

DONATE YOUR ART AND KEEP IT TOO: HOW THE GOVERNMENT SUBSIDIZES ART COLLECTIONS FOR THE RICH AND WHAT CONGRESS CAN DO ABOUT IT

Steven Rodgers*

I. INTRODUCTION

“Where I come from the word ‘giving’ doesn’t mean keeping.”
— Charles Grassley, U.S. Senator¹

Imagine when you were growing up that your uncle said he would help pay for your favorite collection as long as you allowed the public to view it. It could be baseball cards, stamps, or comics; but nonetheless, your uncle would help pay 30-40% of the purchase price if you met certain conditions. You must store the collectibles purchased with his help separately from other items in your collection. Although the items must be stored separately, you still have complete control over which items will be available for viewing and when they can be viewed. Also, you can trade and sell the items from the collection to add new items, but you cannot retain any profit from these transactions. Therefore, once an item is purchased with your uncle’s help, it must remain in the publicly-available section. Finally, you must publicize that your collection is available for public viewing. Simply placing a few flyers around school that let everyone know when and where your collection can be viewed should suffice. With that framework, nearly every child would take the deal. You get to obtain a larger collection than ever possible with your own money. Under these circumstances, I may have been able to purchase that Mark McGwire rookie card during his prolific 1998 season.²

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1. Stephanie Strom, *The Man Museums Love to Hate*, N.Y. TIMES (Dec. 10, 2006), <http://www.nytimes.com/2006/12/10/arts/design/10stro.html?pagewanted=all>.
2. *Mark McGwire Player Page*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/m/mcgwima01.shtml> (last visited Apr. 7, 2015) (seventy homeruns in one season, which set the record at the time). It is probably better I did not have the chance anyway because the card can now be purchased for five dollars, well down from the hundreds of dollars it sold for during

A similar setup is now occurring between Uncle Sam and wealthy individuals. The government allows a charitable tax deduction for artwork that is donated to a private art museum, even when the museum is created and controlled by the individual who donated the artwork. The question then becomes “whether taxpayers are helping subsidize wealthy collectors’ multimillion-dollar purchases with little public benefit in return.”³ A *New York Times* article recently posed this question while recognizing that many wealthy art collectors are setting up their own “private museums” to gain substantial tax benefits while still being able to retain control of their prized artwork.⁴

Prior to 2006, wealthy art collectors were able to donate art over the course of many years, gaining substantial tax benefits, and often never actually handing over physical possession of the artwork.⁵ However, Congress essentially closed out this loophole by amending the Internal Revenue Code (“the Code”) to require donors of tangible personal property to relinquish physical possession or risk recapture of any deduction, with interest, previously claimed.⁶ The new way to achieve these tax benefits and still maintain control over the donated artwork is for the wealthy to create a tax-exempt organization as described in § 501(c)(3) of the Code.⁷

This method of donating while simultaneously retaining control over the donated property raises many issues at the intersection of the goals the tax code seeks to achieve.⁸ On the one hand, there is a very important goal of preserving and presenting fine art to people across the United States. At the same time, “[t]he perception of fairness may be as important as fairness itself as a goal of tax policy.”⁹ As indicated in the *New York Times* article,

McGwire’s record setting run. See *Rookie Cards*, SPORTSCARDSFUN.COM, <http://www.sportscardfun.com/rookie-cards.asp> (last visited Apr. 7, 2015).

3. Patricia Cohen, *Writing Off the Warhol Next Door: Art Collectors Gain Tax Benefits From Private Museums*, N.Y. TIMES, Jan. 11, 2015, at BU1.
4. *Id.*
5. Samuel G. Wieczorek, Winokur, *Lose, or Draw: Collectors Lose an Important Tax Break*, 8 HOUS. BUS. & TAX J. 90, 91 (2007).
6. 26 U.S.C. § 170(o)(3)(A) (2012).
7. *Id.* at § 501(c) (“List of exempt organizations.—The following organizations are referred to in subsection (a): (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .”).
8. Rebecca Thiess & Thomas L. Hungerford, *The Earned Income Tax Credit and the Child Tax Credit*, Sept. 25, 2013, <http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/> (last visited Apr. 9, 2015) (“The primary purpose of taxes is to fund government to meet various social and economic goals regarding national security, economic stability, income distribution, poverty alleviation, and the efficient allocation of resources.”).
9. OFFICE OF THE SECRETARY, DEP’T OF THE TREASURY, *Tax Reform for Fairness, Simplicity, and Economic Growth: The Treasury Department Report to the President*, November 1984 (Nov. 1, 1984), at 16, <http://www.treasury.gov/resource-center/tax-policy/Documents/tres84v1C-2.pdf> (adding “[t]he growing use of the income tax to subsidize various forms of economic activity is a

the current setup of allowing massive tax deductions to wealthy individuals who maintain control of their “donated” artwork seems very unfair.¹⁰ One of the likely causes of wealthy individuals being able to take advantage of the tax code is the failure to fine-tune general rules.¹¹ So, while this Comment will propose potential options for matching public benefit with tax revenue losses, it will do so with an eye for avoiding excessive complication.

This Comment will analyze and offer recommendations that will ultimately bring the public benefit in closer alignment with the tax dollars the government gives up by allowing these deductions. The starting point will be to provide a background of the problems that were recognized prior to 2006, and the government’s subsequent actions. Section II will then discuss the proliferation of the private museums, and the concerns people have regarding them. Also, Section II will lay out the requirements currently in place that a private museum must meet in order to be considered tax-exempt. Finally, Section III will propose solutions to the current problem that will hopefully align the costs and benefits of the preferred donation techniques.

II. BACKGROUND

“A tax loophole is ‘something that benefits the other guy.’ If it benefits you, it is tax reform.”

— *Russell B. Long, U.S. Senator*¹²

To fully understand the current loophole, it is important to discuss how the tax code has evolved in this area. This Section will first discuss the goals of taxation. Second, this Section will lay out the framework regarding donations in general, along with the interplay between donations and charitable foundations. Finally, this Section will discuss the historical evolution of art donations, important changes Congress made in reaction to certain developments, and the current state of donating requirements.

major source of the increase in the perceived lack of fairness of the tax system”) [hereinafter Treasury Report].

10. Cohen, *supra* note 3.

11. Treasury Report, *supra* note 9 at 16. (“A primary focus of the tax reform study has been to eliminate and avoid provisions that would unduly complicate tax administration and compliance for most taxpayers.”)

12. *Tax Quotes*, I.R.S., <http://www.irs.gov/uac/Tax-Quotes> (last visited May 1, 2015).

