deviation.[182]

A leading choice of reformers is to allow the charity greater flexibility to modify a donor limit after some number of years, which depending on the commentator ranges from fifteen years to forty.[183] Another approach is to expand the scope of what courts consider when

181. Flannery, *supra* note 65; COLLINS & FLANNERY, *supra* note 66, at 20 (noting that donor-advised funds and private foundations have "quintuple[ed] their share of the charitable pie in less than thirty years"). *See generally* BUTEAU ET AL., *supra* note 124, at 7 ("For years, the relative scarcity of meaningfully sized, unrestricted gifts has been a source of frustration for nonprofit leaders, as research by [the Center for Effective Philanthropy] and others has documented.").

182. *See* Gary, *supra* note 23, at 584 (noting that the "doctrines of *cy pres* and deviation hold important roles in any discussion about control over charitable gifts, and much of the scholarship in this area involves thoughts about loosening or tightening the application of those doctrines, to make adjustments of restrictions by a charity more or less likely").

183. *Id.* at 600–03. These include proposals by Lewis Simes (thirty years), Evelyn Brody, Melanie Leslie (forty years), Iris Goodwin (fifteen years), and Allison Tate (donor's lifetime), all of which have different components. *Id.*

modifying donor limits.[184] Still another is to turn the decision on charitable use over to the charity's fiduciaries.[185] The consensus of all approaches is to relax the donor intent imperative. This is exemplified in recent revisions to the Uniform Trust Code and to UPMIFA, adopted in most States.[186]

Another, supplemental, approach is to strengthen the bargaining position of charities. As practitioners note, when it comes to imposing specific restrictions on gifts, donors have significant "leverage with the charity."[187] Fundamentally, charities need and want donations in order to operate. To refuse a donor limitation is to risk losing the gift altogether, as donors can go elsewhere. Accordingly, some argue that charities could strengthen their negotiating position by adopting a gift acceptance policy. Professor Harvey Dale embraces this approach and notes that the IRS nudges charities in that direction by asking on the Form 990 whether the organization has a gift acceptance policy "that requires the review of any non-standard contributions."[188] Professor Eason agrees that thoughtful negotiation about donor limits at the gift acceptance stage would help prevent future conflict about charitable use.[189] Along similar lines, Professor Brody asks whether to adopt rules that protect charities from waiving the no-standing default rule in their gift agreements.[190]

184. Gary, *supra* note 23, at 600–01, 604–05 (citing Lewis Simes (allowing a relaxed *cy pres* to apply if the restriction is "impractical or inexpedient" after thirty years), Kenneth Karst (calling for "modification under a standard that would allow consideration of the public interest in a charitable trust"), John Simon (suggesting the "court should instead consider what a reasonable donor would want"), and Katie Magallanes, Ilana Eisenstein, and John Nivala (consideration of the public interest)). Gary herself recommends more consideration of the public interest, suggesting that maybe a "reasonable donor standard," or "an honest acceptance of the public benefit standard . . . would help." *Id.* at 608.

185. *Id.* at 605–07 (citing approaches by Rob Atkinson and Ilana Eisenstein).

186. *See* discussion *supra* Section I.B.

187. Hubbard, *supra* note 39, at 34 (noting also the "[i]nherent conflict between the parties," namely "the donor's desire for specificity and the donee's desire for flexibility"); *see also* FOX, *supra* note 13, § 23.01 n.3 ("As a practical matter, the rejection of a sizeable contribution by a strong-willed donor may prove difficult to a charity."). As one charity leader commented, "[a]sking for unrestricted gifts is one of the more difficult asks, so we typically just haven't." The practice is similar to "asking someone to marry you. It takes time, and the donor has to really know you." Holly Hall, *No Strings Attached*, CHRON. OF PHILANTHROPY (Sept. 20, 2007), https://www.philanthropy.com/article/no-strings-attached-178363/ [https://perma.cc/545W-D29Q].

188. INTERNAL REVENUE SERV., SCHEDULE M (FORM 990): NONCASH CONTRIBUTIONS (2022), https://www.irs.gov/pub/irs-pdf/f990sm.pdf [https://perma.cc/8P3F-88DS]; *see* Dale, *supra* note 41, at 29 (noting that "[c]harities should consider adopting a formal Gift Acceptance Policy").

189. Eason, *supra* note 126, at 703.

190. Brody, *supra* note 28, at 1192. The fact that charities might need such relief is of course an indicator that the donor quite often is in a strong position when negotiating a gift.

Merits of these various proposals aside, the wealth of commentary pressing for change over many decades is a good indicator that donor limits on charitable gifts are concerning. Commentators rarely consider, however, the role the tax law plays in fostering donor limits in the first place or, concomitantly, what tax law reform of donor-limited gifts might look like. It is therefore worth exploring tax reform options of the tax subsidy for perpetual donor limits. In addition, unlike *cy pres* reform, which proceeds slowly and on a state-by-state basis, tax reform would have immediate results on charitable giving practices and lead to more unrestricted giving, and thus reduce the need to rely on *cy pres*.

B. Tax Law Reform Options to Account for Donor Limits

In contemplating tax reform, there two broad conceptual approaches. As explained in this section, donor limits could be considered as (1) partial interests or retained rights, or (2) as return benefits or as materially affecting the value of the donated asset. Depending on the approach, the result would be either no charitable deduction for donor-limited gifts or a deduction based on the value of the contribution, taking the donor limit into account. This section also separately considers donor-limited giving to intermediaries and from donor-advised funds.

1. Donor Limits as Partial Interests or Retained Rights

As discussed in Section I.D, gifts must be complete to be deductible, meaning that the donor has relinquished dominion and control over the asset. Donor limits, however, invite the question of whether the gift is complete. A restriction to spend only a percentage of an asset's value annually (an endowment), or a restriction as to use, means that the donor dictates the essential terms of holding the asset. Even though the restriction does not affect ownership in a formal legal sense, for all practical purposes, the charity does not have full dominion and control. Likewise, funds held in a donor-advised fund may be under the formal control of the charity, but as a practical matter, donors wield effective control of donated funds, which sit in accounts that bear the donor's name and are subject to the donor's advisory privileges.[191] Thus, in an important sense, the gift is not complete until distribution from the fund.[192]

Similarly, donor limits are like partial interests in property. The partial interest rule requires that the donor give up their entire interest.[193] Under the classic view of property rights, the entire interest of the donor would include every right the donor had, which typically includes the rights to use and enjoy, to exclude others, and to alienate the asset.[194] Yet if, after a gift, the donor is able, directly or indirectly, to force a charity to use the asset in a certain way, the donor does not relinquish their entire interest. Further, the donor limit is derived from, or carved out of, the donor's original ownership of the asset, making it a retained part of the donor's property rights—similar to a cloud on title.

