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Restricted Charitable Gifts to the Government

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ABSTRACT. With surprising frequency, the government accepts a restricted charitable gift but later determines that compliance with the donor's restrictions is illegal, undesirable, or impossible. The government must then continue complying with a restriction it deems objectionable, and seek court approval to modify or deviate, or otherwise risk legal consequences for violation. When accepting a restricted charitable gift, the government often discounts future administration and compliance costs that can significantly undermine public benefits produced by the donor's philanthropy.

A rich literature has examined restricted charitable gift policy largely from the donor's perspective. That scholarship focuses on various mechanisms for supervising and enforcing donor-imposed restrictions. This Essay accepts as settled law that any charitable donee, including the government, should comply with donor-imposed restrictions unless legally altered. This Essay then covers new ground by rethinking the donee's role in philanthropic transfers that most acutely implicates the public interest in charitable assets: the government's acceptance of restricted charitable gifts.

Through a survey of litigated disputes involving government compliance with a restricted charitable gift, this Essay reveals four patterns of frequent conflict: when donor restrictions (1) violate public policy, (2) diverge from governmental priorities, (3) prescribe a charitable purpose impossible to accomplish with the amount given, or (4) subject the government to liability for gift maladministration. Those disputes demonstrate why the government's policy regarding restricted charitable gifts should not be acceptance by default. The Essay concludes by recommending government-acceptance-policy reforms that better protect the public interest in charitable assets while providing greater clarity for donors deciding how to structure a restricted charitable gift.

INTRODUCTION

The American doctrine of testamentary freedom robustly protects the right of property owners to decide how to alienate their assets at death.[1] Property

1. *See, e.g.*, *In re* Szperka's Will, 35 N.W.2d 209, 210-11 (Wis. 1948) ("[O]ne of the most important rights that a normal adult person has is his power to dispose of his property by will

owners, for example, may exercise testamentary freedom by imposing restrictions governing the future use of gifted property, provided that the donative objective is not illegal.[2] Donor-imposed restrictions can be applied to charitable gifts, including philanthropic donations to the government,[3] and they can remain in place long after the donor's death.[4]

Donees, however, are not compelled to accept restrictions they find objectionable. When such objections are not addressed before an inchoate gift proposal ossifies into a binding donative transfer, a donee can avoid subjecting itself to the donor's restrictions by disclaiming the property interest rather than accepting the problematic gift.[5]

This Essay contends that, like any donee, the government has the power to repudiate a charitable gift when it objects to the attendant restrictions,[6] but that the government too often fails to exercise that power. As a result, the government often accepts restricted charitable gifts that are not aligned with the public interest in charitable assets. We therefore argue that the government should be far more selective about accepting a restricted charitable gift because, in the long run, the cost of complying with or undertaking litigation to modify donor-imposed restrictions can undermine the value and enjoyment of philanthropy as a public good.

For a cautionary tale, consider a recent high-profile case in which a local government found itself ensnared in litigation more than two centuries after the donor's charitable gift. In 1822, President John Adams deeded several real-property

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as he chooses. In fact, it has been referred to by this court as a 'sacred right' . . . ."); *In re* Martinson's Est., 190 P.2d 96, 97 (Wash. 1948).

2. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2011) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

3. *See, e.g.*, RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 4.01 cmt. a (AM. L. INST. 2021) (stating that "a government must comply with a specific restriction on a charitable asset even if the government actors come to believe that the asset could be used for a better purpose than the purpose specified by the donor").

4. *See, e.g.*, Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304-05 (2003); RESTATEMENT (SECOND) OF TRS. § 365 (AM. L. INST. 1959) ("A charitable trust is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period.").

5. *See* Miller v. Herzfeld, 4 F.2d 355, 356 (3d Cir. 1925) ("[W]hile a man may not be made to accept a gift which he does not desire to possess, . . . when the gift has been made, it vests in him, subject to his repudiation, and remains vested until he repudiates it."); UNIF. PROB. CODE § 2-1106 (UNIF. L. COMM'N 2019) (codifying rules for a disclaimer of interest in property).