A. Background on Taxation

Taxes, at their most straightforward level, are in place to “raise revenue for necessary governmental functions.”¹³ Taxation has other goals, however, such as to steer private income in a direction desired by the government.¹⁴ One of the more controversial ways the government does this is by tax expenditures.¹⁵ Tax expenditures are losses in revenue that are allowed by the Code to promote some societal good without the government directly incurring the cost.¹⁶ While tax expenditures can take many forms, the form most relevant to this article is a deduction from an individual’s gross income.¹⁷ Deductions are the government’s way of saying that it will allow you to pay less in taxes as long as you pay that extra money to someone else who will then benefit the public. The following subsections will provide an overview of the goals of tax reform, charitable deductions, and charitable foundations.

1. Goals of Tax Reform

According to the IRS, the most serious problem facing taxpayers is “the complexity of the Internal Revenue Code.”¹⁸ From a sixteen-page statute in 1913,¹⁹ the tax code has ballooned into a massive compilation of statutes, regulations, and rulings.²⁰ The shift away from a broadly-worded statute to such a complex statute has been Congress’s attempt to answer all

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13. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3, n.1 (2006). Put another way, “[t]axes are what we pay for civilized society . . .” *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J. dissenting).
 14. *Id.* at 3 (adding redistribution, “aimed at reducing the unequal distribution of income and wealth that results from the normal operation of a market-based economy” as another function of taxation).
 15. *Id.*
 16. Lily Batchelder, *Tax Expenditures: What Are They and How Are They Structured?*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/briefing-book/background/shelters/expenditures.cfm> (last updated July 17, 2009).
 17. *Id.*
 18. INTERNAL REVENUE SERV., *Taxpayer Advocate Series – 2008 Annual Report to Congress Vol. 1*, 3, available at http://www.irs.gov/pub/tas/08_tas_arc_msp_1.pdf.
 19. James W. Colliton, *Standards, Rules, and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 266 (1995).
 20. Accounts differ as to how large the Code is currently. See Kelly Phillips Erb, *Tax Code Hits Nearly 4 Million Words, Taxpayer Advocate Calls It Too Complicated*, FORBES (Jan. 10, 2013, 9:28 PM), <http://www.forbes.com/sites/kellyphillipserb/2013/01/10/tax-code-hits-nearly-4-million-words-taxpayer-advocate-calls-it-too-complicated/> (estimating the current tax code is four million words, just under four times the total number of words in all of the Harry Potter books); see also Joseph Henchman, *How Many Words are in the Tax Code?*, TAX FOUNDATION (Apr. 15, 2014), <http://taxfoundation.org/blog/how-many-words-are-tax-code> (noting that the *Standard Federal Tax Reporter*, which the Commerce Clearing House considers the “tax code,” amounts to 70,000 pages).

tax policy questions itself.²¹ In reacting to each court case and IRS regulation, Congress “provides rigid, clear rules to allow taxpayers and the [IRS] to determine with certainty the tax consequences of particular facts.”²²

Despite the trend towards a larger and more complex tax code, nearly everyone agrees that simplicity and convenience are essential to a successful tax system.²³ Simplicity can be defined as “the characteristic of a tax which makes the tax determinable for each taxpayer from a few readily ascertainable facts.”²⁴ Simplicity, however, is “the most widely quoted but the least widely observed of the goals of tax policy.”²⁵ Simplicity’s main rival, equity, can be defined as a relatively equal burden on each taxpayer in light of their respective situations.²⁶ At least one commentator has argued that the complexity of the charitable contribution provisions is necessary to maintain an equitable scheme that encourages charitable giving but prevents tax abuse.²⁷ No matter which side you take, it is clear that to make the tax system simpler, the public must accept some unfairness.

2. Charitable Deductions

Taxpayers are allowed a deduction for any charitable contribution made within the taxable year.²⁸ A taxpayer can deduct up to 50% of their adjusted gross income in a given year for donations of cash to a narrow set of public charities.²⁹ For contributions made to private charities, a taxpayer

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21. Colliton, *supra* note 19, at 266 (“As the I.R.S. and the courts interpret these new rules, controversies again develop which inspire Congress to provide yet more detailed rules. This process has been repeated hundreds of times in the history of the tax law and is responsible for most of its statutory complexity.”).
 22. *Id.* For an interesting quote that seems to have forecasted Congress’s foray into tax law, see Andrew Morrison Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649, 649 (2013) (“No man is so wise as to be able to take account of every single case, wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all in order to avoid confusion. — Thomas Aquinas, *Summa Theologica*, ca. 1270”).
 23. Thiess & Hungerford, *supra* note 8 (citing Adam Smith’s *The Wealth of Nations*).
 24. Stanley S. Surrey & Gerard M. Brannon, *Simplification and Equity of Tax Policy*, 9 WM. & MARY L. REV. 915, 915 (1968).
 25. *Id.*
 26. *Id.* at 916.
 27. Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1057 (2003).
 28. 26 U.S.C. § 170(a)(1) (2012).
 29. 26 U.S.C. § 170(b)(1)(A) (2012) (listing churches, traditional educational institutions, hospitals, and governmental units, among others).

can deduct up to 30% of their contribution base in a given year.³⁰ Deductions are generally most valuable to the highest-income individuals because the value of the deduction is the total of the amount deducted multiplied by the taxpayer's marginal tax rate.³¹ Also, low-income individuals are less likely to deduct charitable contributions because they do not donate enough to itemize their deductions.³² The result is that those individuals with the highest incomes choose which activities will receive public dollars through their contributions.³³

3. §501(c)(3) Organizations

To make a donation worthy of a deduction, the donation must be made to an organization established and operated in compliance with I.R.C. §501(c)(3).³⁴ The most common rationale offered as to why Congress allows certain private organizations to operate exempt from taxes is that they “perform functions and services that are public in nature and that otherwise would have to be provided by the government.”³⁵ The Treasury has adopted the general definition of charity which includes, among other things, any activity that lessens “the burdens of Government.”³⁶ Congress has decided from the outset that organizations serving certain purposes should be exempt from taxes, namely “religious, charitable, scientific, testing for public safety, literary, or educational purposes.”³⁷ While the IRS and courts have struggled to define those words in regards to actual organizations, they have generally expanded over time.³⁸ Art has regularly been recognized as a category that meets both the educational and charitable requirements.³⁹ The next section will specify what type of organization a taxpayer can create to receive maximum tax advantages.

30. 26 U.S.C. § 170(b)(1)(B)(i) (2012).