Retained right characterization appears especially apt when a donor has standing to enforce a limit. As noted in Section I.B, the general rule is that donors do not have standing—enforcement of a gift's terms is the job of the state attorney general. However, the donor may insist on standing in a gift agreement, and some jurisdictions are relaxing the "no donor standing" rule to allow donor lawsuits.[195] Donor standing is a legal right to sue to enforce a limitation, a strong indicator that the donor has not given everything away.

In sum, donor limits could fairly be characterized as retained rights or partial interests, and so in violation of either of the completed gift or partial interest rules. The result would be to disallow the charitable deduction for donor-limited gifts, at least until the limitation is

191. Colinvaux, *supra* note 17, at 2650. Charities that sponsor donor-advised funds would quickly lose donors if they spent funds independently of donor advice, and in fact DAF sponsors follow donor advice as a matter of course. SHERLOCK & GRAVELLE, *supra* note 20 ("Evidence suggests . . . that donors to DAFs have effective control over grants, and to some extent investments, because sponsoring organizations typically follow the donor's advice.").

192. *See* discussion *supra* Section I.A (discussing how private foundation giving is similar to donor-advised fund giving—similarities that led to the development of a special set of rules).

193. *See* discussion *supra* Section I.D.3. There is a distinction between a partial interest and a fractional interest because a fractional interest divides the property into parts but gives the entire interest in the part. I.R.C. § 170(f)(3)(B)(ii). A full charitable deduction for gifts of a fractional interest generally is permitted, subject to special rules. *See* I.R.C. § 170(o).

194. These property rights are often referred to as the "bundle of sticks."

195. *See* Dale, *supra* note 41 (explaining that the modern trend is to provide for donor standing (especially in the trust context), thus allowing donors directly to enforce their restrictions); UNIF. TR. CODE § 405I (UNIF. L. COMM'N 2000).

released. Alternatively, a current deduction could be allowed, but only if the donor limit has a time limit, for example fifteen years.[196]

2. Donor Limits as Return Benefits or Affecting Asset Value

Another approach would view donor limits either as return benefits to the donor or as reducing the value of the contributed asset.[197] As discussed in Section II.E, there is little doubt that donor limits benefit the donor and that donors value them. Donor limits are personal preferences imposed with good intentions, but also for selfish reasons.[198]

In some cases, the benefit to the donor could be characterized as a return benefit instead of as a retained right. For example, in the donor-advised fund context, donors must accept that they have yielded formal dominion and control of their property to a sponsoring organization as a condition of the deduction;[199] but donors then receive the benefit of providing advice about when and how to spend the money. The advisory privilege could be characterized as a grant back of a benefit in exchange for the donation. DAF sponsors, for example, do not allow advisory privileges to random members of the public, but only to donors in exchange for donations.[200] Similarly, when a charity provides naming rights to a donor in exchange for a gift, the charity cedes a valuable property right to the donor, which it could grant to any person or keep.

196. This would be similar to the approach often advocated for *cy pres* reform (time limits on following donor intent) but would make the time limit a condition of the charitable deduction for income and estate tax purposes. *See* discussion *supra* Section III.A. Also, as discussed *infra* Section III.B.3, conditioning the deduction on there being a time limit to the donor limit is the approach taken in recent proposed legislation with respect to donor-advised funds.

197. As noted in Section I.D, the tax law ignores spending restrictions, advisory privileges, and many charitable use restrictions for valuation and return benefit purposes. *See supra* notes and accompanying text. A gift of $1 million generates a $1 million deduction even if the money is not available for immediate use or is not "materially restricted" as to use.

198. When private foundations impose limits on grants, any charitable deduction has already been claimed, so a retained right or return benefit characterization would not make a difference for foundation grants.

199. The Internal Revenue Code requires that for a contribution to a DAF sponsor to be deductible, the donor must obtain an acknowledgment from the sponsor that the sponsor has "exclusive legal control over the assets contributed." I.R.C. § 170(f)(18). This circumvents the completed gift rule.

200. I.R.C. § 4966(d)(2)(A)(iii) (defining a donor-advised fund as a fund where a donor or person appointed by the donor is allowed to give advice "with respect to the distribution or investment" of the funds).

In addition, donor limits unquestionably affect the value of the asset as held by the charity.[201] Charities may (in most cases) receive a fee simple interest, but a charity's use is circumscribed by the private choice of the donor, restraining the asset from moving to a potentially more valuable charitable use. Relatedly, as explained in Part II, donor limits necessarily impose an array of compliance costs on charities that unrestricted gifts do not—costs that affect the overall value of the gift to the charity even if they do not directly reduce the value of the asset.

Further, scholars commonly view donor limits as a quid pro quo. For example, Susan Gary argues that the "public's interest in the charitable gift" comes from a "deal"[202] in which a "donor enters into an agreement with a charity, agreeing to donate money or property in exchange for the charity's commitment to use the gift in a specified way.[203] Similarly, John Eason notes that "[d]onors are afforded such perpetual control as part of a quid pro quo exchange."[204] Other scholars similarly refer to the benefits of perpetuity and other types of benefits that donors receive in exchange for their limited gifts.[205]

Moreover, it is already the case that return benefits do not have to fit the typical mold of a quid pro quo exchange of tangible goods. The Treasury Department recently clarified in regulations that return benefits may take unconventional forms, including state tax benefits.[206] Legal protections for donor limits are a similar form of quid pro quo: the law provides favorable treatment in exchange for the charitable donation. This characterization is squarely in line with the *Dartmouth College* decision as well.[207]

201. The IRS, however, uses a willing-buyer–willing-seller standard for valuation, which is based on market transactions, not on a subjective valuation an asset may have to the donee charity. *See, e.g.*, FOX, *supra* note 13, § 23.07 (discussing how the IRS uses a willing-buyer–willing-seller standard for valuation of artwork in the gross estate which, based on market transactions, is not always helpful in assessing the impact of a donor limit).