6. *See, e.g.*, *In re* Nicholson's Est., 93 P.2d 880, 889 (Colo. 1939) ("[W]hen the appointment [as charitable trustee] is tendered [to the city, the city] may refuse or reject it.").

parcels in a charitable trust to his hometown of Quincy, Massachusetts.[7] The parcels were expressly restricted for the purpose of funding construction of "a Congregational Temple to be built of stone, to be taken from the premises," as well as "a School for the teaching of the Greek and Latin languages, [and] arts and sciences."[8] When Adams died in 1826, Quincy made good on its obligation to build the church,[9] but plans for the private school proved more challenging. In 1870, the granite-clad Adams Academy finally opened, but it did not last long as an educational institution and closed for good in 1907.[10] Because President Adams' original restriction governing the schoolhouse property remained binding, the town petitioned courts for several trust modifications, including designation of a substitute charitable beneficiary (the Woodward School for Girls) and approval of a fifty-year lease to the Quincy Historical Society.[11]

The controversy's modern epoch began in 2007 when the Woodward School accused Quincy of breaching its fiduciary duty to invest the trust's liquid assets prudently.[12] The multi-year litigation culminated in an unfavorable outcome for Quincy: the trial court removed the city as trustee for cause[13] and the state supreme court held that the city had waived any sovereign-immunity defense by accepting Adams's appointment as charitable trustee.[14] After its removal as trustee, Quincy invoked the nuclear option of condemning the schoolhouse by eminent domain, an escalation that remains in litigation today.[15]

In hindsight, Quincy might now regret its acceptance of President Adams's gift because the restrictions generated centuries of legal woes. While, by modern standards, the city's obligation to build a church might be seen as violating the

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7. *See* Jalkut v. City of Quincy, 234 N.E.3d 328, 330-31 (Mass. App. Ct. 2024) (noting that the gift included historically significant real estate, such as the land parcel where John Hancock was born).

8. *Id.* at 331 (internal quotation marks omitted). The deed went on to describe "President Adams's personal thoughts about the curriculum to be taught at the school, including a prolonged discussion of the merits of learning Latin, Greek, and Hebrew". *Id.*

9. *See Survey of Historic Sites and Buildings: United First Parish Church (Unitarian)*, NAT'L PARK SERV. (Jan. 22, 2004), https://www.nps.gov/parkhistory/online_books/presidents/site32.htm [https://perma.cc/YYK8-4EU2].

10. *Jalkut*, 234 N.E.3d at 331.

11. *See* Woodward Sch. for Girls, Inc. v. City of Quincy, 13 N.E.3d 579, 585 (Mass. 2014); *Jalkut*, 234 N.E.3d at 331-33 (summarizing a series of court decisions from 1918, 1953, 1972, 2007, and 2014).

12. *See Woodward Sch.*, 13 N.E.3d at 586.

13. *See id.* at 586-88; *Jalkut*, 234 N.E.3d at 332-33.

14. *See Woodward Sch.*, 13 N.E.3d 579 at 601 ("A trustee, regardless of whether it is a municipality, a corporation, or a private individual, is accountable to courts for its conduct in fulfilling, or committing a breach of, the fiduciary duties it owes.").

15. *Jalkut*, 234 N.E.3d at 330.

Establishment Clause's church-state-separation doctrine,[16] it was Quincy's administration of the schoolhouse gift that ultimately subjected the municipality to fiduciary liability. Likewise, President Adams might have considered a different estate plan if he could have predicted the academy's permanent closure and the city's condemnation of the property for an unrelated public purpose. Judges presiding over the case have expressed their own exasperation, with one noting that "were he to be with us today, President Adams would, most assuredly, not be pleased with the events of the past fifty-seven years."[17]

It turns out that the Adams Academy saga is not an isolated case. As another court recently lamented, disputes arising from the government's acceptance of restricted charitable gifts are "disturbing[ly]" common.[18] Our own research confirms that such disputes are neither infrequent nor new.[19] The frequency of

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16. U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion."); *cf.* Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004) (holding that maintenance of Latin cross sculpture on government land violated the Establishment Clause).

17. *Jalkut*, 234 N.E.3d at 335-36 ("Now, three appeals later, one can only imagine how chagrined President Adams might be that the legal dispute over his gifts continues unabated.").

18. The court explained:

> Not infrequently, wealthy individuals, intending both to promote the common weal[th] and to memorialize themselves, give property to a city on the condition that it be used in perpetuity for some specified purpose. With disturbing regularity, however, the city soon tires of using the donated property for the purpose to which it agreed when it accepted the gift, and instead seeks to convert the property to some other use.

City of Palm Springs v. Living Desert Rsrv., 82 Cal. Rptr. 2d 859, 863 (Cal. Ct. App. 1999).