31. Batchelder, *supra* note 16; *see also* Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle-and-Low Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 330 (1997) (“An individual in a 15 percent tax bracket pays eighty-five cents for each dollar given to charity, while an individual in the 33 percent tax bracket only pays sixty-seven cents for the same one dollar gift . . . Moreover, a taxpayer who cannot itemize deductions pays the full dollar for the gift of a dollar.”).

32. Bullock, *supra* note 31, at 330.

33. *Id.*

34. *See generally* 26 U.S.C. § 170 (2012).

35. STAFF OF JOINT COMM. ON TAXATION, *II. History and Evolution of the Exempt Status of Section 501(C)(3) Organizations*, Apr. 19, 2005, JCX-29-05 NO 4 (I.R.S.), 2005 WL 5783678 [hereinafter JOINT COMM. ON TAXATION]. Another theory is that it would be too difficult to determine net income for a nonprofit. *Id.*

36. 26 C.F.R. § 1.501(c)(3)-1(d)(2) (1959).

37. 26 U.S.C. § 501(c)(3) (2012).

38. JOINT COMM. ON TAXATION, *supra* note 35.

39. *Goldsboro Art League, Inc. v. Comm’r*, 75 T.C. 337, 343 (1980).

4. *Private Operating Foundations*

Once an interested art collector decides to open an art museum, they must decide which category of foundation best suits their needs. One of the most popular is the private operating foundation.⁴⁰ A private operating foundation is a tax-exempt organization that “devotes most of its earnings and much of its assets directly for the conduct of its charitable, educational, or similar purposes.”⁴¹ The organization must meet an income test, which requires it to expend directly for its exempt purposes the lesser of its adjusted net income or its minimum investment return.⁴² Also, the organization must meet one of the following three tests: assets test, endowment test, or the support test.⁴³ The assets test makes the most sense for an art museum because it requires that at least 65% of the foundation’s assets be devoted to the active conduct of its charitable activities.⁴⁴

Contributions to a qualified private operating foundation are deductible to the full extent permitted for public charities.⁴⁵ This is a huge advantage because generally contributions of property to private foundations are limited to an individual’s basis in the property when the donation is made.⁴⁶ For example, if a taxpayer bought a painting for \$1,000 and it is now worth \$10,000, then the taxpayer could only deduct \$1,000 if the painting was donated to a private foundation, while the taxpayer could deduct \$10,000 if the painting is donated to a private operating foundation.

To come full circle, the wealthy art collector creates a private operating foundation which conducts its business as an art museum. The wealthy collector donates her art to the museum and subsequently deducts the full fair market value of the artwork from her gross income. The taxpayer can deduct the amounts to the extent that they do not exceed thirty percent of her modified adjusted gross income.⁴⁷ Even after the art is donated, however, the taxpayer can still exercise dominion and control over the foundation’s assets as long as the foundation is satisfying the Code’s requirements. The next section will discuss the history of donating art over

40. See Cohen, *supra* note 3.

41. BRUCE R. HOPKINS, *STARTING AND MANAGING A NONPROFIT ORGANIZATION: A LEGAL GUIDE* 91 (John Wiley & Sons, 5th ed. 2009). The private operating foundation must meet all of the requirements as described in 26 U.S.C. § 4942(j)(3) (2012). *Id.*

42. *Id.* (defining substantially all as 85%).

43. *Id.*

44. *Id.*

45. *Id.*

46. See 26 U.S.C. § 170(e)(1)(B)(ii) (2012).

47. *Id.* at § 170(b)(1)(B)(i) (2012).

the last forty years and what changes Congress has made in reaction to different donation strategies.

B. History of Art Donations in the United States

“It's like a time share for your art.”⁴⁸

Wealthy art collectors have long saved millions by donating their art to museums and other educational institutions.⁴⁹ However, the way in which they donate has evolved over the years. The next three subsections will discuss the changes in the popular ways of donating art over the last forty years or so.

1. *The Good Ol' Days:*

Prior to the Pension Protection Act of 2006, a popular method of donating art was fractional giving, which allowed wealthy investors to make a series of partial donations over an extended period of time.⁵⁰ While fractional giving only accounted for ten percent of new acquisitions for American art museums, they were often the source of the “most valuable and historically significant pieces.”⁵¹ Using fractional gifts to donate artwork with extremely high values was essential because it allowed taxpayers to break up their donations into as many segments as necessary in order to deduct the full amount of the artwork.⁵² Without this mechanism, many individuals with expensive art could never fully deduct the fair market value of their donation.⁵³

48. Rachel Emma Silverman, *Joint Custody For Your Monet: 'Fractional Giving' Hits the Art World, as Donors Share Works With Museums*, WALL ST. J., Jul. 6, 2005, at D1.

49. Cohen, *supra* note 3.

50. Catherine A. Karayan, *What Artworks May Come (to a Museum Near You): The State of Fractional Charitable Giving at the Intersection of Museology and Tax Policy*, 20 S. CAL. INTERDISC. L.J. 459, 460 (2011). Partial donations can be either a percentage of a single piece of art or a percentage of an entire collection.

51. Alicia Beyer, *Gone But Not Forgotten: The End of Fractional Giving and the Search for Alternatives*, 36 COLUM. J.L. & ARTS 459, 459 (2013) (quoting Jeremy Kahn, *Museums Fear Tax Law Changes on Some Donations*, N.Y. TIMES, Sept. 13, 2006, at E1); *see also* Elizabeth Dillinger, *A Not So Starry Night: The Pension Protection Act's Destruction of Fractional Giving*, 76 UMKC L. REV. 1045, 1047, 1052 (2008) (detailing a series of large donations that were made possible through fractional giving).

52. Dillinger, *supra* note 51, at 1051.

53. *Id.*; *see also* 26 U.S.C. § 170 (2012) (limiting deductions of this sort to thirty percent of a taxpayer's contribution base, with any excess to be carried over for the next five years).

The following chart⁵⁴ illustrates how a fractional gift would work prior to the enactment of the Pension Protection Act:

Donation Number ⁵⁵	Fair Market Value	Percentage Donated	Deduction Allowed	Amount of Time Museum Has Right to Possession	Amount of Time Museum Must Possess Artwork
1	\$1,000,000	25%	\$250,000	3 months	0 days
2	\$2,000,000	25%	\$500,000	6 months	0 days
3	\$4,000,000	25%	\$1,000,000	9 months	0 days
4	\$5,000,000	25%	\$1,250,000	Whole Year	Whole Year

One of the biggest benefits of fractional giving, and the one that made it so popular, was the ability to donate the art while simultaneously keeping the artwork for most, if not all, of the year.⁵⁶ This taxpayer-friendly scenario was made possible by a 1988 Tax Court decision, *Winokur v. Commissioner of Internal Revenue*, where the court held that “the donee simply must have the right to interrupt the donor’s possession and the right to have physical possession of the property during each year following the donation equivalent to its undivided interest in the property, in addition to the other rights of a tenant in common.”⁵⁷ In some instances museums did not take possession at all for their share of the time because it was expensive to ship and store the art.⁵⁸ From a museum’s perspective, fractional gifts were “more about the future than the present, locking in a

54. For this example we can assume that the donation is of one piece of art. Also, we can assume that the donor has sufficient adjusted gross income (with modifications) to take the maximum deduction allowed.