202. Gary, *supra* note 23, at 591.

203. *Id.* Gary says there is also "a second deal, one entered into with the public, albeit without an explicit agreement. The donor provides benefits to the public but also receives benefits from the public." *Id.* Gary also notes benefits to donors, including tax benefits and "legal rules that allow the donor to structure the gift differently from a gift for a private purpose," including perpetuity. *Id.*

204. Eason, *supra* note 126, at 698.

205. *See* Gary, *supra* note 23, at 591 n.216 (citing Brody, *supra* note 28, at 1258 (referring to donor limits as a "giftract," or something in between a contract and a completed gift)); Alex M. Johnson Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the* Cy Pres *Doctrine*, 21 U. HAW. L. REV. 353, 357 (1999) (discussing how perpetuity is granted in exchange for the public's right to modify the terms of the gift).

206. Treas. Reg. § 1.170A-1(h)(3); *see also* Colinvaux, *supra* note 100, at 792 (explaining that return benefits include benefits from third parties).

207. *See* discussion *supra* Section II.G.

In theory, adopting a return benefit approach for donor limits would reduce the amount of the deduction by the value of the limit (or loss in value to the asset from the limit). One obvious difficulty would be determining the amount of the reduction. A reduction based on the subjective value of the benefit to the donor, or the cost to the charity, plainly would be inadministrable and hard to determine on a case-by-case basis. Alternatively, the reduction could be a fixed percentage of the value of the asset, based on the type of restriction imposed, for example, a 10 percent reduction. Thus, the amount allowed as a deduction for a donor-limited gift of $1 million would be $900,000. The percentage reduction would represent the cost of the limit.

This would be somewhat arbitrary, understating value in some cases and overstating it in others. Even so, the tax law often uses arbitrary bright lines to provide certainty for the IRS in administering the law and for taxpayers in complying with it.[208] Further, the risk that donors would burden gifts with substantial limits and only "pay" for a modest (10 percent) reduction would be minimized because of the rule that substantial return benefits result in complete disallowance.[209]

3. Donor-Limited Giving to Intermediaries

As discussed in Section I.A, gifts to intermediaries, whether to a donor-advised fund or private foundation, allow a donor to retain effective control of donated assets and present the problem of delayed benefits. Absent special rules, the delayed benefit may be perpetual.

Congress addressed this concern in 1969 for private foundations primarily through an annual payout requirement, as well as by disfavoring foundation giving relative to public charities.[210] Today, two key concerns are that the 5 percent payout rule is easily satisfied with non-charitable payments[211] and that it operates as a cap on distributions instead of as a minimum.[212] Proposed legislation, the Accelerating Charitable Efforts (ACE) Act, would tackle some of these

208. *E.g.*, I.R.C. § 170(l) (2012) (stating that before a change to the law in 2017, contributions to universities were reduced by 20 percent when tickets to athletic events were received in exchange); *see also* Sugin, *supra* note 105, at 168 ("Once we treat the charitable deduction as an arbiter of social meaning, and not only an economic incentive, the precise value of a quid pro quo matters less.").

209. *See* United States v. Am. Bar Endowment, 477 U.S. 105, 116 (1986); *supra* note 100 and accompanying text.

210. *See supra* note 84 and accompanying text.

211. Colinvaux, *supra* note 17, at 2659–62.

212. *See* Ray Madoff, *The Five Percent Fig Leaf*, 17 PITT. TAX REV. 341, 346 (2020) (discussing the loopholes foundations exploit to satisfy the 5 percent rule).

problems.[213] Among other things, the ACE Act contains incentives for private foundations to pay out more than the annual minimum, including if a foundation adopts a limit on perpetual existence.[214]

Unlike foundations, donor-advised funds face no requirements ever to make distributions. The ACE Act takes a retained rights approach to this problem, providing that there would be no income tax deduction[215] for donor-advised fund gifts unless and until the donor relinquishes advisory privileges.[216] Under one scenario of the ACE Act, a current deduction is conditional on advisory privileges of fifteen years or less.[217] Under another scenario, the deduction is delayed until the donation is distributed from the donor-advised fund, that is, no deduction until the gift is effectively complete.[218]

Unlike the income tax, the estate tax charitable deduction does not distinguish between public charities and private foundations but treats both types of gifts the same. The estate tax charitable deduction could therefore be reformed to encourage unrestricted giving by disfavoring gifts to intermediaries. One approach would be to introduce rules similar to the income tax percentage limitations.[219] For example, estate tax charitable contributions to intermediaries (DAF sponsors and private foundations) could not exceed a set percentage of the gross estate or a percentage of total charitable gifts from an estate.[220]

213. Accelerating Charitable Efforts Act, S. 1981, 117th Cong. §§ 4(a), 5(a) (2021) (providing that distributions by private foundations to donor-advised funds or to family members for travel or compensation generally do not count towards the payout requirement); DEP'T OF THE TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2024 REVENUE PROPOSALS 139–41 (2023) (same).

214. *See* Accelerating Charitable Efforts Act, S. 1981, 117th Cong. § 8(a) (2021) (describing how new foundations that impose a twenty-five-year limit on their existence would be exempt from the annual excise tax on investment income).

215. The rules of the ACE Act do not apply for estate tax purposes. *See* Accelerating Charitable Efforts Act, S. 1981, 117th Cong. § 2(a) (2021).

216. *Id.* § 3(a) (proposing the addition of § 4967A(a)–(c) to the Internal Revenue Code).

217. *Id.* § 2(b).

218. *Id.* § 2(a). For discussion of the ACE Act provisions, see Colinvaux, *supra* note 17, at 2639–40; see also Colinvaux & Madoff, *supra* note 176, at 1872 (arguing that the deduction for contributions to DAF sponsors should be timed to the distribution).

219. The income tax charitable deduction limits allowable charitable deductions to a percentage of the taxpayer's adjusted gross income, with higher percentage limits for gifts to public charities over private foundations. I.R.C. § 170(b).

220. For example, if the gross estate is valued at $50 million, the rule might be that private foundation giving could be no more than 5 percent or $2.5 million. In addition, there could be a limit that private foundation giving could be no more than a percentage of all charitable giving. If, for example, such percentage was 50 percent, and total charitable gifts from the estate are $20 million, only $10 million of that could go to a private foundation.