19. *See, e.g.*, Cleveland Botanical Garden v. Worthington Drewien, 216 N.E.3d 544, 546 (Ohio 2022) (addressing a gift of land "[t]o be used for no other purpose than a Public Park and to be called and known forever by the name Wade Park"); County of Contra Costa v. Bruzzone, No. A134369, 2012 WL 4842649, at *1 (Cal. Ct. App. Oct. 12, 2012) (concerning a gift of real property "for school purposes"); Folendorf v. City of Angels, No. C052723, 2007 WL 4510346, at *1 (Cal. Ct. App. Dec. 26, 2007) (concerning a deed "restrict[ing] the City from permitting, implementing or allowing any use *other* than a firehouse"); McDonell v. City of San Buenaventura, No. B175857, 2005 WL 3216230, at *1 (Cal. Ct. App. Dec. 1, 2005) (concerning a restricted gift of park land that contained a religious cross installation); Fletcher v. City of San Diego, No. D038916, 2002 WL 31480258, at *1 (Cal. Ct. App. Nov. 7, 2002) (concerning a gift of land "for the exclusive use of the United States Navy Department as a site for a Naval Training Station"); Homes v. Town of Madison, No. 422334, 1998 WL 712343, at *1 (Conn. Super. Ct. Oct. 5, 1998) (concerning a gift of land restricted to certain municipal purposes); Blumenthal v. White, 683 A.2d 410, 411 (Conn. App. Ct. 1996) (concerning a gift of land to the city for a public park); Walton v. City of Red Bluff, 3 Cal. Rptr. 2d 275, 287 (Cal. App. Ct. 1991) (concerning a gift that reverted to heirs when the municipality ceased use of the property in compliance with deed restrictions); *In re* Est. of Heil, 259 Cal. Rptr. 28, 29 (Cal. Ct. App. 1989) (concerning a gift "to the State of Nevada for the preservation of the wild horses in Nevada"); Dunphy v. Commonwealth, 331 N.E.2d 883, 884 (Mass. 1975) (concerning a gift of land "to be kept and used as a Public Park in perpetuity for the public good and to be called

disputes involving restricted charitable gifts to the government and their potential to severely undermine the public interest in charitable assets render this topic important and timely.

This Essay seeks to evaluate the government's exercise of repudiation rights at a pivotal moment of the gifting process--*before* acceptance of a restricted charitable gift. Acceptance is the pivotal moment because, thereafter, the transfer is complete and the gift is generally governed by the "golden rule" of testamentary freedom: "Whoever has the gold, makes the rules!"[20] Thus, when a donee accepts a gift, the law generally requires the donee to comply with restrictions imposed by the donor.[21] Unless the restriction violates public policy or the government follows proper procedures to obtain a court's approval to modify or deviate, the law requires compliance once the government has accepted a restricted charitable gift.[22]

We recognize that the American doctrine of testamentary freedom is contestable. A contrary rule, for example, might resolve objections to donor-imposed restrictions by allowing the government to invalidate them unilaterally or by

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the Maj. Edward P. Reed Park"); Abbot Kinney Co. v. City of Los Angeles, 36 Cal. Rptr. 113, 114 (Cal. Ct. App. 1963) (concerning a gift of beach property restricted to serving as a public pleasure park or beach); Bernstein v. City of Pittsburgh, 77 A.2d 452, 453 (Pa. 1951) (concerning a gift of land to be used as a public park).

20. *See* BRANT PARKER & JOHNNY HART, REMEMBER THE GOLDEN RULE!, IN THE WIZARD OF ID (1971).

21. *See* RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 4.01 (AM. L. INST. 2021) (restating the enforceability of restrictions on charitable assets). Longstanding trust doctrine also holds that a trust cannot be terminated or modified by consent of the beneficiaries if termination or modification would be inconsistent with a material trust purpose. *See* UNIF. TR. CODE § 411 (UNIF. L. COMM'N 2023); Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889). For analysis of economic justifications that favor limiting testamentary freedom, see Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1158 (2013). Kelly describes the "theoretical reasons why effectuating the donor's express wishes may diverge from what is socially optimal, including (1) imperfect information, (2) negative externalities, and (3) intergenerational equity." *Id*.

22. A rich body of legal scholarship has already examined the enforceability of restricted charitable gifts. For an excellent recent treatment surveying that literature and explaining the current state of play, see Nancy A. McLaughlin, *Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification*, 70 UCLA L. REV. DISCOURSE 2 (2023). Our inquiry focuses exclusively on policy implications arising from the government's acceptance of donor-imposed gift restrictions. For other policy concerns implicated by so-called "patriotic philanthropy," such as the government's overreliance on voluntary charitable gifts to fund governmental functions and the ability of wealthy donors to exert political influence through philanthropic transfers that are unregulated by campaign-contribution and political-lobbying regulations, see generally Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129 (2018).

