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Don't Give Me That!: Tax Valuation of Gifts to Art Museums

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Don't Give Me That!: Tax Valuation of Gifts to Art Museums

Mary Varson Cromer*

Table of Contents

I. Introduction	778
II. The Legal Requirements of Charitable Deductions	782
A. The Threshold Requirement for Fee Simple Defeasible Interests.....	782
B. Fair Market Value and Charitable Deductions	784
C. Substantiation and Appraisal Requirements	785
D. Tax Court Interpretations of Fair Market Value of Restricted Gifts of Art	786
E. The IRS's Position Regarding the Valuation of Restricted Donations of Art.....	788
III. A Proposal to Limit the Value of Charitable Deductions on Overly Restricted Gifts	791
IV. The Effects of This Proposal on Different Aspects of the Law of Charitable Giving	794
A. Rule Against Restraints on Alienation and the Exception for Charitable Uses	794
B. The Possibility of Failure of the Initial Interest	796
C. The Effects of This Proposal on the Three Types of Federal Taxpayers	797
1. Income Tax	797
2. Estate Taxes	798
3. Gift Taxes	799

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V.	The Effects of Depressed Valuation	800
A.	The Donor's Choice to Remove the Restriction or Withdraw the Offered Donation	801
B.	Clarifying Donor Intent	802
1.	What Clear Donor Intent Would Mean for Museum Professionals	802
2.	The Effect of Clear Donor Intent on the Application of the <i>Cy Pres</i> Doctrine	804
3.	Restricted Gifts and Conflicting Duties	807
VI.	Conclusion.....	808

I. Introduction

Imagine the following hypothetical: In 1959, Ms. Burns bequeathed to the Springfield Museum of Modern Art her collection of European Secessionist art from the early 1900s. In 1959, Springfield was a growing city that provided ample funding for its various culture and arts venues. Since that time, the economy of Springfield has become increasingly depressed, forcing the city to withdraw almost all funding for its museums and libraries. In the meantime, the value of Ms. Burns' art has skyrocketed and is the centerpiece of the museum's collection. The museum's operating budget barely meets basic operating expenses, leaving no funds for the restoration needed for some of the more valuable Secessionist pieces. As a result, many of the earliest and most valuable pieces are kept in storage to prevent further deterioration. In an effort to focus its collection and increase its public visibility, the museum would like to sell the later Secessionist pieces and use the proceeds to restore the earlier ones. If the sale occurs, the museum will have the most unified collection of early Secessionist art in the United States. The problem is that Ms. Burns' donation expressly restricted the sale of any of the works. According to the gift instrument, the Springfield Museum must hold the works in perpetuity. This scenario illustrates the problems facing both small and large museums across the country. Although it would not completely resolve the problem, the Internal Revenue Service (IRS) should address the problem in this situation by using deduction valuation procedures at the time of the original donation to discourage restrictions on the alienability of donations to museums.

Most art museums¹ operate as either charitable trusts² or nonprofit corporations.³ With either organizational structure, the museum has a duty to provide a social benefit to the public at large or a reasonably large class thereof. This Note concerns only publicly supported tax-exempt art museums organized as either charitable trusts or nonprofit corporations. These museums have been determined by the IRS to be tax-exempt under I.R.C. § 501(c)(3)⁴ and have demonstrated that they receive a substantial part of their support from governmental units and the general public.⁵ Funding for these museums comes from private donations, grants, and limited revenue-producing activities.⁶ Further, the collections of these museums are largely dependent on donations.⁷

Like the hypothetical Springfield museum, many museums are rich in assets⁸ but struggle to meet basic financial needs for operational expenses.⁹ One way that museums deal with this problem is through deaccessioning¹⁰ either to acquire new assets or to meet operational expenses. Recent trends in the museum profession also lead museums to deaccession. Museums are generally becoming more focused in their collecting and are less likely to keep

1. An art museum is defined generally as "a permanent, not-for-profit institution, essentially educational and humanistic in purpose, that studies and cares for works of art and on some regular schedule exhibits and interprets them to the public." ASS'N OF ART MUSEUM DIR., PROFESSIONAL PRACTICES IN ART MUSEUMS 6 (2001).

2. See RESTATEMENT (SECOND) OF TRUSTS § 348 (1959) (defining charitable trust as a fiduciary duty subjecting the trustees to the equitable duty of maintaining the property for a charitable purpose).

3. See MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 5 (1998) (defining a nonprofit corporation or a charitable corporation as an organization established in a corporate form for the pursuit of a charitable purpose or purposes) [hereinafter MALARO, A LEGAL PRIMER]. Most museums are operated as nonprofit corporations. *Id.* at 4.

4. I.R.C. § 501(c)(3) (2000).

5. See MALARO, A LEGAL PRIMER, *supra* note 3, at 370 (describing the IRS requirements for publicly supported tax-exempt art museums).

6. See Marie C. Malaro, *Deaccessioning: The American Perspective*, 10 MUSEUM MGMT. & CURATORSHIP 273, 274 (1991) [hereinafter Malaro, *Deaccessioning*] (describing how museums in the United States get funding).

7. See *id.* (stating that it is estimated that over 90% of the objects in United States museums have been donated); see also MALARO, A LEGAL PRIMER, *supra* note 3, at 61 ("Without tax incentives and generous donations, museums could not flourish.").

8. See STEPHEN E. WEIL, A CABINET OF CURIOSITIES: INQUIRIES INTO MUSEUMS AND THEIR PROSPECTS 140 (1995) [hereinafter WEIL, A CABINET OF CURIOSITIES] (estimating the potential aggregate value of the collections of United States art museums).

9. See *id.* (noting that because museums are under pressure to fully expend their resources during each fiscal year, they operate near the edge of their available resources).

10. See Malaro, *Deaccessioning*, *supra* note 6, at 273 (defining deaccessioning as "the permanent removal of an object that was once accessioned into a museum's collection").

objects that are extraneous to their mission.¹¹ In addition, because of increased knowledge and heightened regard for the importance of proper storage and conservation combined with the cost of those activities,¹² museums are more likely to deaccession objects that are not clearly furthering the museum's mission.¹³ Two standards guide museum professionals in making deaccessioning decisions. First, the legal standard sets the floor by determining when deaccessioning is and is not allowed.¹⁴ Next, the professional ethics standard defines when deaccessioning should occur.¹⁵

Museums may encounter a number of difficulties in trying to deaccession a donated work of art. The legal standard for permissible deaccessioning is generally determined with reference to the method of acquisition.¹⁶ If the pieces were acquired by gift and if the donor imposed a restriction on the alienability of the gift, either by requiring that the museum keep or display the piece in perpetuity or affirmatively denying the museum the right to sell the piece, the museum has a duty to abide by the donor's wishes.¹⁷ Despite a contrary agreement with the donor, however, a court in equity can allow a museum to sell the object by reforming the gift instrument under the doctrine of *cy pres*.¹⁸ On the other hand, the court may refuse to allow the sale despite the judgment of the museum professionals.¹⁹

11. *Id.* at 276.

12. In 1988, the average annual cost of keeping an object in storage was estimated to be \$30 per square foot. STEPHEN E. WEIL MAKING MUSEUMS MATTER 141, 142 (2002).

13. Malaro, *Deaccessioning*, *supra* note 6, at 276.

14. *See infra* Part V.B.2 (discussing potential legal challenges to a museum's decision to deaccession a restricted gift of art).

15. *See* AMERICAN ASSOCIATION OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 8–9 (2000) ("Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections."); ASS'N OF ART MUSEUM DIR., *supra* note 1, at 11 ("The funds . . . received from the disposal of any deaccessioned work of art must be used only for the acquisition of works of art."); WEIL, A CABINET OF CURIOSITIES, *supra* note 8, at 139–43 (arguing that the use of deaccessioning proceeds to fund a museum's operating expenses is a self-defeating policy).

16. While acknowledging public controversies regarding deaccessioning decisions, Malaro states that she does not believe that there will be legislation banning deaccessioning. Malaro, *Deaccessioning*, *supra* note 6, at 276. She instead advocates careful adherence to professional codes of ethics among museums. *Id.* at 278–79.

17. *See infra* Part V.B.3 (discussing the fiduciary duties of museum trustees and directors).

18. *See infra* Part V.B.2 (discussing the use of the *cy pres* doctrine).

19. *See, e.g.*, Museum of Fine Arts v. Beland, 735 N.E.2d 1248, 1251 (Mass. 2000) (refusing to allow the museum to sell seventeen paintings, only three of which were exhibited, because of the donor's requirement that the paintings be permanently and inalienably given to

Even if the museum ultimately prevails under a *cy pres* decision, doing so requires considerable time and effort in pursuit of its professional goals. While acknowledging and appreciating the support of museum donors, it is also important to recognize the difficulties museums may encounter as a result of donations encumbered by restrictions on the museum's ability to deaccession. Because of these difficulties, such donations should be discouraged and unrestricted donations should be encouraged. One way of effecting this policy approach is through the tax system. The donations discussed in this Note are deductible under the federal income, gift, and estate tax regimes.²⁰ The IRS has taken the position that despite the fact that the museum may be bound by the inalienability terms of the gift instrument, it will allow the donor a full fair market value deduction for the piece.²¹ The general policy behind the allowance of a charitable deduction in these circumstances, however, is to encourage public support of charitable institutions.²² In light of that policy rationale, the IRS should base deduction valuations on what the museum receives and not the value the donor has given. Therefore, when a donor donates a piece of art to a museum with a restriction on the museum's ability to sell the art in the future the IRS should require the donor to depress the value of her charitable deduction. To the extent that the donor makes decisions with an eye toward tax savings, such a policy would provide a disincentive for these types of restrictions and encourage less restricted giving. On the other hand, should the donor go ahead with the restriction, and should the museum accept the gift,²³ the donor's resolve regarding the restrictions would have been tested, leaving less ambiguity in future situations that require the court²⁴ or the museum's trustees or directors²⁵ to conjure the donor's intent.

the museum).