Alternatively, intermediary gifts could be excluded altogether from the estate tax charitable deduction.

4. Donor-Limited Giving from Donor-Advised Funds

Donor-advised funds may seem an odd candidate for making donor-limited gifts since, technically, the donor is the DAF sponsor (a corporate charity), not the person who advises the grant. Thus, it would seem at first blush that donor-advisors could not impose limits on their grants. However, the granting policies of at least one leading DAF sponsor indicate that advising privileges include the ability to "advise" a restriction on the use of funds.[221] For example, Schwab Charitable allows account holders to "recommend a grant purpose" for "certain common, specific, and custom purposes," which includes endowment funds.[222] Even "more specific purpose[s]" are allowed, upon further review by Schwab Charitable, with the caveat that "Schwab Charitable generally cannot compel a charitable organization to use grant money for the specific purpose."[223] It is not clear whether Schwab Charitable means that it does not have standing to enforce the limit, or that the limit is not binding on the charity because it is only a "recommendation" of the donor-advisor as opposed to an actual donor limit imposed by Schwab Charitable.

This reflects a legal grey area of what appears to be a new category of donor limit, namely a donor-advised perpetual limit. If the donor's "recommendation" as to use is just a recommendation to the grantee, then it is not binding on the charity and is merely precatory. But if the DAF sponsor makes the donor-advisor's recommendation a part of the grant, then under normal rules the limit would be binding on the charity as a donor limit of the DAF sponsor.

This would appear to be an area ripe for confusion and also of concern. If a restriction is "advised" or "recommended" by the donor-advisor and then imposed by the DAF sponsor, is the intent of the DAF sponsor given the same deference as if the donor-advisor had made the gift directly? Further, by imposing a donor-advisor's customized restriction, is the DAF sponsor acting as the donor's agent, thereby potentially undermining the donor's charitable deduction? Legal questions aside, to the extent DAF sponsors are directly or indirectly

221. SCHWAB CHARITABLE, PROGRAM POLICIES 21 (2022).
222. *Id.*
223. *Id.*

encouraging donor-advisors to impose limits on their grants, DAF sponsors will be facilitating, on a mass scale, even more donor limits than might otherwise occur by presenting donor-advisors with a choice (potentially for *every* grant) to impose a limit that the donor might not otherwise have considered.[224]

C. Finding the Right Fit: Weighing Reform Alternatives

As Part II of this Article demonstrated, there are significant costs to the tax code's equivalent treatment of donor-limited and unlimited gifts. These costs will only grow as donor-limited giving burdens an ever-increasing share of charitable assets. If donors want to limit their gifts, they may—that is not the issue. The issue is whether the tax law should subsidize and so encourage limited giving to the detriment of outright giving. If there was a tax cost to donor limits, donors would impose them less, more gifts would be unrestricted, and more charities would have full dominion and control over their property.

While there are several viable ways to reform the tax subsidy for perpetual donor limits,[225] the role of this Article is not to prescribe any one approach. Rather, it is to place a spotlight on the issue of donor-limited giving and to emphasize the importance of promoting, whether in comprehensive or piecemeal fashion, unrestricted, fully complete gifts to charity, so charities have the ability to determine, free from donor-imposed limitations, how best to use charitable assets.

In weighing tax reform approaches discussed in this Part, there are a host of considerations. A retained right approach would mean disallowance of the deduction until the donor limit is released, or, in

224. Another candidate for confusion and concern in this area is that in theory, and almost certainly in practice, donors are likely leveraging their ability to advise grants from their donor-advised funds by entering into specific agreements with charities to provide advice to make a distribution in favor of the charity in consideration for the charity accepting a limitation on the use of funds. To the extent advisory privileges are used as consideration in a contract between donor-advisor and a grantee charity, this highlights that the advisory privilege is both valuable and a legal right of the donor, contrary to current tax law treatment for deduction purposes.

225. The IRS could address many of these issues in regulations or by Revenue Ruling. The IRS has the authority generally to determine what makes a gift complete, what is a retained partial interest, and what is a more than incidental return benefit. One conclusion of the IRS that warrants review is that the public recognition a donor receives from association with a charity, including naming rights, is an incidental and tenuous benefit and therefore can be ignored for tax purposes. *See, e.g.*, Rev. Rul. 68-432, 1968-2 C.B. 104 ("Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value . . . ."); Rev. Rul. 73-407, 1973-2 C.B. 383 (public recognition "is an incidental and tenuous benefit"); I.R.S. Priv. Ltr. Rul. 2010-0172 (Sept. 24, 2010) (same). For additional discussion, see Sugin, *supra* note 105, at 151–53.

the alternative, a deduction conditional on a time limit to the donor limit (fifteen years, for example). A main disadvantage to this approach is that it may be perceived as extreme by barring charitable deductions for what is now a routine practice.

On the other hand, disallowance of the deduction is not in fact extraordinary or radical, but rather is the norm. The charitable contributions of most taxpayers are already disallowed through itemization. As noted, only 9 percent of taxpayers are in a position to take income tax charitable deductions; that is, deductions are already disallowed for the remaining 91 percent, whether their gifts are limited or not.[226] Further, disallowance already is the approach used for retained rights, partial interests, and substantial return benefits.[227] Thus, a disallowance rule for donor-limited gifts would simply be a further refinement of the type of gifts that *should* be incentivized, sending a strong signal in favor of unrestricted gifts. Moreover, a retained right approach is administrable, providing a relatively clear line for what makes a contribution charitable.[228] Nonetheless, in terms of political acceptance, an across-the-board disallowance rule for donor-limited gifts presumably would face steep odds legislatively.

A return benefit approach is likely to be perceived as less drastic than a retained right approach and would fit within prevailing conceptions of donor limits as received in exchange for the gift. As noted, the idea of perpetual limits as a quid pro quo for charitable gifts has deep roots in the law.[229] By discounting the tax deduction to account for donor limits, a return benefit approach would simply be a corrective measure, tailoring the tax benefit to the net gift and disallowing the deduction only to the extent of donor gains. To be administrable, a set percentage would have to be established. Importantly, disallowance would still be an option if the donor limit is substantial. Thus, the IRS would still have to monitor for donor limits that result in substantial return benefits, necessarily complicating the administrability of the rule.