55. Also, prior to 2006, there were no restrictions on the timing of the donations. See Beyer, *supra* note 51, at 459. For example, the taxpayer could make the first 25% donation in 1995, the second donation in 2000, the third donation in 2005, and the fourth donation in 2010. This allowed individuals to deduct amounts in years where their income was potentially higher.

56. Silverman, *supra* note 48.

57. *Winokur v. Comm’r*, 90 T.C. 733, 740 (1988). The taxpayer had given ten percent interests in a collection of 44 pieces of art in the years 1977 and 1978. *Id.* at 734. The museum, the Carnegie Institute, never took possession of the art. *Id.* at 735. The court stated that as long as the institute had the right to possession, i.e. was not prevented from possessing the art by the taxpayer, the donation was a present interest and could be deducted in the year made. *Id.* at 740. The court did mention that there could be an issue if there was a side agreement between the museum and donor that the museum would not take possession, however, there was no evidence of that in the case. *Id.* n.4.

58. *Id.*

donor's commitment during his lifetime so that the art doesn't go to a rival museum after the owner dies."⁵⁹

Another benefit that taxpayers received was that they could take larger tax deductions as their artwork appreciated. In the example above, the taxpayer would have been able to take three million dollars in deductions assuming that in each year the deduction was only thirty percent of their modified adjusted gross income. Contrast that to the example below where the taxpayer is limited to deductions of one million dollars and the disincentive to make a fractional gift currently is very clear. Allowing taxpayers to take deductions matching the fair market value when the fractional donation is made is especially important in a booming art market.⁶⁰

While the benefits were many, there were only a couple of requirements for donors. The two most significant requirements were that the donee must have received an "undivided portion of the donor's entire interest" and that the donee must have the right to "possession, dominion, and control of the property for a portion of each year appropriate to its interest in such property."⁶¹ With the overwhelming benefits, combined with the minimal restrictions, fractional donations were "a boon to art collectors and museums, because they enabled collectors to donate their art in a way that benefited the public and expanded access to the art, but also allowed the collector to maintain a very direct and personal connection with the art."⁶²

Just as fractional giving hit its full stride in 2005, an article from *The Wall Street Journal* put the world on notice of the popular donation mechanism.⁶³ While the article seems more informative than critical, it grabbed the attention of a certain senator who relishes the opportunity to cut off tax loopholes for the wealthy.⁶⁴ Upon reading the article, Senator

59. Eric Gibson, *Having Your Art and Selling It Too*, WALL ST. J., Nov. 17, 2006, at W15.

60. See generally Agustino Fontevecchia, 'New Era' For Art Markets As Collectors Drop Half A Billion At Christie's Contemporary Sale, FORBES, May 20, 2013, <http://www.forbes.com/sites/afontevecchia/2013/05/20/new-era-for-art-markets-as-collectors-drop-half-a-billion-at-christies-contemporary-sale/> (noting one example where a Jackson Pollock painting sold for more than fifty-eight million dollars in 2013, up from 2.4 million dollars in 1993, a gain of 2,317% in twenty years.). And no, Pollock did not pass away during this period.

61. Dillinger, *supra* note 51, at 1050. For an example of the first requirement, a donor could not take a deduction for a donation if the donor retained all rights to make and sell reproductions of the artwork. *Id.* For the second requirement, if a donor donated 25% of a piece of art, then the museum must have the right to possess the artwork for three months out of the year. *Id.*

62. *Id.* at 1053.

63. See Silverman, *supra* note 48.

64. See Strom, *supra* note 1 (indicating that Senator Grassley "is somewhat amused to find himself cast suddenly as the enemy of museums and art collectors"). For another example of Mr. Grassley shutting down a tax loophole, see *Bagging the Trophy Tax Break*, N.Y. TIMES, Apr. 11, 2005 (detailing Mr. Grassley and the IRS's investigation into hunters who would underwrite

Grassley said he “ripped the article out, and when [he] came back to [his] office on Monday, [he] gave it to [his] staff.”⁶⁵ The following section will discuss Congress’s response to the popularity of fractional giving in the art world.

2. *Congress Awakens*

It did not take long for Senator Grassley and Congress to spring into action, with President Bush signing the Pension Protection Act on August 17, 2006.⁶⁶ Section 1218 of the Act, a “small provision buried deep within the legislation,” made fractional giving a much less appealing option for donating art.⁶⁷ There was immediate backlash in the art world, with many wondering “[w]hy fix something that isn’t broken?”⁶⁸ Critics of the new legislation claimed it was created in a “frenzied manner,” with one senator stating that the new rules were “passed in the dark of the night.”⁶⁹ Despite the lack of attention to the new rules, they passed rather easily in both the House and Senate.⁷⁰

The new law readjusted the balance between benefits and requirements to such an extent that one prominent art lawyer stated “[t]his is the death of fractional gifts.”⁷¹ Take the following example, which consists of the same four donations made of the same piece of art as in the previous example.⁷²

exotic hunting trips by donating the mounted heads of their kills and deducting the fair market value on their taxes).

65. See Strom, *supra* note 1.

66. Kahn, *supra* note 51.

67. Dillinger, *supra* note 51, at 1045.

68. Kahn, *supra* note 51 (quoting art collector, and frequent partial donor, Norman C. Stone of San Francisco).

69. Dillinger, *supra* note 51, at 1045, 1048 (The “dark of the night” quote was from Charles Schumer (D-New York)).

70. *Id.* at 1060–61 (noting the bill passed in the House 279-131 and in the Senate 93-5). For a more detailed description of the process the fractional gift amendment went through, see *id.* at 1059–61.