20. See *infra* Part II (discussing the charitable deduction allowed by the three federal tax regimes).

21. See *infra* Part II.E (discussing the recent private letter rulings issued by the IRS with regard to charitable donations of art).

22. See *infra* Part V (discussing the policies supporting the deductibility of charitable gifts).

23. See generally Marie C. Malero, *Restricted Gifts and Museum Responsibilities*, 18 J. ARTS MGMT & L., Fall 1988, at 41 [hereinafter Malero, *Restricted Gifts*] (arguing that museums should not accept gifts with restrictions on alienability); Robert J. Vanni, *Deeds of Gift: Caressing the Hand That Feeds*, in LIBRARIES, MUSEUMS, AND ARCHIVES 1, 9 (Thomas A. Lipinski ed., 2002) (advising that museums be wary of accepting restricted gifts, stating "Perpetuity is a long time! Collection policy may change, buildings may be demolished, community use or expectations may change").

24. See *infra* Part V.B.2 (discussing the use of the *cy pres* doctrine).

25. See *infra* Part V.B.3 (discussing the fiduciary obligations of these officers with regard to upholding the terms of the gift).

Part II explores the legal requirements of charitable deductions of art under current tax law and discusses the IRS's interpretation of these requirements as failing to provide for or require a depressed fair market value for restricted gifts. Part III proposes a change in IRS policy in keeping with the purpose behind the charitable deduction. Part IV outlines the legal effects of the proposed change on the taxation of charitable giving. Finally, Part V addresses the benefits and drawbacks of the proposal.

II. The Legal Requirements of Charitable Deductions

A. The Threshold Requirement for Fee Simple Defeasible Interests

Charitable deductions for transfers of art to qualified museums²⁶ are generally allowed for income, gift, and estate taxes under I.R.C. §§ 170, 2522, and 2055, respectively.²⁷ An initial requirement, however, may affect the deductibility of restricted gifts and bequests of art to museums.²⁸ Fee simple defeasible gifts²⁹ are subject to special rules for charitable deductions under the Treasury Regulations for income, gift, and estate tax charitable deductions.³⁰ The language of the gift and estate tax regulations generally tracks the language of the income tax regulation as follows:

26. To qualify for a charitable deduction under income, gift, or estate tax laws, a transfer must be made to a qualified charitable organization as defined in I.R.C. §§ 170(c)(2)(B), 2055(a)(2), and 2522(a)(2) respectively. This Note covers only gifts made to museums meeting these qualifications.

27. See I.R.C. § 170 (providing for charitable deductions from income); *id.* § 2055 (providing for the deduction of charitable contributions from the value of the taxable estate); *id.* § 2522 (providing for the deduction of charitable contributions from taxable gifts).

28. The Treasury Regulations for income, gift, and estate taxes provide that, for gifts given with a condition subsequent, a charitable deduction is only allowed when the possibility of the failure of the first interest is so remote as to be negligible. See Treas. Reg. § 1.170A-1(e) (disallowing a charitable deduction unless the chance of the gift failing is negligible); Treas. Reg. § 20.2055-2(b) (disallowing a charitable deduction unless the chance of the gift failing is negligible); Treas. Reg. § 25.2522(c)-3(b)(1) (disallowing a charitable deduction unless the chance of the gift failing is negligible).

29. See RESTATEMENT (FIRST) OF PROP. § 16 (1936) (defining a fee simple defeasible as a fee simple estate that is "subject to a special limitation . . . a condition subsequent . . . an executory limitation . . . or a combination of such restrictions").

30. See Treas. Reg. § 1.170A-1(e) (providing deduction rules for gifts subject to a condition subsequent); Treas. Reg. § 20.2055-2(b) (providing deduction rules for gifts subject to a condition subsequent); Treas. Reg. § 25.2522(c)-3(b)(1) (providing deduction rules for gifts subject to a condition subsequent).

If an interest in property passes to, or is vested in, charity on the date of the gift and the interest would be defeated by a subsequent performance of some act or the happening of some event, the possibility of occurrence of which appears on the date of the gift to be so remote as to be negligible, the deduction is allowable.³¹

Two ambiguities arise regarding the construction of this regulation. The first is whether the threshold requirement applies equally to transfers in which in the event of a failure of the first interest the gift would revert to the grantor or the grantor's successors or another noncharitable party and transfers that provide for a gift-over to another charitable institution.³² The IRS has taken the position that this requirement applies only to the former, and donations with a gift-over to charity in the event of the failure are considered complete charitable donations.³³

Second, for transfers that could pass to a noncharitable party in the event of a failure of the first interest, the IRS must determine whether the failure of a particular transfer is so remote as to be negligible. In making determinations under this standard, the IRS has cited courts' interpretations of the standard.³⁴ Despite these general guidelines, the deductibility of any particular gift that provides for a gift-over to a noncharitable interest is dependent on an examination of the facts of a specific gift or bequest.³⁵ A detailed discussion of what types of restrictions would pass the "so remote as to be negligible" test is

31. Treas. Reg. § 1.170A-1(e). The language of the gift and estate tax regulations refer to an estate or interest rather than an interest and change the tenses of the verbs in the sentence. See Treas. Reg. §§ 20.2055-2(b) (restating the operative principles found in Treas. Reg. § 1.170A-1(e)), 25.2522(c)-3(b)(1) (restating the operative principles found in Treas. Reg. § 1.170A-1(e)). The estate tax regulation replaces date of the gift with at the time of the decedent's death in two instances. Treas. Reg. § 20.2055-2(b). The gift tax regulations omit "subsequent." Treas. Reg. § 25.222(c)-3.

32. The importance in the distinction turns on the determination of who is ultimately guaranteed to receive the gift. In the former instance, if the first interest fails, the gift will pass out of charity and to a private party.

33. See Priv. Ltr. Rul. 2002-23-014 (June 7, 2002) (finding that the requirements of Treas. Reg. § 25.2522(c)-3(b)(1) were satisfied because under no circumstances would the artwork pass to a noncharitable interest); Priv. Ltr. Rul. 91-27-047 (July 5, 1991) (finding that a restricted bequest was deductible because, at the time of the decedent's death, "there was no more than a remote, negligible possibility that the bequest might not be used for [charitable] purposes").

34. See Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993) (defining "so remote as to be negligible" as a "chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction") (citing *United States v. Dean*, 224 F.2d 26, 29 (1st Cir. 1955)).

35. See Rev. Rul. 2003-28, 2003-1 C.B. 594 (providing examples of factual scenarios in which the deduction would and would not be disallowed).

beyond the scope of this Note;³⁶ however, it is useful to consider examples of restricted gifts that the IRS has stated would and would not pass the test.

In a recent Revenue Ruling, the IRS provided an example of the type of contribution that would be disallowed because of a possible failure.³⁷ In this ruling, the IRS determined that a gift in which a donor gives a patent to a university so long as a specific professor remains employed at the university would not be deductible under I.R.C. § 170 because the possibility that the faculty member would cease to be employed by the university before the end of the patent period was not so remote as to be negligible.³⁸ In comparison, the IRS allowed a full fair market value deduction for gifts of art to a museum where the donor and the donor's children retained a possibility of reverter should the museum fail to comply with the gift conditions.³⁹ The conditions on that gift provided that the museum would be required to display the works continuously and that the donor and the donor's children would have final display control rights over all exhibitions of the work.⁴⁰ The IRS determined that because the donor's display control rights were subject to a good museum practice standard and because the instrument provided for arbitration in the event of a breach of the gift conditions, the possibility of failure was so remote as to be negligible, and it allowed the full fair market value deduction.⁴¹ The IRS does not provide a detailed analysis of the differences between the two fact patterns; however, a key distinction between the two situations is that in the first, the donee and the professor retain control over whether the gift will fail, while in the second the courts are specifically assigned the duty of arbitrating any potential failure.

B. Fair Market Value and Charitable Deductions

Assuming that the restrictions on the gift or bequest do not prevent the charitable deduction, the fair market value of the art on the date of the transfer determines the value of the transferred property.⁴² Fair market value is defined

36. In researching this Note, I have found no examples of proposed gifts to art museums in which the IRS disallowed the deduction because of the possibility of failure of the first interest.

37. Rev. Rul. 2003-28, 2003-1 C.B. 594.

38. *Id.*

39. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993).

40. *Id.*

41. *Id.*

42. See Treas. Reg. § 1.170A-1(c)(1) (stating that fair market value is used to determine the amount of charitable deduction for gifts of property). Treasury Regulation § 20.2055-1(a)

as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts."⁴³ The definition of fair market value provided in the regulations suggests that any restriction on future alienability should be considered in valuation.⁴⁴ As John Sare has pointed out, the requirement that the hypothetical buyer and seller in the exchange have "reasonable knowledge of the relevant facts" supports the position that restricted gifts should be given a lower value than unrestricted gifts.⁴⁵ In the open market, the fact that the Springfield museum could not sell any of Ms. Burns' donations would affect the price that the museum would pay for the pieces. Especially given the current deaccessioning and focused collecting trends in the museum profession,⁴⁶ any restriction on the alienability of a donated piece affects the value of that piece for the museum.