226. *See supra* note 130 and accompanying text. The number is considerably lower for estate tax purposes.

227. *See* discussion *supra* Sections I.D.2–3, 6.

228. As with any "bright line," there would be arguments around the edges. A likely main source of debate would be whether a limit is donor or charity imposed. For example, if a charity solicits gifts for a particular purpose and the donor earmarks a gift for that purpose, is that a donor-limited gift? The best answer is no. While the gift is limited, and the charity would be under an obligation to follow the earmark, the limit is the charity's and a full deduction would be available.

229. *See* discussion *supra* Sections I.D.6 and III.B.2.

With respect to giving to intermediaries, the ACE Act is one important effort. The ideas of the ACE Act could be incorporated into a broader reform of donor limits or remain as a standalone approach. That said, a key focus for lawmakers when it comes to intermediaries should be on the estate tax. The ACE Act does not change incentives for estate tax gifts. However, the problem of equivalent treatment of donor-limited and unrestricted gifts extends across the charitable deduction to both the income and estate tax. Therefore, tax reform of donor-limited giving should encompass changes to both deductions.[230]

Relatedly, the current estate tax charitable deduction fully allows giving to intermediaries, including private foundations. The estate tax therefore treats equally an outright gift to a public charity and a gift to a newly created, perpetual foundation, and thus is *more* favorable than the income tax deduction. The wealthiest donors are thereby encouraged to establish perpetual foundations under family control, with only minimal payout obligations. This fosters dynastic power and prestige through hereditable control of charitable wealth. While changes to the estate tax seem unlikely, policymakers should nonetheless consider disallowing a deduction for all gifts to intermediaries for estate tax purposes (donor-advised funds and foundations), or, in the alternative, capping the amount of intermediary giving. This would create an incentive within the estate tax in favor of giving outright to working public charities.

In addition, there are narrower approaches that also merit lawmakers' attention. These include treating donor standing to enforce a gift as a partial interest resulting in disallowance of the charitable deduction[231] and requiring that distributions from donor-advised funds be unrestricted.[232]

Finally, lawmakers should, when making changes to the charitable deduction, be aware of the cost of donor-limited gifts and the hidden subsidy for perpetuity. This is most salient now that a top priority for some lawmakers and for the charitable sector is a non-itemizer charitable deduction.[233] In the wake of the 2017 Tax Cuts and Jobs Act increase to the standard deduction, Congress passed and then extended

230. The income and estate tax charitable deductions commonly have overlapping provisions. *Compare* I.R.C. § 170(f)(3), *and* I.R.C. § 170(o), *with* I.R.C. § 2522(c)(2), *and* I.R.C. § 2522(e).

231. *See supra* Section III.B.1.

232. *See supra* Section III.B.4.

233. Charitable Act, S. 566, 118th Cong. (2023) (providing for a nonitemizer charitable deduction of up to one-third of the value of the standard deduction) (introduced Mar. 1, 2023).

a modest non-itemizer charitable deduction.[234] This expired at the end of 2021. Importantly, Congress took donor limits into account in part by providing that gifts to donor-advised funds and private foundations were not eligible.[235] In any future new giving incentive, whether a non-itemizer deduction or a charitable giving credit,[236] Congress should retain this limitation and further provide that the incentive is only for unrestricted gifts. This would advance the policy of unrestricted giving going forward and avoid multiplying the problems of donor-limited gifts.

CONCLUSION

The charitable deduction, for income and estate tax purposes, is intended to encourage donors to part with their property for the benefit of society and to supply charities with resources they need to advance the public good. In making gifts, donors often impose limits that restrain charities' use in perpetuity. Donor limits are easy to impose, very hard to get rid of, and burden a substantial amount of charitable assets. Yet donor-limited giving is a form of dead hand control that causes many harms; donor limits undermine the public interest, harm charitable autonomy, weaken pluralism, crowd out operational funding, and subsidize gains to donors. By failing adequately to distinguish between donor-limited and unrestricted gifts, the tax law subsidizes perpetuity.

Many donors likely place limits on gifts because of current giving culture and the ease with which limits can be imposed. A change to tax law that discourages donor limits thus would alter giving culture in a positive way, nudging donors away from limited gifts. The result would be a net benefit to charity and to the public interest from more giving unconstrained by donor limits and their costs.

This Article has outlined several possible approaches to reform of donor-limited gifts consistent with existing legal doctrines. These include treating donor limits as retained rights or return benefits, estate tax reform to discourage giving to intermediaries, curtailing restricted giving from donor-advised funds, and taking donor limits into account for purposes of any new giving incentive, such as a non-itemizer

234. I.R.C. § 170(p) (charitable deduction for taxpayers who do not itemize deductions of $300 ($600 for a joint return)).

235. I.R.C. § 170(p) (providing a special charitable deduction for 2021, but not for gifts to private foundations or donor-advised funds).

236. *See* Colinvaux, *supra* note 157, at 605 (arguing in favor of a charitable giving credit).

deduction or charitable giving credit. Importantly, under any tax reform approach, the power of donors to impose limits would not change. Donors could continue to limit their gifts in perpetuity as they currently do. But charity, and society, would be relieved from some of the costs of the dead hand.

APPENDIX A

Donor-Limited Assets of 75 Top Non-Donor-Advised Fund Public Charities, 2019 Form 990[237]

Public Charity	Net Assets with Donor Restrictions[238]	Total Net Assets[239]	% of Net Assets with Donor Restrictions	Donor-Advised Fund Assets[240]	% of Net Assets with Donor Limits
United Way Worldwide	$22,621,859	$37,842,926	59.78%	$9,899,974	85.94%
Salvation Army	$20,949,396	$64,473,653	32.49%	$0	32.49%
ALSAC/ St. Jude Children's Hospital	$1,068,802,015	$6,564,223,867	16.28%	$0	16.28%
Johns Hopkins University	$7,066,904,000	$10,006,568,000	70.62%	$191,794	70.62%
Stanford University	$17,620,088,269	$40,305,382,466	43.72%	$593,415,506	45.19%
Harvard University	$36,663,307,000	$48,551,934,000	75.51%	$211,041,674	75.95%
Boys & Girls Clubs of America	$204,097,767	$344,679,179	59.21%	$0	59.21%
Compassion International	$26,179,873	$268,592,542	9.75%	$0	9.75%
Health Research	$494,154,240	$617,176,084	80.07%	$0	80.07%
Columbia University	$8,997,903,319	$16,259,215,592	55.34%	$31,415,346	55.53%
American Red Cross	$1,421,418,381	$1,812,215,109	78.44%	$0	78.44%