71. Kahn, *supra* note 51 (quoting New York art law attorney Ralph E. Lerner).

72. See Pension Protection Act of 2006, Pub. L. No. 109-280, § 1218.

Donation Number ⁷³	Fair Market Value	Percentage Donated	Deduction Allowed ⁷⁴	Amount of Time Museum Has Right to Possession	Amount of Time Museum Must Possess Artwork ⁷⁵
1	\$1,000,000	25%	\$250,000	3 months	3 months
2	\$2,000,000	25%	\$250,000	6 months	6 months
3	\$4,000,000	25%	\$250,000	9 months	9 months
4	\$5,000,000	25%	\$250,000	Whole Year	Whole Year

The first additional requirement is that once an initial fractional donation is made, the donor must complete the entire donation of her interest within the earlier of ten years or her death.⁷⁶ The ten-year requirement is especially damaging in an era where there are more and more young donors who would like to retain some possession of their artwork throughout their lifetime.⁷⁷ The second requirement is that deductions are only allowed for the lesser of the fair market value at the time of the initial fractional gift or the fair market value at the time the subsequent fractional gift is made.⁷⁸ Finally, the amendment requires museums to take substantial physical possession of the artwork based on their share of ownership.⁷⁹ One commentator points out the unusualness of the requirement because it forces the museum to act, but penalizes the donor if the museum fails to do so.⁸⁰

73. The Pension Protection Act amended the Code to require all fractional donations be completed “before the earlier of — (I) the date that is 10 years after the date of the initial fractional contribution, or (II) the date of the death of the donor.” 26 U.S.C. § 170(o)(3)(A)(i) (2012). Failure to meet these timelines results in “the recapture of the amount of any deduction allowed under this section (plus interest) with respect to any contribution of an undivided portion of a taxpayer’s entire interest,” along with a ten percent penalty of the amount recaptured. *Id.* at § 170(o)(3)(A) and (B).

74. Taxpayers can no longer make subsequent deductions based on the current fair market value, but instead are forced to use the lesser of the “(A) the fair market value of the property at the time of the initial fractional contribution, or (B) the fair market value of the property at the time of the additional contribution. *Id.* at § 170(o)(3)(B).

75. The Pension Protection Act also forced donees to take “substantial physical possession of the property” or else face the same recapture penalty set out in note 73. *Id.* at § 170(o)(3)(A)(ii)(I).

76. See note 73 and accompanying text.

77. Kahn, *supra* note 51; see also Emily J. Follas, “It Belongs in a Museum”: *Appropriate Donor Incentives for Fractional Gifts of Art*, 83 NOTRE DAME L. REV. 1779, 1795 (2008) (noting that this requirement also makes the donation of entire collections less appealing).

78. See *supra* note 74 and accompanying text.

79. See *supra* note 75 and accompanying text.

80. Follas, *supra* note 77, at 1795.

The Pension Protection Act of 2006 destroyed most of the beneficial uses of fractional giving, which has led many in the art world to call for its repeal, or at a minimum some revisions.⁸¹ Fractional giving was most admonished because individuals could retain some possession of their prized artwork while taking tax deductions. But, at the end of the day, public museums were ultimately given the property. One alternative, which will be discussed next, is to create a private operating foundation and donate the artwork to the operating foundation. Contrary to the intent of the fractional giving amendments, artwork now may never see its way to the public realm.

3. *The Return of the Tax Subsidy*

The ultimate goal of taxpayers seems to be the receipt of an early tax deduction, along with the ability to retain their prized artwork for the foreseeable future. It is not clear what effect the decline of fractional giving has had on private museums, but it is clear that wealthy individuals are opening their own museums at increasing rates.⁸² While donations to museums are still common, opening up a private museum is the optimal solution for a collector “who wants the tax benefits of donating his art collection yet cannot cope with losing total control over the collection.”⁸³ Art donated to these private museums technically ceases to be the private property of the donor, but the donor can still control the artwork through the new charity.⁸⁴ Similar to the 2005 *Wall Street Journal* article, Cohen’s article in the *New York Times* shines a light on the perceived unfairness of allowing large tax deductions when the donor maintains such a large degree of control over the donated artwork.⁸⁵ If Senator Grassley thought fractional donations were giving that really meant keeping, it will be interesting to see how he reacts to this strategy.

The issue here is not these private museums in their entirety. For example, there are multiple private museums that have “tens or hundreds of thousands of visitors every year, operate scores of educational programs, publish catalogs and aggressively publicize their exhibitions.”⁸⁶ The unfairness begins to creep in when a private museum is only open a few

81. Strom, *supra* note 1 (quoting Glenn D. Lowry, director of the Museum of Modern Art in New York, where he stated that he hoped the museum “could work with Congress toward a solution”).

82. Cohen, *supra* note 3 (“[P]rivate museums . . . have proliferated in the last decade.”).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

days a week, is available by appointment only, and is located so close to the main donor's residence that the line is blurred on whom actually owns the museum.⁸⁷ For instance, one private museum, the Glenstone, is only separated from its founder's residence by a large duck pond.⁸⁸ Also, the museum only had 10,000 visitors from 2006 to 2013, which averages out to approximately seven visitors per day.⁸⁹ Robert Storr, Dean of the Yale School of Art, has questioned the practice, stating that "I'm not against it being done, but it's got to be done well."⁹⁰ Dean Storr added that "[i]f there's to be a public forgiveness for taxes there should be a clear public benefit, and it should not be entirely at the discretion of the person running the museum or foundation."⁹¹

On the opposite end of the spectrum you have art lovers and dealers who, just as was the case with the 2006 amendments to fractional giving, think the system is best left as it is.⁹² Jeffrey Deitch, a former museum director and current dealer, says private museums are a "part of our American art culture" and their recent proliferation is "one of the most exciting developments in the international art world."⁹³ One private museum director, Maryse Brand, claims that the resources and funding that goes into the Hall Art Foundation makes "artwork available for the enjoyment and education of the public" and that the costs "far outweigh any benefits received from tax exemptions."⁹⁴

No matter the position, it is clear that there are certain requirements that a private museum must meet before it qualifies for a tax break. The key is for the museum to be educational, "but to be educational, you have to provide access to the public."⁹⁵ The question remains, "[w]hat is enough?"⁹⁶ The next section will discuss the requirements for constituting a tax-exempt organization under the Internal Revenue Code and other applicable authorities.

87. *Id.* For example, Glenstone, a private art museum in Potomac, Maryland, is only open four days a week, for six hours a day. GLENSTONE, <http://www.glenstone.org> (last visited May 3, 2015). Visits are by appointment only, and according to the website, the museum is currently shut down for renovations through fall 2015. *Id.* at <http://www.glenstone.org/visit>.

88. Cohen, *supra* note 3.

89. *Id.* (The seven visitors number comes from taking 10,000 visitors divided by seven years. Then dividing that number by the number of days the museum should be open per year (four days per week multiplied by 52 weeks in a year.)

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (quoting Lloyd Mayer, a professor at Notre Dame Law School).