C. Substantiation and Appraisal Requirements

The existing substantiation requirements for noncash charitable contributions of property also suggest that the donor should consider restrictions

states that a deduction is allowable under I.R.C. § 2055 for the value of the property included in the decedent's estate that passes to qualified charities. Treas. Reg. § 20.2055-1(a) (as amended in 1990). The value of property in the decedent's estate is determined by the fair market value at the time of the decedent's death. Treas. Reg. § 20.2031-1(b) (as amended in 1965). The IRS takes the position that the amount of such a deduction from the decedent's estate is also determined by the fair market value of the property. Priv. Ltr. Rul. 2004-18-002 (Apr. 30, 2004). Similarly, Treasury Regulation § 25.2512-1 requires that fair market value be used to determine the value of any gift passing from the donor. Treas. Reg. § 25.2512-1 (as amended in 1992). From that gift tax, I.R.C. § 2522 allows a deduction for the amount of gifts made to charity. I.R.C. § 2522 (2000). The IRS takes the position that the gift tax deduction is likewise determined by the fair market value of the gift passing from the donor to charity. See Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993) (allowing a full fair market value deduction because donor's retained rights were of no value).

43. Treas. Reg. §§ 1.170A-1(c)(2), 20.2031-1(b), and 25.2512-1.

44. In researching this note, I have not found any situation in which I.R.C. § 2703 has been applied to charitable deductions. I.R.C. § 2703 (2000). This provision states that for purposes of estate and gift tax valuation, any restrictions on the power of alienation should be ignored. *Id.* § 2703(a)(2). The provision is applied most often to the division of a closely held business among family members. See JOHN BOGDANSKI, FEDERAL TAX VALUATION ¶ 6.04[2][a] (1996) (discussing the application of § 2703).

45. John Sare, *Art for Whose Sake? An Analysis of Restricted Gifts to Museums*, 13 COLUM.-VLA J.L. & ARTS 377, 390-91 (1989) (quoting Treas. Reg. 1.170A-1(c)); see also *id.* (arguing that the restrictions placed on a gift should be considered as relevant facts when determining fair market value).

46. See *supra* notes 10-16 and accompanying text (discussing museum deaccessioning).

on alienability in the valuation of donated property. If the claimed value of the contribution is greater than \$500, for income tax purposes,⁴⁷ the donor must file Form 8283.⁴⁸ The form requires that the donor attach a statement of any conditions attached to the contributions.⁴⁹ The form specifies that the donor must divulge permanent or temporary restriction on the donee's right to use or dispose of the donated property.⁵⁰ The IRS further requires that any donation for which the taxpayer claims a deduction greater than \$5,000 must be supported by a qualified appraisal.⁵¹ The appraisal must include "all the facts on which to base an intelligent judgment of the value of the property."⁵² The instructions go on to specify that a qualified appraisal must include the terms of the agreement between the buyer and the seller that relate to "the use, sale, or other disposition of the donated property."⁵³ The IRS is also explicit that it does not accept appraisals without question and that the taxpayer is responsible for supporting the fair market value of the donated property.⁵⁴ Given the attention paid to the terms of any donation and especially the particular requirement that the donor divulge any restrictions on the donee's rights of use or alienability, the IRS substantiation procedures implicitly suggest that such limitations are to be taken into account in determining the deductible amount.

D. Tax Court Interpretations of Fair Market Value of Restricted Gifts of Art

The Tax Court has required the reduction in fair market value of donated art because of restrictions on the donee's right to sell in two cases. In

47. Currently there is no equivalent requirement for estate and gift tax purposes. JOSEPH P. TOCE, JR. ET AL., *TAX ECONOMICS OF CHARITABLE GIVING* ¶ 9.02 (2003/04). For gift and estate tax purposes, the donor must submit such information as the IRS requests. *Id.* (citing Treas. Reg. §§ 20.2055-1(c) and 25.2522(a)-1(c)).

48. I.R.S. Form 8283 (rev. Oct. 1998); see I.R.S. Instructions for Form 8383, at 1 (rev. Oct. 1998) (detailing who must file Form 8283).

49. See I.R.S. Form 8283, Part II, line 3 (requiring donor to attach a statement of conditions).

50. See I.R.S. Form 8283, Part II, line 3(a) (requiring donor to disclose restrictions on the donee's right to use or dispose of the property).

51. I.R.S. Publ. 561, at 8 (rev. Feb. 2000). IRS Publications are meant to provide assistance to taxpayers in preparing tax returns. See LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* 812 (2d ed. 2002) (detailing the authority of various types of IRS publications). The IRS is not bound by statements made in its Publications. *Id.*

52. I.R.S. Publ. 561, at 8 (rev. Feb. 2000).

53. *Id.* at 9.

54. *Id.* at 10.

Silverman v. Commissioner,⁵⁵ the taxpayer had—over the course of several years—given gifts of 148 paintings to various museums.⁵⁶ With each gift, the donee accepted a condition that it would agree not to dispose of the painting for a three-year period.⁵⁷ The IRS assessed a deficiency under I.R.C. § 170 based on the amounts of charitable deductions the taxpayer claimed for the gifts.⁵⁸ The court allowed the deduction but required that the fair market value reflect, *inter alia*, the restriction placed on alienability.⁵⁹ The court noted that "property otherwise intrinsically more valuable which is encumbered by some restriction or condition limiting its marketability must be valued in light of such limitation."⁶⁰ The court agreed that the restriction at issue was not as great as a like restriction on "securities or other property of rapidly fluctuating value" but found that the effect of the restriction was nonetheless "more than of negligible significance."⁶¹

In *Murphy v. Commissioner*,⁶² the taxpayer donated a large rock sculpture to a Texas college and took a \$500,000 income tax deduction.⁶³ As a restriction on the donation, the college agreed not to sell or otherwise dispose of the sculpture within two years of the donation.⁶⁴ Based primarily on a lack of confidence in the taxpayer's appraisal,⁶⁵ the tax court found that the taxpayer was only eligible for a \$30,000 deduction.⁶⁶ In so finding, the court specifically stated that it was taking into account the two-year restriction on alienability.⁶⁷

Both *Silverman* and *Murphy* are Tax Court Memorandum Opinions with no precedential value.⁶⁸ Therefore, neither has been cited in primary cases or in IRS opinion letters or memoranda.⁶⁹ Memorandum opinions are nonbinding,

55. *Silverman v. Comm'r*, 27 T.C.M. 1066 (1968).

56. *Id.* at 1072.

57. *Id.* at 1075.

58. *Id.* at 1073

59. *Id.* at 1075.

60. *Id.* (quoting *Cooley v. Comm'r*, 33 T.C. 223, 225 (1959), *aff'd*, 283 F.2d 945 (2d Cir. 1960)).

61. *Id.*

62. *Murphy v. Comm'r*, 61 T.C.M. 2935 (1991), *rev'd on other grounds*, 8 F.3d 28 (9th Cir. 1993).

63. *Id.* at 2936.

64. *Id.*

65. *See id.* at 2940 (finding the IRS's appraisal more credible than the taxpayers's).

66. *Id.*

67. *Id.*

68. *See LEDERMAN & TAZZA, supra* note 51, at 280 (2d ed. 2002) (stating that Memorandum Opinions have no precedential value).

69. I have Shepardized both cases on Westlaw. Neither has been cited in primary sources

however, because they are issued by tax court judges only in cases that apply clear law to new facts.⁷⁰ This restriction in the use of memorandum opinions would presumably allow the inference that the devaluation of gifts with restrictions on alienation is a settled matter of law. Despite this inference, however, the IRS seems to consider the matter with regard to gifts of art settled as to the fact that such gifts should not be devalued.

E. The IRS's Position Regarding the Valuation of Restricted Donations of Art

A canvas of IRS private letter rulings regarding restricted gifts of art to museums in the past fifteen years⁷¹ demonstrates that the IRS is unwilling to reduce the fair market value of a charitable donation of art to a museum because of restrictions placed on the gift. Two of the rulings involved very similar transfers of art to a museum in which the donors stipulated that at least part of the collection must be displayed continuously and the donor and later the donor's children would have display control rights over the installation of exhibits of the work.⁷² The display control rights retained by the donor were limited by a "good museum practice standard" to be arbitrated by an independent professional museum curator in the event of a conflict.⁷³ The donor and the donor's children retained the right to demand compliance with any of the terms of the gift.⁷⁴ If after a demand, the museum still failed to comply, the museum would automatically lose its interest in the collection.⁷⁵ In the first ruling, the possession would revert to the donor or donor's children.⁷⁶ In the second ruling, the ownership rights would be transferred to another charitable organization.⁷⁷

for the proposition that a restriction on alienation should depress the fair market value of a donated gift.

70. LEDERMAN & TAZZA, *supra* note 51, at 280 (2d ed. 2002).

71. Private letter rulings have no precedential value and are only binding as to the taxpayer to whom they are addressed. See I.R.C. § 6110 (k)(3) (2000) (disclaiming any precedential value of written determinations). However, they are instructive in determining the IRS's position on ambiguous tax matters. This Note presents the four Private Letter Rulings issued in the past fifteen years that deal with the valuation of donations of art to charitable organizations.

72. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993); Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

73. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993); Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

74. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993); Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

75. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993); Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

76. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993).

77. Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

In the first ruling, in determining first that the donation was deductible under the income, gift, and estate tax provisions, the IRS found that the reversion rights and the display control rights retained by the donor and donor's children were "largely fiduciary powers to be exercised in furtherance of the charitable purpose of the Donee."⁷⁸ As such, the IRS determined that the donor's display control rights and reversion rights had no value for income, gift, or estate tax purposes.⁷⁹ Therefore, the IRS found that these retained interests would not reduce the fair market value of the collection, and the deductions would be allowed for the full fair market value.⁸⁰

In the second ruling, the IRS likewise determined that the display control rights were not substantial.⁸¹ The IRS noted that because the donor did not retain any reversionary interest, the transfer was deductible.⁸² In determining the value of potential income, gift, and estate tax charitable deductions, the IRS noted that because the rights retained by the grantor were not substantial, valuation should be based on the full fair market value of the collection.⁸³ From these two rulings, it appears that the IRS has taken the position that if the grantor's retained interest is not substantial, it should not affect the fair market value of the item(s) transferred.