237. The listed charities are taken from the top one hundred U.S. charities in the United States as ranked by *The Chronicle of Philanthropy* newspaper, not including public universities and two religiously affiliated organizations, which are excluded because many do not file a Form 990. *The Chronicle of Philanthropy* bases its ranking on the amount charities raise in cash and stock, which does not include "government grants, donated products, and contributions to donor-advised funds." Theis & O'Leary, *supra* note 58. *The Chronicle*'s list includes some DAF sponsors (Foundation for the Carolinas, the Greater Kansas City Community Foundation, and the California Community Foundation) because these charities (and not other sponsors) raise "enough cash support outside their donor-advised funds to be included" under *The Chronicle*'s criteria. *Id.*

238. Data collected from the "Net assets with donor restrictions" field of the Form 990 for each charity. *See* INTERNAL REVENUE SERV., *supra* note 53, pt. X, line 28.

239. Data collected from the "Total net assets or fund balances" field of the Form 990 for each charity. *See id.* pt. X, line 32.

240. Data collected from the "Aggregate value at end of year" row and "Donor advised funds" column of the Schedule D (Form 990): Supplemental Financial Statements form for each charity. *See* INTERNAL REVENUE SERV., *supra* note 56, pt. I, line 4(a).

Habitat for Humanity Interna-tional	$123,433,129	$230,835,224	53.47%	$0	53.47%
University of Pennsyl-vania	$7,669,446,000	$16,326,348,000	46.98%	$2,755,071	46.99%
Mass General Brigham Inc. (Group Return)[241]	$3,967,384,174	$13,927,644,949	28.49%	$0	28.49%
University of Southern California	$2,576,482,341	$8,882,471,455	29.01%	$39,408,376	29.45%
Nature Conserv-ancy	$1,338,580,307	$7,052,349,509	18.98%	$32,996,995	19.45%
Lutheran Services in America	$1,060,066	$2,470,311	42.91%	$0	42.91%
Step Up for Students	$463,808,684	$477,395,028	97.15%	$0	97.15%
Samaritan's Purse	$243,282,699	$701,956,825	34.66%	$0	34.66%
Mayo Clinic	$3,083,489,373	$3,768,205,733	81.83%	$3,166,662	81.91%
World Vision	$130,184,282	$216,508,384	60.13%	$17,956,019	68.42%
Yale University	$27,117,085,522	$30,994,700,008	87.49%	$152,181,271	87.98%
New York University	$3,793,886,434	$5,859,980,527	64.74%	$0	64.74%
HealthWell Foundation	$430,616,299	$455,710,646	94.49%	$0	94.49%
Cornell University	$6,929,485,271	$10,020,821,856	69.15%	$0	69.15%
Doctors Without Borders USA	$27,218,343	$222,971,038	12.21%	$0	12.21%
Duke University	$6,364,121,678	$10,881,439,224	58.49%	$0	58.49%
Feeding America	$263,690,902	$399,955,302	65.93%	$0	65.93%
Planned Parenthood	$94,317,592	$324,776,110	29.04%	$0	29.04%
American Cancer Society	$673,637,551	$1,114,677,014	60.43%	$0	60.43%

241. Formerly named Partners HealthCare System—and referred to as such in *The Chronicle*'s listing—Mass General Brigham changed its name in 2019. MASS GENERAL BRIGHAM, *Our Story*, https://www.massgeneralbrigham.org/en/about/our-story [https://perma.cc/DQB8-A9KV].

Greater Kansas City Community Foundation	$13,720,862	$1,727,450,129	0.79%	$1,367,323,058	79.95%
American Heart Association	$530,302,405	$877,961,055	60.40%	$0	60.40%
University of Chicago	$6,643,684,490	$7,223,970,958	91.97%	$0	91.97%
U.S. Fund for Unicef	$74,381,549	$137,394,243	54.14%	$0	54.14%
Massachusetts Institute of Technology	$14,510,555,000	$23,795,577,000	60.98%	$24,373,741	61.08%
Shriners Hospitals for Children	$1,423,340,000	$9,729,871,703	14.63%	$0	14.63%
University of Notre Dame	$8,043,499,831	$14,493,492,847	55.50%	$156,583,453	56.58%
Dana-Farber Cancer Institute	$1,134,595,555	$2,155,251,216	52.64%	$0	52.64%
PAN Foundation	$429,657,732	$462,673,779	92.86%	$0	92.86%
Dartmouth College	$5,668,423,129	$7,168,551,656	79.07%	$48,863,365	79.76%
Leukemia & Lymphoma Society	$116,403,128	$366,122,438	31.79%	$0	31.79%
Catholic Relief Services	$85,321,022	$183,847,941	46.41%	$0	46.41%
Northwestern University	$4,679,261,039	$12,462,639,415	37.55%	$7,452,183	37.61%
Save the Children	$134,365,546	$266,116,682	50.49%	$0	50.49%
Assistance Fund	$279,561,049	$315,530,753	88.60%	$0	88.60%
CARE	$265,173,627	$332,000,229	79.87%	$0	79.87%
Broad Institute	$840,922,432	$1,061,070,514	79.25%	$0	79.25%
Alzheimer's Association	$137,089,114	$276,275,464	49.62%	$0	49.62%
YMCA of the USA	$90,631,180	$131,655,568	68.84%	$0	68.84%
American Kidney Fund	$2,347,835	$57,151,666	4.11%	$0	4.11%
Rotary Foundation	$470,634,417	$1,126,581,948	41.78%	$32,127,826	44.63%