96. *Id.* (quoting Lloyd Mayer, a professor at Notre Dame Law School).

C. Requirements for a Private Museum to Qualify as Tax-Exempt

To be eligible for tax-exempt status, the organization must fall into one or more of the designated categories in I.R.C. § 501(c)(3).⁹⁷ The wealthy individuals in these cases generally opt to open private museums under the exempt category of educational purposes.⁹⁸ To be considered educational, an organization must meet one of the following definitions: “(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.”⁹⁹ Museums are expressly listed as an example of an educational organization.¹⁰⁰

Further, an organization “must be devoted to educational purposes exclusively.”¹⁰¹ The United States Supreme Court in *Better Business Bureau of Washington, D.C. v. United States* set the standard for multipurpose organizations, holding “the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes.”¹⁰² The organization must also show that it has satisfied the organizational¹⁰³ and operational¹⁰⁴ tests.

In a Technical Advice Memorandum in 1988, the IRS revoked the tax-exempt status of an organization because the organization placed sculptures on the estate of A and B, the organization’s founders.¹⁰⁵ While some of the

97. 26 U.S.C. § 501(c)(3) (2012) (including “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .”).

98. Cohen, *supra* note 3.

99. 26 C.F.R. § 1.501(c)(3)-1(d)(3)(i) (1959).

100. 26 C.F.R. § 1.501(c)(3)-1(d)(3)(ii) (1959).

101. *Better Bus. Bureau of Wash. D.C. v. United States*, 326 U.S. 279, 283 (1945) (holding the Better Business Bureau was not entitled to tax-exempt status under the educational category because an important purpose of the organization was to promote a profitable business community).

102. *Id.*

103. *Copyright Clearance Ctr., Inc. v. Comm’r*, 79 T.C. 793, 803 (1982) (To meet the organizational test, an organization’s “‘articles of organization’ must limit petitioner to one or more exempt purposes, and not authorize substantial activities not in furtherance of such purpose or purposes.”).

104. *St. Louis Sci. Fiction Ltd. v. Comm’r*, T.C. Memo. 1985-162 (Apr. 2, 1985). “To pass the operational test, petitioner must show that its activities accomplish one or more exempt purposes as specified in section 501(c)(3), focusing on “the purpose of an activity, not its nature.” *Id.* “However, one activity may be exempt and nonexempt, and in such situations it is necessary to determine whether the nonexempt purposes are more than insubstantial.” *Id.* (holding the organization was not exempt because, although it served an educational purpose, it also had a substantial recreational purpose by operating a convention that benefitted private individuals).

105. I.R.S. Tech. Adv. Mem. 88-24-001 (June 17, 1988).

sculptures were viewable from the road, and “in theory available to the general public,” it was “primarily only those who are affiliated with the art museums and schools who receive full advantage of their availability.”¹⁰⁶ The IRS took notice that there were no signs to advise the public that they were welcome to tour the property.¹⁰⁷

The IRS also considered the placement of the organization’s assets on the estate of A and B to be an act of self-dealing under I.R.C. § 4941(d)(1)(E), which forbids “use by or for the benefit of, a disqualified person of the income or assets of a private foundation.”¹⁰⁸ A disqualified person is defined as a person who is “a substantial contributor to the foundation,” “a foundation manager,” or a “member of the family of anyone else meeting the definition,” among others.¹⁰⁹ The IRS made a similar finding in a situation where a private foundation placed donated artwork in the home of a substantial contributor after showing the artwork for a number of years in various museums.¹¹⁰ Although the artwork held by the disqualified person was viewed by 2,000 persons on semiannual tours, the IRS found the placement in the person’s home to be “a direct use of the foundation’s assets by or for the benefit of the disqualified person.”¹¹¹ The concept of self-dealing is interesting in regards to how these private museums are set up and operated, especially when, as the *New York Times* put it, the museums “are just a quick stroll from their living rooms.”¹¹² The next section will take a closer look at the inequities that arise in these situations and possible actions that Congress can take to create a more fair application of the Code’s charitable giving provisions.

106. *Id.*

107. *Id.*

108. *Id.*; 26 U.S.C. § 4941(d)(1)(E) (2012).

109. 26 U.S.C. § 4946(a)(1)(A-D) (2012).

110. Rev. Rul. 74-600, 1974-2 C.B. 385.

111. *Id.* It is worth noting that there is an exception that allows a private foundation to furnish goods to a disqualified person but only on a “basis no more favorable than that on which such goods, services, or facilities are made available to the general public.” 26 U.S.C. § 4941(d)(2)(D) (2012).

112. Cohen, *supra* note 3.

III. ANALYSIS

“The difference between death and taxes is death doesn’t get worse every time Congress meets.”
– Will Rogers¹¹³

It is worth noting at the start that most of these private museums are run for the benefit of the public. Not all art collectors even take advantage of tax exemptions.¹¹⁴ However, as the old proverb goes, a few bad apples can spoil the bunch.¹¹⁵ In fact, much of the complexity regarding the current tax code was enacted to prevent tax abuse.¹¹⁶ For example, the amendments to the fractional giving provisions were not put in place because of the individuals who actually shared their artwork for a portion of the year. Instead, the amendments were made because some individuals never gave up possession of their artwork, despite taking tax deductions. In this instance, any new legislation would not be aimed at those organizations that operate in the best interest of the public, with many educational programs and substantial availability. Rather, new legislation would be aimed at those who essentially write-off their own collections while keeping tight control and limiting the public’s access.

In many of these instances where a small percentage of individuals are abusing an otherwise successful system, the argument is that any new legislation would be “an overreaction to a limited problem.”¹¹⁷ In other words, we would be better off to let the few who try to game the system get away with it because cutting them off would negatively affect the charitable giving and displaying of art as a whole. With that being said, “once a robber baron or other donor forces the government to pay a large part of the tab by claiming a tax deduction, the government should regulate to protect the public interest.”¹¹⁸ To introduce a new rule or regulation to this area, Congress would be imposing greater complexity on donors with reduced

113. Robert W. Wood, *20 Inspirational Quotes . . . About Taxes*, FORBES, Sept. 20, 2013, <http://www.forbes.com/sites/robertwood/2013/09/20/20-inspirational-quotes-about-taxes/>.

114. Cohen, *supra* note 3 (noting at least two collectors who “have opened small museums with limited hours and access, but neither gallery space is registered as a foundation or charity”).

115. NPR, *Bad Apple Proverbs: There’s One In Every Bunch*, May 5, 2011, available at <http://www.npr.org/2011/05/09/136017612/bad-apple-proverbs-theres-one-in-every-bunch>.