A third ruling involved the bequest of a collection of paintings to a museum.⁸⁴ The terms of the agreement required that the museum exhibit the works permanently and continuously in a coherent and integrated manner.⁸⁵ The agreement provided for removal of the pieces for conservation, restoration, and loan, as well as for the possible deaccessioning of the pieces as long as the proceeds were used for acquisition of similar works of art.⁸⁶ Any works of art acquired from deaccessions would also be subject to the terms of the bequest.⁸⁷

It is important to keep in mind that this proposed donation is distinguishable from the rulings discussed above⁸⁸ because the terms of this gift allowed the museum to deaccession the donated art under certain conditions.⁸⁹

78. Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993).

79. *Id.*

80. *Id.*

81. Priv. Ltr. Rul. 2002-23-014 (June 7, 2002).

82. *Id.*

83. *Id.*

84. Priv. Ltr. Rul. 2002-02-032 (Jan. 11, 2002).

85. *Id.*

86. *Id.*

87. *Id.*

88. *See supra* notes 77-83 and accompanying text (discussing the first two rulings).

89. Priv. Ltr. Rul. 2002-02-032 (Jan. 11, 2002).

Despite this allowance, this donation should be considered along with other donations that absolutely forbid deaccessioning because of the limits placed on the museum's professional decisionmaking power regarding deaccessioning. The taxpayer's estate retained no reversionary interest.⁹⁰ The instrument provided that if the museum accepted the gift, it would agree to submit to the jurisdiction of a court for purposes of any suit brought by the taxpayer's executors for injunction or specific performance of the provisions of the agreement.⁹¹ The IRS determined that the estate tax deduction would equal the full fair market value of the taxpayer's interest in the art includible in the taxpayer's gross estate.⁹² In making its determination, the IRS noted that after the museum accepts the bequest, it cannot be divested of ownership of the collection.⁹³ The IRS also noted that the agreement provided that the museum could deaccession and loan the works in the collection subject to certain conditions.⁹⁴

In the fourth ruling, the IRS again determined that the charitable deduction allowable for gift and estate tax purposes would be equal to the full fair market value without regard to the numerous restrictions placed on the bequest.⁹⁵ The transfer at issue in this letter involved shared responsibilities between a foundation and a museum, both of which were qualified charitable organizations.⁹⁶ The museum was to receive a fee simple interest in the collection subject to a condition subsequent.⁹⁷ The display of the collection was to be split between the museum and the foundation, which would take over control of the donor's gallery after the donor's death.⁹⁸ The agreement required further that a minimum number of works from the collection would be permanently displayed at the museum.⁹⁹ The museum retained full responsibility for insuring, conserving, and providing curatorial services for all art in the collection, whether it was to be housed at the museum or at the foundation's gallery.¹⁰⁰ The agreement further provided that the museum could not deaccession by sale, trade, or transfer any of the works in the collection, and

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Priv. Ltr. Rul. 2004-18-002 (Apr. 30, 2004).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

if it did so, the ownership of that work would automatically vest in the foundation.¹⁰¹ Further, if the museum failed to meet any of the conditions of the bequest, the foundation retained a power of termination¹⁰² over the bequest.¹⁰³ If the foundation terminated the museum's interest, the instrument provided that the foundation would take full ownership of the collection.¹⁰⁴ Noting that under no circumstances would the interest in the collection "revert to the Taxpayers or inure to the benefit of other private individuals," the IRS determined that the full fair market value of the collection should be allowed as a charitable deduction.¹⁰⁵

These four private letter rulings show the IRS's consistent application of its determination that limitations on alienability should not depress the fair market value of a donated piece of art. The IRS seems to ignore that such restrictions can often harm the museum in the future. It is likely that the IRS allows the full deduction as a way of encouraging charitable giving.¹⁰⁶ This practice, however, ignores the fact that charitable giving is encouraged only as a way of supporting charitable institutions.¹⁰⁷

III. A Proposal to Limit the Value of Charitable Deductions on Overly Restricted Gifts

The premise underlying the encouragement of charitable giving is that the government wants to support certain types of social institutions.¹⁰⁸ Because of the unique legal and financial circumstances of museums,¹⁰⁹ however, the

101. *Id.*

102. See RESTATEMENT (FIRST) OF PROP. § 24 (1936) (defining a "power of termination" as "the option to terminate an estate upon breach of a condition subsequent").

103. Priv. Ltr. Rul. 2004-18-002 (Apr. 30, 2004).

104. *Id.*

105. *Id.*

106. In researching this Note, I have not been able to find any IRS statement explaining why it does not depress the value of the deduction in these situations.

107. See *infra* notes 112-17 and accompanying text (discussing the policy behind the tax-exempt organization).

108. This theoretical foundation for the tax-exempt status of certain social institutions is referred to as the subsidy rationale. See JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 22-27 (1995) (discussing the subsidy rationale to explain charitable exemptions in modern times); MALARO, *A LEGAL PRIMER*, *supra* note 3, at 34-41 (discussing oversight by taxing authorities and the modern theory of tax exemption as federal financial assistance).

109. See *infra* Parts V.B.2-3 (discussing the *cypres* doctrine and the conflicting duties of museum trustees with regard to restricted gifts).

burden of restrictions on some donations can outweigh the benefits.¹¹⁰ Therefore, restrictions on alienability should be discouraged by taking them into account in determining an item's fair market value for charitable deduction purposes.¹¹¹ Instead, the fair market value of the art should be depressed to account for the limitations placed on the donee's rights with regard to the disposition of the art.

Most private art museums are organized as charitable organizations under I.R.C. § 501(c)(3).¹¹² Museums are specifically listed in the regulations of that section as an example of charitable organizations that serve an educational function.¹¹³ The Court interpreted the legislative purpose of I.R.C. §§ 501(c)(3) and 170¹¹⁴ in *Bob Jones University v. United States*.¹¹⁵ It found that Congress intended "to give tax benefits to organizations" that serve "charitable purposes" through the enactment of

110. For specific instances, see *infra* Part V.B.1 (examining what clear donor intent would mean for museum professionals).

111. The IRS already reduces the allowable deduction because of restrictions in other circumstances. See, e.g., Rev. Rul. 85-99, 1985-2 C.B. 83 (determining that the amount of the taxpayer's deduction for a gift of real property with a restrictive covenant on its use to be the fair market value of the property in light of the restrictions placed on its use). A distinction can be made in the case of real property because of the enforceability of restrictive covenants. The enforceability of restrictions of gifts of personal property and the likelihood of any enforcement are less certain. See *infra* Part V.B.2 (discussing the *cy pres* doctrine).

112. I.R.C. § 501(c)(3) (2000). See ROBERT C. LIND ET AL., ART & MUSEUM LAW: CASES AND MATERIALS 471-72 (2002) (discussing the process of application for tax exemption for art museums); MARILYN E. PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL §§ 8:01-8:14, at 291-306 (2d ed. 2001) (discussing the process and requirements for application for 501(c)(3) status).

113. See Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) ex. 4 (listing museums among educational organizations).

114. I.R.C. §§ 170, 501(c)(3) (2000).

115. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983). In *Bob Jones University*, the Supreme Court considered the validity of the IRS's decision to deny tax exempt status to two private religious schools that had racially discriminatory policies. *Id.* at 579-84. The Court looked beyond the specific words of I.R.C. § 501(c)(3), which exempts religious institutions, and examined the statute in light of the framework of the Internal Revenue Code and the legislative purpose behind the rule. *Id.* at 586-92. The Court determined, based on the scheme of the Internal Revenue Code and the history of exemptions for charitable organizations, that the purposes of the exemption in I.R.C. § 501(c)(3) and the charitable deductions incident to the exemptions were to benefit organizations serving charitable purposes. *Id.* at 587. The Court noted that throughout the history of exempting charitable organizations from taxation, only charities that benefit the public and act in conformity with public policies are given exemptions. *Id.* at 588-91. The Court found therefore that because both of these institutions had racial discrimination policies that were contrary to public policy, the IRS properly denied them tax-exempt status. *Id.* at 605.

I.R.C. §§ 170 and 501(c)(3).¹¹⁶ Given that the primary purpose of these provisions is to benefit charity, any benefit to the taxpayer is secondary and merely for the purpose of providing incentive to the taxpayer to assist with the greater goal of benefiting charities.¹¹⁷ In keeping with the purpose of these provisions, the IRS should value the amount of benefit to the museum for purposes of determining the deduction. However, in the Private Letter Rulings discussed above,¹¹⁸ the IRS focused on what the donor had given and not what the donee had received.¹¹⁹ This Note proposes that the IRS shift the focus and value the gift based on what the art museum receives by determining what a willing buyer having full knowledge of all restrictions would pay for the gift.

Returning to our hypothetical, if such a policy had been in place in 1959 when Ms. Burns donated her art to the Springfield museum, she may have removed the restrictions. If so, the museum today could deaccession the more peripheral pieces and have money to restore and properly conserve a core collection. If Ms. Burns was still reluctant to remove the restrictions, the museum would have more leverage to negotiate the terms of the gift agreement with her, possibly suggesting precatory language regarding alienation. If Ms. Burns insisted on the restrictions, the Springfield museum may have chosen not to accept the donation. It is unlikely that this would have happened in 1959, but it is much more likely to happen today as museum collection policies have become more focused and museums are increasingly aware of the future dangers of restricted gifts.

116. *Id.* at 587–88.

117. For an interesting discussion of the evolution of the modern subsidy rationale for charitable exemptions and the need for further consideration of the extent of the exempt sector, see generally COLOMBO & HALL, *supra* note 108.