Young Life	$16,131,607	$361,995,526	4.46%	$0	4.46%
Chronic Disease Fund	$34,557,135	$71,983,147	48.01%	$0	48.01%
ACLU Foundation	$7,077,216	$122,363,387	5.78%	$0	5.78%
Interna-tional Rescue Committee	$147,542,943	$242,364,188	60.88%	$0	60.88%
Princeton University	$15,816,232,000	$27,926,389,000	56.64%	$0	56.64%
American Jewish Joint Distri-bution Committee	$267,696,083	$449,061,612	59.61%	$3,384,981	60.37%
Pew Chari-table Trusts	$52,757,236	$887,202,941	5.95%	$178,962,546	26.12%
Washington University (St. Louis)	$5,882,576,387	$11,768,305,029	49.99%	$17,373	50%
Patient Advocate Foundation	$299,602,427	$318,050,823	94.20%	$0	94.20%
ASPCA	$75,499,444	$340,007,209	22.21%	$0	22.21%
Wounded Warrior Project	$6,309,932	$326,432,119	1.93%	$0	1.93%
Memorial Sloan Ket-tering Can-cer Center	$1,373,154,000	$6,975,513,000	19.69%	$0	19.69%
Emory University	$6,127,010,284	$11,462,653,030	53.45%	$0	53.45%
Foundation for the Carolinas	$575,770,434	$2,034,110,093	28.31%	$1,473,899, 791	100.8%
Make-a-Wish Foundation of America	$24,104,831	$46,581,084	51.75%	$0	51.75%
Jewish Fed-erations of North America	$77,700,522	$106,995,419	72.62%	$0	72.62%
Boston Children's Hospital	$1,744,966,828	$4,565,716,741	38.22%	$0	38.22%
Brown University	$4,326,572,536	$5,463,088,256	79.20%	$1,467,306	79.22%
Metropoli-tan Mu-seum of Art	$2,675,457,851	$3,678,005,490	72.74%	$0	72.74%
World Wildlife Fund	$229,705,347	$386,025,271	59.51%	$0	59.51%

California Community Foundation	$168,491,625	$1,561,401,343	10.79%	$843,234,366	64.80%
World Resources Institute	$247,395,530	$263,865,928	93.76%	$0	93.76%
Educational Media Foundation	$4,687,727	$690,455,221	0.68%	$0	0.68%
Smithson-ian Institu-tion	$1,981,163,857	$4,636,979,503	42.73%	$0	42.73%
TOTAL	$226,633,671, 490	$405,730,253, 125	55.86%	$5,232,118, 677	57.15%

APPENDIX B

Donor-Advised Fund Assets of 25 of the Largest DAF Sponsors, 2019 Form 990[242]

Public Charity	Donor-Advised Fund Assets as Reported on 2019 Form 990[243]	Total Net Assets[244]
Fidelity Charitable	$34,969,283,806	$35,231,008,813
Schwab Charitable Fund	$17,116,359,559	$17,131,571,707
National Philanthropic Trust	$10,869,983,817	$10,483,958,397
Vanguard Charitable Endowment Program	$10,746,451,640	$10,803,018,572
Silicon Valley Community Foundation	$8,132,307,091	$8,518,824,249
Goldman Sachs Philanthropy Fund	$8,046,878,714	$8,054,087,000
American Endowment Foundation	$3,504,439,102	$3,473,563,088
Morgan Stanley Global Impact Funding Trust	$2,733,294,015	$2,722,841,043
National Christian Charitable Foundation	$2,558,407,018	$2,613,429,411
Bank of America Charitable Gift Fund	$2,065,474,251	$2,322,966,557
The Chicago Community Trust	$2,060,394,167	$3,541,801,045
Jewish Communal Fund	$1,942,149,535	$1,959,282,334
Renaissance Charitable Fund	$1,605,545,695	$1,607,576,667
Impactassets	$1,110,808,169	$1,112,972,578
Columbus Foundation	$927,760,046	$1,988,102,234
Ayco Charitable Foundation	$775,489,200	$775,828,900

242. These DAF sponsors all have at least $200 million in contributions for the year. A $200 million contribution amount was chosen because that amount is close to the cash support amount for the 100th ranked charity in *The Chronicle of Philanthropy*'s list of top 100 charities. Theis & O'Leary, *supra* note 58. This is not intended to be a comprehensive list—there are other DAF sponsors with more than $200 million in contributions in 2019.

243. Data collected from the "Aggregate value at end of year" row and "Donor advised funds" column of the Schedule D (Form 990): Supplemental Financial Statements form for each charity. INTERNAL REVENUE SERV., *supra* note 56, pt. I, line 4(a).

244. Data collected from the "Total net assets or fund balances" field of the Form 990 for each charity. INTERNAL REVENUE SERV., *supra* note 53, pt. X, line 32.

Oregon Community Foundation	$711,704,867	$2,208,457,710
Raymond James Charitable Endowment Fund	$755,438,476	$774,138,314
Servant Foundation	$693,276,162	$699,516,453
San Francisco Foundation	$536,220,057	$1,447,200,600
Greater Horizons	$494,503,016	$493,489,083
Community Foundation of Greater Memphis	$485,070,527	$618,090,425
Donors Trust	$409,080,868	$422,291,633
Tides Foundation	$284,933,406	$405,852,315
Charities Aid Foundation America	$183,572,119	$194,095,558
TOTAL	$113,718,825,323	$119,603,964,686

APPENDIX C

Endowment Assets of 75 Top Non-Donor-Advised Fund Public Charities, 2019 Form 990[245]

Public Charity	Assets Held in Endowment[246]	Donor-Restricted Endowment	% of Endowment that is Donor Restricted[247]	Total Assets Subject to Donor Limits
United Way Worldwide	$5,663,568	$4,140,068	73.10%	$32,521,833
Salvation Army	$343,807	$343,807	100%	$20,949,396
ALSAC/St. Jude Children's Hospital	$1,033,682,990	$933,932,581	90.35%	$1,068,802,015
Johns Hopkins University	$6,750,092,000	$5,778,078,752	85.60%	$7,067,095,794
Stanford University	$28,948,111,000	$15,241,180,441	52.65%	$18,213,503,775
Harvard University	$40,674,723,000	$30,343,343,358	74.60%	$36,874,348,674
Boys & Girls Clubs of America	$233,455,756	$120,813,354	51.75%	$204,097,767
Compassion International	$10,146,081	$10,146,081	100%	$26,179,873
Health Research	$31,672	$0	0%	$494,154,240
Columbia University	$11,257,021,000	$7,690,796,747	68.32%	$9,029,318,665
American Red Cross	$1,034,439,039	$1,034,439,039	100%	$1,421,418,381
Habitat for Humanity International	$3,686,686	$3,686,686	100%	$123,433,129
University of Pennsylvania	$13,143,906,966	$7,054,334,896	53.67%	$7,672,201,071
Mass General Brigham Inc. (Group Return)[248]	$3,149,754,057	$1,939,933,524	61.59%	$3,967,384,174
University of Southern California	$5,400,108,641	$3,942,079,307	73.00%	$2,615,890,717
Nature Conservancy	$1,347,399,103	$403,411,291	29.94%	$1,371,577,302

245. *See supra* note 198.