116. Lindsey, *supra* note 27, at 1058.

117. *Id.* at 1079.

118. William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 264 (2010) (citing Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38, 41–42 (quoting Vartan Gregorian, the president of the Carnegie Corporation)).

advantages. An ideal solution would both weed out tax abuse and not hinder those who donate and display art in the most philanthropic ways.

There are many disincentives for individuals to donate artwork to museums. Not only the severe limitations placed on fractional giving, but also museums are often only able to display five percent of their inventory at any time.¹¹⁹ Don Fisher, co-founder of the Gap, offered to donate his collection to the San Francisco Museum of Modern Art with a stipulation that much of the collection be on display for a significant period of time.¹²⁰ When the museum declined, Mr. Fisher decided to open his own museum that would actually include 5,000 more square-feet than San Francisco's museum.¹²¹ Finally, art collectors are scared that soon after they donate a piece, the museum will turn around and sell it, especially as the art market is currently sizzling.¹²²

The main question in enacting any new legislation is what do we want to encourage? Congress has already showed disdain for the practice of donating piecemeal while being able to retain physical possession of the fractionally-donated property. While Congress may want to reduce abuse of tax donations, it still wants to encourage art donation so more people get a chance to view and appreciate cultural history. The following subsections will discuss the pluses and minuses of different requirements that could make the art donation and private operating foundation nexus more equitable.

1. Forced Separation of Powers

As far back as 1965, there have been concerns that private foundations “represent dangerous concentrations of economic and social power.”¹²³ Currently, tax policy “reinforces power, influence, and inequality” in our society and this elitism passes on with each subsequent generation.¹²⁴ The government is allowing the wealthy to redistribute the public's money, essentially exercising a form of self-government.¹²⁵ This power is magnified when the wealthy create and donate to their own foundations, allowing “the founder and the founder's family to select the objects of their

119. Lauren A.E. Schuker, *The Firestorm Over Private Museums*, WALL ST. J., Apr. 4, 2008, available at <http://www.wsj.com/articles/SB120727433942088537>.

120. *Id.*

121. *Id.* (In deciding not to make the donation, Mr. Fisher stated “[o]ur collection is too good to sit in the basement someplace.”).

122. *Id.* For example, recently “the New York Public Library and a number of major university institutions [] [were] selling gifts to make a quick profit.” *Id.*

123. STAFF OF JOINT COMM. ON TAXATION, *supra* note 35.

124. Bullock, *supra* note 31, at 330.

125. *Id.*

charitable bounty and to manage the charitable assets.”¹²⁶ One Treasury Report identified numerous major problems in the realm of private foundations, with one being “donor involvement in foundation management.”¹²⁷

One possible solution is to prohibit a substantial contributor to a foundation from being a central member of the foundation’s governing board. This prohibition should also be extended to family members of substantial contributors. If you separate the donors and the directors of private art museums, the donated artwork is more likely to serve the public interest. The donor of the artwork would no longer be able to exercise control of the museum’s assets, which is probably in the public’s best interest. It is likely that an art expert or a diverse group of knowledgeable individuals are better suited to operate a museum when compared to donors or their families.¹²⁸ A foundation can deal and trade the art to supply artwork that is less likely to be available in the relevant areas. Also, an independently-governed private foundation is less likely to be located near a substantial contributor’s residence, which are often inaccessible to the public.

The 1965 Treasury Report contained a similar idea, recommending that “after a foundation had been in existence for 25 years, no more than 25 percent of the foundation’s governing body could consist of donors or related parties.”¹²⁹ A similar provision would be reasonable to give a private operating foundation a chance to get started and provide some initial stability. Without a provision that divests complete control of a foundation from the primary donor, the only thing a donation does is remove the donor’s legal ownership. To avid collectors who are not in it for investment purposes, this is really no loss at all. These wealthy art collectors could still employ their “innovative ideas” in the charitable sector for a period, but

126. *Id.* (quoting John G. Simon, *Charity and Dynasty Under the Federal Tax System*, 5 Prob. Law. 1, 5 (1978)). In regards to the Brant Foundation, Peter Brant stated in an interview that “[a]s for the curatorial side, I basically try to do that myself—though I try to confer with people that I respect and really feel contribute. My daughter is a young lady, but she certainly learns more every month and she’s doing a terrific job.” Andrew M. Goldstein, *Interview Magazine Owner Peter Brant on the New “Renaissance” in American Art*, INTERVIEW MAGAZINE, Apr. 22, 2014. Mr. Brant’s “daughter Allison is the director of the Brant Foundation Art Study Center, and other children serve on the board of the Brant Foundation, established in 1996, which oversees the center’s day-to-day operations.” Benjamin Genocchio, *Displaying a Taste for the Moderns*, N.Y. TIMES, May 24, 2009, at CT9.

127. Bullock, *supra* note 31, at 330.

128. See Drennan, *supra* note 118, at 260–61 (adding that a concentration of board members from a single family “may not only lead to a lack of diversity, but a lack of expertise and experience”).

129. STAFF OF JOINT COMM. ON TAXATION, *supra* note 35.

there is no reason to allow a single family to run a museum forever.¹³⁰ Donors will still have the incentive to create a museum because they can operate and control the charity's assets for twenty-five years, and even if they have to give up control of the governing board, the founder is likely to remain a key member of the charity during their life.

Another, albeit similar solution, would be to limit substantial contributors and their families from receiving compensation for their participation in the direction of the private museum. Currently, a private operating foundation can pay a reasonable salary to any disqualified person, which includes substantial contributors and their family members, as long as the payment is necessary to carrying out the exempt purpose of the foundation.¹³¹ The concentration of power and pay in a single family discourages outside participation, leading non-family members to believe "that family members will have the 'inside track' for hiring and subsequent advancement."¹³² While some believe nepotism is a positive, most believe the practice has a negative effect which "conflicts so fundamentally with the basic American values of egalitarianism and merit."¹³³ Not only will eliminating pay for disqualified persons create a culture of diversity and inclusiveness among operating foundations, but it will force the foundations to hire more qualified individuals.

2. *Underserved Area*

If we start with the proposition that tax-exempt status is allowed because a particular organization supplies some good or service that the government would otherwise have to provide, it is odd that an organization can be tax-exempt while performing a service that the government simultaneously provides. For example, the St. Louis Art Museum is funded by city and county property taxes.¹³⁴ At the same time, a private museum could open up right next to the city's museum and receive preferential tax treatment, even though the government would not need to provide that

130. See Drennan, *supra* note 118, at 261. Also, while many of these wealthy art collectors are "entrepreneurial wizard[s]" themselves, "the skill level of the founder's descendants is mere speculation." *Id.*

131. 26 U.S.C. § 4941(d)(2)(E) (2012). "For the determination whether compensation is excessive, see § 1.162-7 of this chapter (Income Tax Regulations)." 26 C.F.R. § 53.4941(d)-3(c) (1973). "In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." 26 C.F.R. § 1.162-7(b)(3) (1960).