118. See *supra* Part II.E (outlining the IRS's recent positions regarding restricted gifts of art to museums).

119. See Priv. Ltr. Rul. 93-03-007 (Jan. 22, 1993) (finding that because the donor's retained rights had no value for tax purposes, the charitable deduction would be equal to the full fair market value without regard to the restrictions on the gift); Priv. Ltr. Rul. 2002-23-014 (June 7, 2002) (finding that the fair market value should not be reduced because the donor's retained rights were insubstantial); Priv. Ltr. Rul. 2004-18-002 (Apr. 30, 2004) (determining that the taxpayer was entitled to a full fair market value deduction because the collection would not revert to the donor under any circumstances). *But see* Priv. Ltr. Rul. 2002-02-032 (Jan. 11, 2002) (determining that the taxpayer was entitled to a full fair market value deduction because the museum could not be divested of its ownership of the item).

IV. *The Effects of This Proposal on Different Aspects of the Law of Charitable Giving*

A. *Rule Against Restraints on Alienation and the Exception for Charitable Uses*

The common law rule against restraints on alienation normally would disallow a donation of art that restrains the museum's ability to sell in perpetuity; however, charities are excepted from this rule.¹²⁰ The common law rule is based on a policy against keeping property out of commerce and obstructing business affairs.¹²¹ Several reasons are given for the exception for charities. The first reason is to acknowledge that under equitable principles of common law, the prohibition on transfer may have a limited effect.¹²² In the case of charitable trusts and nonprofit organizations with gifts that expressly restrict the charity's ability to sell the art, the doctrine of *cy pres* allows the court to release the restriction and give the charity the power of sale when the sale is found to be for the public benefit generally contemplated by the donor.¹²³ The *cy pres* doctrine has proven effective for museums seeking to reform donations in many instances.¹²⁴ One could argue that the same uncertainty engendered by the possible use of the *cy pres* doctrine in the future should give the donor a right to receive a full fair market deduction at the time of the donation: If there is a substantial likelihood that a court will modify or abandon the donor's restrictions in the future, why should a donor have to pay for those restrictions? This argument, however, focuses on what the donor has given. As this Note argues, because the ultimate purpose of the charitable

120. See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 349 (Rev. 2d ed. 1992) (discussing the court's equitable power under the *cy pres* doctrine and the rule that charitable trusts are allowed to be perpetual as reasons for the exception); and RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 (2) (1983) (stating that restraints on alienation of donated property may be valid if the policies favoring freedom of alienation do not apply). See also RESTATEMENT (FIRST) OF PROP. § 398 cmt. a (1944) (stating that a perpetual charitable trust is valid because the desirability of encouraging gifts to charity outweighs other factors that normally justify restrictions on the duration of trusts).

121. See BOGERT & BOGERT, *supra* note 120, § 349 (discussing these policy implications with regard to the exception for charities).

122. See *id.* (stating that because a court of equity retains the power to require the sale against the donor's wishes, the prohibition of transfer is limited).

123. See *id.* § 392 (stating that courts have authorized the sale of trust property in spite of express restrictions on alienation in numerous cases).

124. See *infra* notes 185–98 and accompanying text (discussing the effect of clear donor intent on the court's application of the *cy pres* doctrine).

deduction is to benefit the museum, valuation must focus on what the museum receives. Even if a court in equity were to remove the restriction in the future, it likely would not do so without considerable expense to the museum and it would strive to find a balance as close as possible to the donor's originally expressed intent.¹²⁵ Therefore, the general exception from the rule against restraints on alienation should not operate to give the donor a full deduction based on the argument that the restriction may be modified in the future.

The second reason given for the exception for charities is that the law allows perpetuity in charitable trusts, while it forbids it in most other cases.¹²⁶ The rationale for this larger exception has been described as "an implicit quid pro quo."¹²⁷ The donor receives the exceptional right to control the use and disposition of the item in perpetuity in exchange for allowing her property to pass from the private to the public arena.¹²⁸ Any effect of this rationale on the valuation of the charitable deduction under this proposal is secondary. Concomitant with the supposed benefits to the donor and the public is a limitation on the donee. This limitation diminishes the value of what the museum receives, and the donor's deduction should reflect that diminution.

There is one narrow exception in which the traditional rule against restraints on alienation applies to donations to charity: Donated gifts with a gift-over to a noncharitable entity, other than the donor, are not excepted from the rule against perpetuities.¹²⁹ In these situations, the rule voids the gift-over and the first interest retains the full right.¹³⁰ With regard to the tax valuation in light of the applicable rule against perpetuities in this instance, the argument for a depressed valuation in these circumstances would be the same as above where the possibility of failure analysis is not required, and the valuation is based on the fair market value of the restricted gift that the museum receives.¹³¹

125. See Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1115 (1993) (noting that the court's power under *cy pres* is "closely circumscribed").

126. See BOGERT & BOGERT, *supra* note 120, §349 (stating that the allowance of perpetuity necessarily requires some degree of restraint on alienability); see also RESTATEMENT (FIRST) OF PROP. § 398 cmt. a (1944) (stating that a perpetual charitable trust is valid because the desirability of encouraging gifts to charity outweighs other factors that normally justify restrictions on the duration of trusts).

127. Atkinson, *supra* note 125, at 1114.

128. See *id.* at 1114–15 (noting the balance between public benefit and perpetual donor control).

129. See BOGERT & BOGERT, *supra* note 120, § 347 (discussing the application of the rule against perpetuities on charitable donations).

130. *Id.* (discussing the effects of the application of the rule against perpetuities). Bogert notes that jurisdictions differ with regard to the application of this exception to the exception. See *id.* (noting different state cases in the footnotes).

131. See *supra* notes 137–39 and accompanying text (discussing valuation where a

B. *The Possibility of Failure of the Initial Interest*

As noted above,¹³² certain fee simple defeasible interests are subject to a threshold requirement for deductibility. If the gift-over is to a noncharitable party, the charitable deduction will be allowed only if the possibility of failure of the initial interest is so remote as to be negligible.¹³³ Because the IRS has determined that the possibility of failure in these instances is negligible, such an interest should not be valued for tax purposes. Instead, the IRS should focus solely on the reduced value of the interest given to charity.¹³⁴

In circumstances that do not require the threshold analysis of the possibility of failure, the valuation of deductions would be more complicated but should still be based on the value of what the museum receives rather than what the donor gives. One circumstance in which the possibility of failure analysis is not required occurs when another charity would take in the case of the failure of a lead interest.¹³⁵ In such circumstances, the IRS should determine the value of the deduction based on the aggregate value of what the charities receive. The aggregate value of the fragmented rights in the donated piece of art should be less than the full fair market value of an unrestricted interest in the art.¹³⁶ The depression in value is based on the perceptions of the hypothetical buyer and seller who have full knowledge of the relevant facts. Imagining two hypothetical buyers, one each for the first and

possibility of failure analysis is not required).

132. *See supra* Part II.A (discussing the threshold requirement for fee simple defeasible interests).

133. *See supra* note 31 and accompanying text (describing the Treasury Regulation requirements regarding the deductibility of restricted gifts); *Comm'r v. Estate of Sternberger*, 348 U.S. 187, 199 (1955) (finding that the taxpayer's bequest to charity contingent on the taxpayer's daughter dying without issue was not deductible because there was "no assurance that charity [would] receive the bequest of some determinable part of it"). The IRS has interpreted this possibility of failure requirement to apply only to transfers that ultimately would pass out of charity generally in the event of failure. *See supra* note 33 (discussing the IRS's application of the regulations to gifts that were guaranteed to go to a charity).

134. *But see* Tech. Adv. Mem. 94-43-004 (Jan. 7, 1994) (stating that the deduction for a restricted charitable donation with a possibility of reverter was allowable because the possibility of failure of the gift was so remote as to be negligible but the deduction must be reduced by the value of any possibility of reversion).

135. *See supra* note 33 (discussing the IRS's application of the regulations to gifts that were guaranteed to go to charity).

136. I have in mind a scheme somewhat analogous to the discounts for fractional interests allowed for donative transfers. *See Estate of Bonner v. United States*, 84 F.3d 196, 197-98 (5th Cir. 1996) (allowing a fractional interest discount in the decedent's estate tax for a boat in which the decedent owned a 50% interest); *see also* Bogdanski, *supra* note 44, ¶ 5.01[2][b] (stating that the reasons for the allowed discount include the possibility of an irreconcilable conflict or dispute between the joint tenants and the leerness of a hypothetical buyer to enter into such an arrangement).

contingent interest, the sum of the values that the buyers would pay would not equal the full fair market value of the art. The sum would be reduced because each knowledgeable buyer in turn would require a reduction in price in light of the relevant restriction (or the ultimate possibility of loss of ownership) or contingency.

The possibility of failure analysis is also not required when the taxpayer restricts the alienability of the gift but fails to provide for a contingency in the event of a violation of those restrictions or otherwise ensures that the museum will not be divested of its ownership of the donated piece.¹³⁷ When such gifts are made, the focus is not on the contingency of failure. The museum, however, is still obligated to comply with the donor's intentions regarding the restriction.¹³⁸ Such compliance can be costly for the museum. In certain circumstances, the restriction may even compromise the art.¹³⁹ Because of these potential costs to the museum,¹⁴⁰ the fair market value should also be reduced in these circumstances.