246. Data collected from the "End of year balance" row relating to "Endowment Funds" in the Schedule D (Form 990): Supplemental Financial Statements form for each charity INTERNAL REVENUE SERV., *supra* note 56, pt. V, line 1(g).

247. Calculated by subtracting the "percentage of the . . . year end balance" of endowment funds held as "[b]oard designated or quasi-endowment" from 100 percent. *Id.* pt. V, line 2(a).

248. *See supra* note 241.

Lutheran Services in America	$0	$0	0%	$1,060,066
Step Up for Students	$0	$0	0%	$463,808,684
Samaritan's Purse	$1,007,009	$1,007,009	100%	$243,282,699
Mayo Clinic	$4,427,091,907	$2,370,707,716	53.55%	$3,086,656,035
World Vision	$8,315,341	$7,899,573	95.00%	$148,140,301
Yale University	$31,244,272,067	$25,770,275,600	82.48%	$27,269,266,793
New York University	$4,576,242,732	$3,067,913,127	67.04%	$3,793,886,434
HealthWell Foundation	$0	$0	100%	$430,616,299
Cornell University	$6,678,526,938	$5,342,821,550	80.00%	$6,929,485,271
Doctors Without Borders USA	$3,257,492	$1,466,522	45.02%	$27,218,343
Duke University	$8,446,092,302	$3,443,471,831	40.77%	$6,364,121,678
Feeding America	$39,766,000	$2,624,556	6.60%	$263,690,902
Planned Parenthood	$173,078,460	$41,538,830	24.00%	$94,317,592
American Cancer Society	$106,990,454	$106,990,454	100%	$673,637,551
Greater Kansas City Community Foundation	$269,086,277	$0	0%	$1,381,043,920
American Heart Association	$69,497,022	$69,497,022	100%	$530,302,405
University of Chicago	$7,116,270,400	$5,052,551,984	71.00%	$6,643,684,490
U.S. Fund for Unicef	$4,162,329	$4,162,329	100%	$74,381,549
Massachusetts Institute of Technology	$18,465,010,000	$13,137,854,615	71.15%	$14,534,928,741
Shriners Hospitals for Children	$9,079,436,262	$604,690,455	6.66%	$1,423,340,000
University of Notre Dame	$12,319,422,270	$7,453,250,473	60.50%	$8,200,083,284
Dana-Farber Cancer Institute	$357,421,000	$357,421,000	100%	$1,134,595,555
PAN Foundation	$0	$0	0%	$429,657,732
Dartmouth College	$5,975,179,828	$4,620,009,043	77.32%	$5,717,286,494
Leukemia & Lymphoma Society	$5,902,791	$5,902,791	100%	$116,403,128
Catholic Relief Services	$19,795,240	$19,795,240	100%	$85,321,022
Northwestern University	$8,484,706,000	$4,267,807,118	50.30%	$4,686,713,222
Save the Children	$148,768,235	$41,060,032	27.60%	$134,365,546
Assistance Fund	$0	$0	0%	$279,561,049
CARE	$35,475,893	$30,427,673	85.77%	$265,173,627

Broad Institute	$688,837,965	$688,837,965	100%	$840,922,432
Alzheimer's Association	$24,252,597	$24,252,597	100%	$137,089,114
YMCA of the USA	$84,880,476	$40,997,269	48.30%	$90,631,180
American Kidney Fund	$187,632	$187,632	100%	$2,347,835
Rotary Foundation	$484,525,865	$427,497,170	88.23%	$502,762,243
Young Life	$2,158,469	$2,158,469	100%	$16,131,607
Chronic Disease Fund	$0	$0	0%	$34,557,135
ACLU Foundation	$451,395	$451,395	100%	$7,077,216
International Rescue Committee	$112,649,000	$63,083,440	56.00%	$147,542,943
Princeton University	$25,944,283,000	$15,047,684,140	58.00%	$15,816,232,000
American Jewish Joint Distribution Committee	$124,772,274	$75,849,065	60.79%	$271,081,064
Pew Charitable Trusts	$0	$0	0%	$231,719,782
Washington University (St. Louis)	$8,515,200,208	$5,449,728,133	64.00%	$5,882,593,760
Patient Advocate Foundation	$2,186,163	$0	0%	$299,602,427
ASPCA	$11,246,524	$11,246,524	100%	$75,499,444
Wounded Warrior Project	$1,353,536	$1,353,536	100%	$6,309,932
Memorial Sloan Kettering Cancer Center	$1,208,893,000	$718,082,442	59.40%	$1,373,154,000
Emory University	$7,467,506,671	$5,730,564,619	76.74%	$6,127,010,284
Foundation for the Carolinas	$593,690,757	$281,409,418	47.40%	$2,049,670,225
Make-a-Wish Foundation of America	$12,672,355	$12,672,355	100%	$24,104,831
Jewish Federations of North America	$29,972,608	$29,972,608	100%	$77,700,522
Boston Children's Hospital	$1,222,213,000	$552,073,612	45.17%	$1,744,966,828
Brown University	$4,358,253,647	$3,748,098,136	86.00%	$4,328,039,842
Metropolitan Museum of Art	$3,261,957,741	$2,329,037,827	71.40%	$2,675,457,851
World Wildlife Fund	$209,872,045	$65,564,026	31.24%	$229,705,347
California Community Foundation	$586,522,331	$60,705,061	10.35%	$1,011,725,991
World Resources Institute	$31,741,079	$28,217,819	88.90%	$247,395,530
Educational Media Foundation	$12,684,467	$3,181,264	25.08%	$4,687,727

Smithsonian Institution	$1,937,754,681	$1,133,005,161	58.47%	$1,981,163,857
TOTAL	$287,978,059,101	$186,847,718,158	64.88%	$231,865,790,167