132. See Drennan, *supra* note 118, at 259.

133. *Nepotism: Wrong For the Workplace?*, NPR (Oct. 17, 2007), <http://www.npr.org/templates/story/story.php?storyId=15353609>.

134. *About Us*, ST. LOUIS ART MUSEUM, <http://www.slam.org/AboutUs/foundation.php> (last visited Apr. 9, 2015).

additional service otherwise. This is especially true if an area is oversaturated with any particular service, be it an art museum or a zoo.

One solution would be to require any potential tax-exempt private art museum to be located in an underserved area or, at a minimum, some distance from a well-established tax-funded museum. If the government is going to give up tax dollars, the public should gain something that it currently does not have. This might not be such an issue with a chess club or science fiction group because there is not much money flowing in and out of those organizations. On the other hand, in the case of a private museum, you have collections worth millions and the accompanying deductions that the organization's founders are able to take. At least one court has weighed the distance from the nearest art gallery or museum as a substantial factor in granting tax-exempt status to an art organization.¹³⁵

The flipside to this proposal is that a private museum may do better when located near a more prominent museum. For example, the Barnes Foundation faced the possibility of bankruptcy in 2004 before the courts granted legal permission to move the museum near the Philadelphia Museum of Art.¹³⁶ At its new location, the museum received greater visibility, which ultimately allowed it to keep its doors open.¹³⁷ Even if an occasional private museum would fare better near a more prominent museum, it is still in the public's interest generally if these museums are located in underserved areas. If the government is already paying for the service, then it does not make sense to subsidize the exact same service in the same area.

3. *Publicly Accessible*

Another solution, and one that ties the first two suggestions together, is to require private museums to be more publicly accessible. This would likely mean requiring that the museum not be located on the founder's or a substantial donor's residence. The IRS has already held that the placement by a foundation of sculptures on the residence of a substantial donor was an act of self-dealing.¹³⁸ In the same memorandum, the IRS noted that a lack of signs to alert the public was a problem.¹³⁹ The IRS explained that not

135. *Cleveland Creative Arts Guild v. Comm'r*, T.C. Memo. 1985-316 (declaring that the guild furthered public appreciation in the arts "especially in view of the fact that it operates in a community thirty miles from the nearest art gallery or museum").

136. Schuker, *supra* note 119.

137. *Id.*

138. *See* Tech. Adv. Mem. 88-24-001 (June 17, 1988).

139. *See id.*

many individuals feel welcome to traverse another's property, especially when there is no indication they are invited to do so.

For example, The Brant Foundation Art Study Center, a five-year-old museum, is located just down the road from its creator's residence.¹⁴⁰ There are no identifying signs for the center, either at the main turnoff to the location, the security gate, or even on the building.¹⁴¹ While the general public is likely unaware of the center's location, the location is known to "the art-world cognoscenti and celebrities who attend the twice-a-year gala openings."¹⁴² This is the type of situation where the perception is that an individual is receiving the primary benefit while only a limited number of people from the public see a gain.

At a minimum, a private museum should have signs that direct the public starting at main roads and highways. Also, the museums should be labeled as such and convey to the public that it is welcome. To be accessible to a wider range of people, these museums should also be required to have more accessible hours. Not only are the private museums often by appointment only, they tend to only be available only at inconvenient times.¹⁴³ The hours seem set to allow occasional school and museum tours as opposed to a large number of the public. A starting point for this proposal would be to mandate that these museums offer certain walk-up days, especially on the weekends when people are most likely to take a spontaneous trip to a museum.¹⁴⁴ While it might not be realistic to require these museums to remain fully staffed and secured to the level of public museums, they should be reasonably available. With the appointment-only restriction, and weekday-only availability, the vast majority of the public is unlikely to get to appreciate the foundation's artwork.

4. Limiting Deductions

Another possible solution is to lower the percentage an individual can deduct when donating property to a foundation where the same individual is the one who created and controls the foundation. For example, if an individual creates an art museum and is also a significant contributor of art

140. Cohen, *supra* note 3.

141. *Id.*

142. *Id.*

143. See, e.g., *Contact*, BRANTFOUNDATION.ORG, <http://www.brantfoundation.org/page/contact> (last visited Apr. 9, 2015) (listing open times as Monday-Friday from 10-4).

144. The Brant Foundation is closed on the weekends unless you are one of the lucky few who get to attend the preview and party sessions, which are often "glamorous and star-studded" events. Cait Munro, *The Brant Foundation Hosts the Party of the Year*, ARTNET NEWS, May 12, 2014, available at <https://news.artnet.com/people/the-brant-foundation-hosts-the-party-of-the-year-18001>.

to the museum, then that person would be limited to taking a deduction of half of the fair market value of the artwork. This lessened deduction would account for the fact that the person still gets to exercise dominion and control over the item, despite giving up legal ownership. Another way to limit deductions would be to add a category in the sliding scales of deductions. Currently, a person can deduct up to fifty percent of their contribution base when they donate cash to public charities and thirty percent when they donate property to public charities and cash to private charities.¹⁴⁵ A new rule could add a third category where a person donates to private charities controlled by them. The percentage could be set at fifteen and, again, the lower deduction would be attributed to the fact that the person still has control over the property. Any limitation like this should only be applied to donations of tangible property, however, because cash donations do not create the same type of concerns

IV. CONCLUSION

There is a problem in the sense of perceived fairness when wealthy individuals are able to take substantial tax deductions, while at the same time retaining control over the donated property. The issue then is whether new rules and regulations should be implemented that will affect all donors and foundations, despite only a limited few causing any real problems. This has been the evolution of the Code. To iron out inequities, Congress has had to create additional rules to cover each possible scenario. Any suggestion put forth in this Comment will do the same. To reach a more equitable solution, we must accept more complexity and sacrifice simplicity. At some point, we reach a threshold where adding to the Code is not worth it. In this instance, it is fair to question the worth of these private museums versus the benefit the public receives. Each proposed solution seeks to either increase what the public receives from these museums or decrease what the government has to give up in tax revenue. To have a truly successful tax code that the public believes in, we need to make changes that align the costs and benefits of the charitable provisions of the tax code.

145. See 26 U.S.C. § 170(b)(1)(A-C) (2012).