C. The Effects of This Proposal on the Three Types of Federal Taxpayers

1. Income Tax

The deduction allowed by I.R.C. § 170 is an itemized deduction not subject to the two-percent floor limitation on miscellaneous itemized

137. For example, in a recent private letter ruling, the taxpayer donated a collection of art to a museum on the condition that the collection would be permanently continuously displayed. Priv. Ltr. Rul. 2002-02-032 (Jan. 11, 2003). The gift agreement, however, contained a provision allowing the museum to deaccession the works under certain circumstances. *Id.* The agreement also required that the museum submit itself to the jurisdiction of a court with the power to direct specific performance or injunctive relief against the museum in the event of a breach. *Id.* The agreement provided expressly that no provision or condition of the agreement could divest the museum of its ownership of the collection. *Id.*

138. See RESTATEMENT (SECOND) OF TRUSTS § 380 cmt. d (1959) (stating that the trustee's power to sell is limited if the terms of the trust implicitly or explicitly forbid sale); see also *id.* § 401 cmt. b (1959) (stating that where the donor fails to provide specific conditions in the donation instrument but restricts the donee's power over the gift, the restrictions do not have the power of a condition, whereby the donee's failure to abide by the restrictions would cause failure of the gift and reversion to the donor; however, the donees may be compelled to abide by the restricted terms of the gift).

139. For example, in the terms of his gift to Harvard University, Mark Rothko required that five of his large paintings be displayed together in a certain configuration. John T. Bethell, *Damaged Goods*, HARV. MAG., Jul.–Aug. 1988, at 25, 27. It was not until after Rothko's death that Harvard realized the extent of the light damage that had been done to the paintings. *Id.* at 30. Despite the restriction that the paintings should never be moved without permission of the artist or his representative, Harvard removed the paintings to dark storage. *Id.* at 30–31.

140. See *supra* note 12 (stating the estimated cost of museum storage).

deductions of I.R.C. § 67.¹⁴¹ The deduction is subject to a limitation for higher income individuals based on adjusted gross income.¹⁴² The allowance of yearly deductions for capital gain property is capped at 30% of the taxpayer's contribution base for the year.¹⁴³ The Code provides for a limited carry-over of excess contributions for the following five years.¹⁴⁴ Any such deduction is only allowed "if verified under regulations prescribed by the Secretary."¹⁴⁵

The value of the allowable deduction to any given taxpayer primarily depends on the taxpayer's income tax bracket. As of 2004, the maximum tax rate was 36.9% and applied to taxpayer's with taxable incomes of over \$250,000.¹⁴⁶ Taxpayers in the highest income bracket receive the greatest gain from charitable deductions because such a taxpayer's after-tax cost of the donation is reduced by 36.9%.¹⁴⁷ The 36.9% reduction represents foregone revenue by the federal government and has been referred to as an indirect federal subsidy of the recipient charity.¹⁴⁸ A reduction in the fair market value of a charitable contribution would represent a loss to the taxpayer at the taxpayer's income tax rate because the amount of the reduction would again become part of the taxpayer's taxable income.

2. Estate Taxes

The potential consequences of a reduction in fair market value for those required to pay estate tax¹⁴⁹ may be more severe because of the higher tax rate.

141. See I.R.C. § 67(b)(4) (2000) (excluding I.R.C. § 170 deductions from its definition of miscellaneous itemized deductions); see also *id.* § 67(a) (limiting miscellaneous itemized deductions to the extent to which they exceed 2% of the taxpayer's aggregate gross income).

142. See I.R.C. § 68(a) (2000) (reducing the deductible amount for individuals whose income exceeds the applicable amount). The applicable amount for taxable years beginning in 2005 is \$145,950 or \$72,975 for married individuals filing separately. Rev. Proc. 2004-71, 2004-50 I.R.B. 970.

143. See I.R.C. § 170(b)(1)(C)(i) (capping contributions of capital gain property). Contribution base is defined as the taxpayer's "adjusted gross income . . . computed without regard to any net operating loss carryback." Treas. Reg. § 1.170A-8(e) (as amended in 1972).

144. See I.R.C. § 170(b)(1)(C)(ii) (2000) (providing carryover of basis for five years).

145. I.R.C. § 170(a)(1) (2000).

146. I.R.C. §§ 1(a)-(c) (2000).

147. See WEIL, A CABINET OF CURIOSITIES, *supra* note 8, at 170 (illustrating the after-cost of charitable contributions by taxpayers paying different rates).

148. See *id.* (referring to the taxpayer's tax savings as an indirect federal subsidy). For more on the subsidy rationale for tax-exempt organizations, see *supra* Part III.

149. It is important to keep in mind that as of 2005 only estates above \$1,500,000 are subject to estate taxes. I.R.C. § 2010(c) (2000).

I.R.C. § 2033 requires that the decedent's estate include the value of any property in which the decedent had an interest at the time of her death.¹⁵⁰ If the decedent provided for the donation of art to a charitable organization in her will under I.R.C. § 2055, the value of that donation would be deducted from the decedent's estate.¹⁵¹ If, because of the restrictions placed on the bequest, the value of the decedent's interest in a donated piece was greater than the fair market value of the donation, the difference would be included in the decedent's gross estate. Depending on the size of the decedent's estate, the tax cost of that inclusion could be substantial.¹⁵²

3. Gift Taxes

The effect of a reduction in the fair market value of a deduction based on what the museum receives would be similar for gift taxpayers. Currently, the charitable deduction allowed by I.R.C. § 2522¹⁵³ offsets the gift tax imposed by I.R.C. § 2501¹⁵⁴ in almost all circumstances. Under current requirements, the regulations specify that the tax is imposed on the fair market value of the property passing from the donor not on the property received by the donee.¹⁵⁵ The current regulations, however, do not define the method by which to value the deduction. If, as this Note proposes, the IRS were to value the deduction based on what the museum receives and not what the donor gives, most restricted gift situations would result in a gift tax to the donor for the difference in the two values. If the donor relinquishes all rights to the gift in that she retains no reversionary interest but restricts the museum's right to dispose of

150. See I.R.C. § 2033 (2000) (defining the property to be included in the decedent's gross estate).

151. See I.R.C. § 2055 (2000) (deducting charitable contributions from the value of the taxable estate).

152. As of 2005, the highest marginal estate tax rate is 47%. I.R.C. § 2001(c)(2). However, it is important to remember that The Economic Growth and Tax Relief Reconciliation Act of 2001 provides for a phase out of the estate tax to culminate in a repeal of the tax on January 1, 2010. ROBERT T. DANFORTH, NOW YOU SEE IT, NOW YOU DON'T: AN ESTATE PLANNING PERSPECTIVE ON CONGRESS'S DISAPPEARING TAX ACT 1 (July 1, 2001) (unpublished manuscript, on file with the Washington and Lee Law Review). It is not really a repeal. During the year 2010, the estate tax will be replaced with a partial carryover basis scheme. *Id.* at 4. Then in January 2011, the estate tax law will revert to the law as it was in effect in 2001. *Id.* at 1. Though it is difficult to predict how, Professor Danforth states that the new tax rules are likely to change before the end of the phase out period. *Id.* at 6.

153. I.R.C. § 2522 (2000).

154. I.R.C. § 2501 (2000).

155. Treas. Reg. § 25.2511-2(a) (as amended in 1999).

the gift, the gift tax would be imposed on the whole value of what the donor has relinquished, but only the depressed value of what the museum received would be deducted. Similarly, in the case of a gift-over to another qualified charity¹⁵⁶ in the event of a failure of the gift condition, the donor would be taxed on the entire amount of the gift less the value of the aggregate of the two gifts to charity.¹⁵⁷ In the case of a reversion to the taxpayer or the taxpayer's estate in the event of a failure of the gift, the value of the reversion is not subject to gift tax so long as the reversion can be valued with accepted valuation methods.¹⁵⁸ Despite this limitation on the value of the overall gift, the donor would still be liable for the taxes on the difference between what she was deemed to have given and the value of what the museum received.

V. *The Effects of Depressed Valuation*

If the restriction placed on the donation decreases the allowable deduction, the taxpayer can either remove the restriction and receive a full fair market value deduction¹⁵⁹ or insist on the restriction and receive a lesser deduction. As always, the museum also has a choice whether to accept the donation.¹⁶⁰ It is impossible to predict whether the donor will remove the restriction. The donor's actions depend in part on her motivation for the donation.¹⁶¹ The more prevalent tax savings are in the donor's thinking, the more likely she will remove the restriction. On the other hand, if the donor feels strongly about the stated restriction, she will be more willing to suffer the tax consequences of her requirement. Because of the difficulty museums encounter when dealing with

156. See I.R.C. § 2522 (2000) (providing a description of the types of charities that qualify for a gift tax charitable deduction).

157. See *supra* notes 135–36 and accompanying text (proposing a valuation scheme for charitable gifts with a gift-over to another charity).

158. See Treas. Reg. § 25.2511-1(e) (as amended in 1997) (stating that the gift tax applies to donor's retained interest if that interest cannot be measured with accepted valuation principles).

159. See Malero, *Restricted Gifts*, *supra* note 23, at 53 (stating that in situations in which donors are confronted with museums that have a policy prohibiting the acceptance of restricted gifts, it is rare for the donor to insist upon the restriction).

160. See *id.* at 53–54 (noting that even museums with policies against acceptance of restricted gifts sometimes make an exception because of the value or interest of the proffered gift or because of the needs of the museum).

161. Donor motivations vary greatly and are often simultaneously altruistic and self-serving. See COLOMBO & HALL, *supra* note 108, at 120–31 (discussing various possible motives for donating to charity); Vanni, *supra* note 23, at 3 (describing the different concerns and agendas of modern donors).

restricted donations of art, it would be preferable for the donor to remove the restriction and receive the full tax benefit of the donation.

Even if the donor maintains the requirement, the fact that the donor was forced to affirmatively choose the requirement over the foregone tax benefit will reduce ambiguity in the gift instrument by substantiating the level of commitment of the donor to the imposed restrictions.¹⁶² In many instances, the museum will likely refuse the gift.¹⁶³

*A. The Donor's Choice to Remove the Restriction or Withdraw
the Offered Donation*

In his article *Restrictions on Charitable Bequests of Art*, Fox argues that reducing the charitable deduction for gifts of art with restrictions on alienability would ultimately discourage such contributions and should not be required because to do so would violate the policy underlying tax deductions for charitable transfers of property.¹⁶⁴ As support for his position, Fox notes that judicial policy favors liberal construction of charitable deductions statutes to encourage contributions.¹⁶⁵ While it is true that in certain situations the entire gift would be discouraged by the reduced deductibility, it is not clear how often that would happen. Malero notes that as charities have gained increased control over their assets,¹⁶⁶ the level of giving has not decreased.¹⁶⁷ Malero concludes from this evidence that when faced with a challenge to proposed restrictions, the donor often will withdraw the restriction.¹⁶⁸ In those circumstances in which the donor does not withdraw the restriction on alienation, according to

162. *But see* Sare, *supra* note 45, at 391 n.45 (arguing that the symmetrical argument that a reduced tax deduction should lead to a more restricted application of the *cy pres* doctrine is based on the false premise that the donor retains an interest in her gift).

163. *See* ASS'N OF ART MUSEUM DIR., *supra* note 1, at 9 (stating that acquisitions made through gift or bequest should be unrestricted whenever possible). *See generally* Malero, *Restricted Gifts*, *supra* note 23 (arguing that the acceptance of restricted gifts by museum professionals conflicts with their fiduciary responsibilities).

164. Richard L. Fox, *Restrictions on Charitable Bequests of Art: Recent Ltr. Ruling Paints a Picture*, 29 EST. PLAN. 452, 458–59 (2002).

165. *See id.* at 459 n.37 ("The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from the motives of public policy, and are not to be narrowly construed.") (quoting *Comm'r v. Bliss*, 293 U.S. 144, 150–51 (1934)).

166. *See infra* Part V.B.2 (discussing the relaxation of the *cy pres* doctrine).

167. Malero, *Restricted Gifts*, *supra* note 23, at 72 n.52.

168. *Id.*

current professional museum standards, it is likely that the museum will not accept the donation.¹⁶⁹

B. Clarifying Donor Intent

If the donor chooses to forgo part of her tax benefit to maintain the restriction on the museum's ability to sell, the donor has made a clear signal of the level of her commitment to the restriction.¹⁷⁰ The clarity of the donor's intent will provide improved guidance in several situations. First, museum professionals will have more information with which to make professional acquisitions decisions.¹⁷¹ Second, during the administration of the restricted gift, the trustees or directors will have more guidance as to when their duties of loyalty to the public and of obedience to the terms of the interest conflict to the point that they should petition a court for relief from the restriction.¹⁷² Third, should the museum choose to accept the piece, a court in a later reformation action would have more knowledge of the donor's specific intent with regard to the donation.¹⁷³

1. What Clear Donor Intent Would Mean for Museum Professionals

As discussed earlier, professional museum codes discourage the acceptance of restricted gifts. At the same time, museums depend on donors for support.¹⁷⁴ In weighing the benefits and burdens of an attractive gift along

169. See *supra* note 163 and accompanying text (discussing the unwillingness of museums to accept restricted gifts).

170. In the future, given the knowledge that the IRS no longer allows a full fair market value deduction for gifts that restrict the museum's ability to alienate, the donor and the museum would discuss the donor's tax decision in negotiating the gift. Further, if the gift is the subject of a later reformation action, the court could use evidence of the donor's tax appraisals to indicate the level of the donor's commitment to the restrictions.

171. See MALARO, A LEGAL PRIMER, *supra* note 3, at 137 ("It is wise for a museum to have a general policy that prohibits the acceptance of restricted gifts. It is also wise to have a procedure for considering exceptions to the rule.").

172. See *id.* at 135 (stating that if a museum accepts a restricted gift, it should "seek court relief only when circumstances clearly make adherence to the restriction impossible or impractical").

173. *But see* Sare, *supra* note 45, at 391 n.45 (arguing that the symmetrical argument that a reduced tax deduction should lead to a more restricted application of the *cy pres* doctrine is based on the false premise that the donor retains an interest in her gift).

174. See Malaro, *Deaccessioning*, *supra* note 6, at 274 (stating that it is estimated that over 90% of the objects in United States museums have been donated).

with the current needs of the museum, the trustees of a museum may be compelled to accept a donor's restrictions.¹⁷⁵ The trustees may be less likely to be overcome by "myopia" if they realize the extent of the donor's attachment to the requirement of the restrictions. This is especially true if courts and attorneys general are likely to interpret the donor's having foregone tax savings as indicative of the level of commitment to the specific intent of the restrictions and thereby more assiduously enforce the donor's intent.

Fox argues that because of the professional decision making power of museums, no reduction in the value of the restricted item should be required.¹⁷⁶ Fox states:

The acceptance of the collection in such a case is indicative of the position of the museum's board of trustees that owning the collection, even subject to a permanent restriction on sale, furthers the museum's long-term educational purposes and is otherwise in the museum's best interests. To reduce the amount of the available estate tax charitable deduction in such a case would, in effect, make the IRS or the courts the ultimate arbiter of those restrictions that can be permanently imposed on charitable bequests of artwork—an issue clearly better left to the judgment of the museum's board of trustees.¹⁷⁷

Fox is correct that the decision belongs to the museum professionals. By extension, however, this does not require that the IRS implicitly support restricted giving. The IRS should discourage restrictions and leave the acceptance decision to the museum professionals.

Additionally, Fox's argument that the acceptance of the restricted gift by the museum board indicates that the overall gift is in the museum's best interest ignores the primary problem with restricted perpetual gifts¹⁷⁸—it is impossible to predict the future circumstances under which a museum may need to deaccession the work. In the Springfield museum hypothetical, for instance, the museum had no way of knowing the economic fate of the town when it accepted the paintings in 1959. Making a good decision regarding acceptance would require that the museum trustees be able to predict the future best interests of the museum in perpetuity.¹⁷⁹

175. See MALARO, A LEGAL PRIMER, *supra* note 3, at 135 ("Unfortunately, even among those who should know better, the offer of an attractive gift, though tightly bound, can bring on a sudden case of myopia.").

176. Fox, *supra* note 164, at 459.

177. *Id.*

178. See *supra* Part IV.A (discussing the charitable gift exception to the rule against restraints on alienation).

179. See Malaro, *Restricted Gifts*, *supra* note 23, at 49–53 (arguing that because of the fundamentally dynamic nature of museum missions, the duty of loyalty owed to the public as beneficiaries, and the professional standard requiring collection review, museums should not

The best interest of the museum, however, is dynamic and may shift over time such that the donated item no longer comports with the museum's collection management policy.¹⁸⁰ While the restrictions on the gift may be in line with the current museum mission and collection policy, the current financial situation of the museum, or the facilities available to the museum at the time, the museum's trustees cannot be assured of the museum's situation in the future. There are many well-known examples of restricted gifts of art on which the restrictions become onerous or even harmful to the museum or the art itself over time.¹⁸¹

The primary benefit of clear donor intent for the museum would be to facilitate negotiations between the museum and the donor at the time of the proffered gift.¹⁸² The museum would be in a better negotiating position by being able to talk to the donor about the potential tax benefits of removing the restriction. If the donor still refused, the museum professionals could depend on their collection management policies to determine whether to accept the gift. While museums' collection management policies over the past few years have shown an increased hesitancy and caution regarding restricted gifts,¹⁸³ these do not have the force of law, nor should they.¹⁸⁴ The ultimate decision, therefore, rests with the museum professionals.

2. *The Effect of Clear Donor Intent on the Application of the Cy Pres Doctrine*

Determination of the donor's intent is important in any action to reform the terms of the gift under the doctrine of *cy pres*. The doctrine of *cy pres* allows a court to permit the trustees of a charitable trust to deviate from the donor's express restrictions so long as the action falls within the general

make indefinite commitments).

180. See *id.* at 43 (defining a collection management policy as a public document that "describes . . . the ways in which the museum acquires, uses, lends, and disposes of collection objects").

181. See *supra* note 139 (discussing Rothko's gift to Harvard).

182. See Willard L. Boyd, *Museums as Centers of Controversy*, DAEDALUS, Summer 1999 at 185, 219–20 (stating that in any conflict with donors, "a friendly and forthright" discussion between museum professionals and the donor is necessary but that institutional integrity must take priority).

183. See ASS'N OF ART MUSEUM DIR., *supra* note 1, at 9 (stating that acquisitions by conditional gifts should be restricted whenever possible). The Association of Art Museum Directors is a 177-member professional organization that establishes and maintains professional standards for its members. ASS'N OF ART MUSEUM DIRS., *Mission Statement*, <http://www.aamd.org/about/> (last visited Nov. 4, 2005) (on file with the Washington and Lee Law Review).

184. See Malaro, *Restricted Gifts*, *supra* note 23, at 64 (stating that one benefit to a publicized collections management policy is that the donor is put on notice regarding the museum's practices).

charitable intention of the grantor.¹⁸⁵ A strict application of the *cy pres* doctrine requires that the court find that the donor had a general charitable intent toward the charity.¹⁸⁶ The court must also find that it is illegal, impossible, or impracticable for the charity to carry out the donor's specific requests.¹⁸⁷ A *cy pres* action can be brought either by the trustees requesting permission to deviate from the terms of the trust or by the Attorney General.¹⁸⁸ Despite the formalities of the *cy pres*, courts have a great deal of discretion in determining whether to require compliance with the donor's intent.¹⁸⁹ Using this discretion, some courts in recent years have liberalized their application of the *cy pres* doctrine, especially with regard to the distinctions between specific and general charitable intent¹⁹⁰ and the reformed use of the donated property.¹⁹¹ The trend, however, is difficult to measure.¹⁹² The most recent revision of the Uniform Trust Code explicitly creates a presumption of general charitable intent,¹⁹³ thus proposing to codify a more liberal approach to the application of *cy pres*.

185. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1959) (explaining the *cy pres* doctrine).

186. See *id.* (explaining the general charitable intent requirement).

187. *Id.*

188. A.W. SCOTT & W.F. FRATCHER, THE LAW OF TRUSTS (4th ed. 1987).

189. See RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. d (1959) ("[T]he court will consider evidence as to what would probably have been the wish of the settlor at the time when he created the trust if he realized that the particular purpose could not be carried out.").

190. See RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003) (stating that the *cy pres* doctrine presumes a general charitable intent unless the terms of the trust express a contrary intention).

191. See *id.* § 67 cmt. d (stating that courts increasingly allow the substitute purpose to be reasonably similar to the donor's stated purpose rather than as close as possible).

192. Compare *In re Barnes Foundation*, No. 58,788, 2004 WL 2903655 (Pa. Com. Pl. Dec. 13, 2004) (allowing the Foundation to move to downtown Philadelphia despite the founder's intent that the art be housed in Merion, Pa.), and Stephen K. Urice, *Some Issues Raised by the Case(s) of the Barnes Foundation*, in ALI-ABA: LEGAL PROBLEMS IN MUSEUM ADMINISTRATION, 491, 513 (1993) ("When the correct procedure is followed and the proper parties are before the courts . . . courts are generally not reluctant to grant relief when the precise directives of a testator or settlor are impractical or incapable of fulfillment under current circumstances."); with *Museum of Fine Arts v. Beland*, 735 N.E.2d 1248, 1251-52 (Mass. 2000) (refusing to apply *cy pres* to allow the trustees to sell stored paintings that were "permanently and inalienably" vested in the charitable trust), and Ilana H. Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1756-57 (2003) (arguing that upholding donor intent is the norm and a lenient application of *cy pres* is the exception in the United States).

193. See UNIF. TRUST CODE § 413 cmt. (amended 2003) (stating that the revision modifies the doctrine of *cy pres* by creating a presumption of general charitable intent); see also RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003) (stating the presumption of general charitable intent in modern *cy pres* doctrine).

Although a more liberal application may immediately benefit art museums, any such relaxation may also diminish donations. Donors who are insistent upon their restrictions may choose not to give when faced with the possibility that the restriction will not be enforced by the courts in the future.¹⁹⁴

A reduction in the allowable charitable deduction would lend clarity and predictability to courts' applications of the *cy pres* doctrine. A donor's choice of restriction above tax savings could be used to determine that the donor had specific rather than general charitable intent with regard to the restrictions.¹⁹⁵ In doing so, a symmetrical argument is presented—where the donor has suffered by a reduction in the amount of her charitable deduction, a more rigorous application of the intent inquiry of the *cy pres* doctrine is required. Sare states that such an argument is specious because it is based on the premise that the donor has retained a right in the donated property and that is why the deduction was limited.¹⁹⁶ The depressed deduction advocated in this Note, however, is not based on the any retained rights in the property but instead focuses on the fact that the museum does not receive full rights to the property.¹⁹⁷ Further, the proposal focuses more specifically on the fact that the donor has made an affirmative choice to restrict the museum's right to alienation at a tax savings cost to herself. Any increase in courts' decisions to disallow *cy pres* reform because of the donor's implicitly expressed intent to make a specific gift should have limited effect. Only in those rare cases in which the donor forgoes the full deduction in favor of the restrictions and the museum accepts the gift with full knowledge of the donor's commitment to the restriction should the court use extrinsic evidence of the charitable deduction to refuse the application of the *cy pres* doctrine. Because the overarching policy behind both relaxation of the *cy pres* doctrine¹⁹⁸ and reduced valuation of

194. See Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 314 (1988) ("Settlers have no way to avoid the risk that courts might invoke their *cy pres* power to alter their expectations, and consequently the possibility always exists that their intentions will be thwarted."). But see Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U. L. REV. 153, 200 (1967) ("There are sufficient incentives for making charitable gifts in this country to assure that under the expanded doctrine of *cy pres* charity will not be deprived of its benefactors.").

195. Extrinsic evidence of the donor's tax treatment of the specific donation could be admitted in any future *cy pres* action. The evidence would include the donor's tax return, as well as the required appraisal form(s). Such information could be kept by the donee museum in its acquisitions file for the donated item(s) or by the donor or by the IRS.

196. See Sare, *supra* note 45, at 391 n.45 (describing the false premise underlying the symmetrical argument).

197. See *supra* Part III (discussing the focus of the proposed change).

198. See generally DiClerico, *supra* note 194 (advocating a relaxation in the *cy pres* doctrine that would subordinate the intent of the donor to the broader interests of the public).

charitable deductions for restricted gifts is to benefit the interest of the museum, the reduction in the donor's charitable deduction should not affect any trend toward relaxing the *cy pres* doctrine.

3. Restricted Gifts and Conflicting Duties

A trustee's or a director's fiduciary duties are substantially the same regardless of whether the museum is organized as a charitable trust or a nonprofit corporation.¹⁹⁹ Museum trustees or directors must make decisions with regard for the museum's mission and what is in the best interest of the museum's beneficiaries, the public.²⁰⁰ At the same time, when a donation of art with a restriction on the museum's power to alienate has been accepted, the museum must comply with the restriction.²⁰¹ It is easy to see how these two duties may at times conflict.

Whether or not the museum is under serious financial strain, a museum trustee's duty to abide by the terms of a restricted gift may conflict with her duty to uphold the educational mission of the museum.²⁰² In times of financial crisis, a museum may need to cull its holdings to have funds sufficient to maintain the museum's collection and fulfill the museum's mission.²⁰³ Even in times of

199. While a trustee's duty is generally regarded as stricter than a director's, the degree of difference does not affect the issues discussed herein. See Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1418–29 (1998) (outlining the differences between the fiduciary duties of a trustee of a charitable trust and those of a director of a not-for-profit corporation). The fiduciary duty of a trustee of a charitable trust is based in trust law. See James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 228 (2003) (stating that although the term "fiduciary" is commonly associated with trust law, "it has much broader use today"). The fiduciary duty of a director of a nonprofit corporation is based in corporate law. *Id.* at 231. Because of this difference, the trustee of a charitable trust is generally held to a standard of ordinary prudence, while the director of a nonprofit corporation is held to a standard of gross negligence. See Malaro, *Restricted Gifts*, *supra* note 23, at 45 (describing the ordinary prudence standard for trustees of a charitable trust). Malaro notes, however, that when examining a fiduciary's performance of a museum's tax exempt purpose, courts and attorney generals tend to apply stricter trust law standards. *Id.* at 49.

200. See Marie C. Malaro, *Legal and Ethical Foundations of Museum Collecting Policies, in LIBRARIES, MUSEUMS, AND ARCHIVES* 69, 72 (Thomas A. Lipinski ed., 2002) (arguing that under the fiduciary duty of loyalty museum professionals should make clear that their decision-making is guided by the best interest of the trust beneficiaries).

201. See BOGERT & BOGERT, *supra* note 120, § 392 (stating that the trustee is bound by any restriction on the power of alienation unless he secures release from the courts).

202. See generally Atkinson, *supra* note 125, at 1115 (arguing that this conflict in duties which underlies all *cy pres* actions requires evolution of the *cy pres* doctrine in a way that would give charities greater autonomy).

203. Once again, I would like to acknowledge that the idea of liquidating museum assets for operational expenses is highly controversial in the museum community. See *supra* note 15

plenty, a trustee's duty of loyalty to the public beneficiaries requires that she be able to make collection management decisions for the benefit of the community.²⁰⁴ When considering a deaccession in violation of the donor's terms, museum trustees must consider whether the donor has substantiated her commitment to the restriction by forgoing tax savings. As always, museum trustees must consider the promises they have made to donors. When considering a deaccession of a restricted item, however, trustees have the additional burden of anticipating a court's determination under *cy pres*. Given that courts should be more reluctant to reform the terms of a restricted gift when the donor has paid for that restriction, trustees should likewise be even more committed to upholding the terms of the agreement if at all possible. Because increased deference to donor's intent in these circumstances may heighten future conflicts between the donor's intent and the museum's public purpose, Malaro's argument that museums should be professionally prohibited from accepting restricted gifts becomes more potent.²⁰⁵ Once again, navigation of these types of conflicts should be left to the museum professionals whenever possible.

VI. Conclusion

Returning again to Springfield, if the IRS were to adopt this proposal and Ms. Smith approached the museum with an offer of a restricted donation of several paintings, the museum trustees would be in a better position to negotiate. They could explain to Ms. Smith that removing the restriction on future deaccessioning would be in the best interest of both her and the museum. If they determined that the paintings were appropriate for addition to the museum's collection, the museum could assure Ms. Smith that they would honor her request that the paintings not be deaccessioned for so long as the paintings are in keeping with the museum's collections policies, the good museum practice standard, and the particular needs of the museum. The museum could suggest that the gift instrument contain precatory but not binding language regarding Ms. Smith's wishes. Only if Ms. Smith still insisted on her restrictions, would the museum have the difficult decision of whether to accept the art with the restriction on alienation.

(discussing the ethical standards for use of deaccession proceeds). This Note merely argues that tax valuation should be used in such a way as to allow museum professionals to make decisions with increased knowledge and latitude within their own professional and ethical guidelines.

204. See generally Malaro, *Deaccessioning*, *supra* note 6 (discussing recent trends in the museum profession regarding deaccessioning).

205. See Malaro, *Restricted Gifts*, *supra* note 23, at 41 (arguing that museums should not accept gifts with restrictions on the right to sell).