treating restrictions as unenforceable under certain conditions.[23] But a general policy of ex post invalidation could invite the government to solicit charitable gifts without any intention or legal obligation to comply with the agreed-upon terms – dubious conduct that could bring public officials uncomfortably close to violating prohibitions against fraudulent charitable solicitation.[24] Moreover, the federal government and many states have enacted legislation that authorizes the acceptance of charitable gifts and empowers the government to enter into agreements to implement such gifts.[25] Several states go a step further in honoring donative intent by expressly *requiring* municipalities that accept a charitable gift to comply with the donor's restrictions.[26]

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23. Older sources report that a charitable trust's terms are unenforceable against the government unless the government has authorized such enforcement by statute. *See, e.g.*, RESTATEMENT (SECOND) OF TRS. § 378(2) (AM. L. INST. 1959) ("The United States or a State has capacity to take and hold property upon a charitable trust, but in the absence of a statute otherwise providing the charitable trust is unenforceable against the United States or a State."); Story v. Snyder, 184 F.2d 454, 456 (D.C. Cir. 1950) ("[G]ifts to the United States which involve any duty, burden, or condition, or are made dependent upon some future performance by the United States, are not accepted by the Government unless by the express authority of Congress.").

24. *Cf.* CAL. GOV'T CODE § 12599.6(f)(2) (West 2025) (prohibiting any charitable solicitation accomplished by "[u]sing any unfair or deceptive acts or practices or engaging in any fraudulent conduct that creates a likelihood of confusion or misunderstanding").

25. *See, e.g.*, 2 U.S.C. § 159 (2024) (providing that the Library of Congress Trust Fund Board "may be sued . . . for the purpose of enforcing the provisions of any trust accepted by it"); 53 PA. CONS. STAT. § 10106 (2025) ("The governing body of every municipality is hereby authorized and empowered . . . to accept gifts, grants or bequests from public and private sources for the purpose of carrying out the powers and duties conferred by this act, and to enter into agreements regarding the acceptance or utilization of such grants, gifts or bequests."); CAL. GOV'T CODE § 37354 (2025); CONN. GEN. STAT. § 7-148(c)(3)(B) (2025); LA. STAT. ANN. 33:7610(20) (2024); MICH. COMP. LAWS § 124.671(1)(b) (2025); TEX. LOC. GOV'T CODE ANN. § 51.076(a) (West 2025); VA. CODE ANN. § 37.2-504(8) (2024); WASH. REV. CODE § 35.21.100 (2025).

26. *See, e.g.*, OHIO REV. CODE ANN. § 755.19 (West 2025) ("In any municipal corporation which is the owner or trustee of property for park purposes, or of funds to be used in connection therewith, by deed of gift, devise, or bequest, such property or funds *shall be managed and administered in accordance with the provisions or conditions* of such deed of gift, devise, or bequest.") (emphasis added); GA. CODE ANN. § 36-37-2 (2025); ME. STAT. tit. 30-A, § 5654 (2025); MINN. STAT. § 465.03 (2025); N.J. STAT. ANN. § 40A:5-29 (West 2025); S.C. CODE ANN. § 51-15-230 (2025); S.D. CODIFIED LAWS § 9-38-32 (2025). In Colorado, the state constitution authorizes the city of Denver to receive charitable gifts "with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust." COLO. CONST. art. XX, § 1. In the South, however, a fraught legislative history reveals that some donor-intent statutes were enacted during the Jim Crow era for the purpose of promoting racial segregation. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 300 n.3 (1966) (describing Georgia statutes enacted in 1905 as "permit[ing] any person to grant a municipal corporation land in trust to the public use as a park on a racially segregated basis" and "authoriz[ing] municipal corporations to accept such grants and to enforce the racial limitations"); *see also*

We also acknowledge that disclaimer is not the only way for a donee to avoid subjecting itself to the legal dictates of a gift restriction. A restricted charitable gift can be construed as creating a charitable trust,[27] thereby enabling the donee to seek judicial permission to alter the restriction under one of several trust-modification doctrines.[28] Under the cy-près doctrine, for instance, a court can modify restrictions imposed by a charitable trust in a manner consistent with the donor's general charitable intent if the donor's chosen charitable purpose is (or has become) "unlawful, impracticable, impossible to achieve, or wasteful."[29] But it is always cheaper and more efficient to disclaim from the outset rather than to accept and pursue modification litigation down the road.

This Essay explains why the government's ex ante disclaimer of a restricted charitable gift often better serves the public interest in charitable assets than post-acceptance modification litigation. Our research reveals that, in the long run, accepting restricted charitable gifts can saddle the government with burdensome compliance costs and produce outcomes misaligned with both the public interest (as determined by the government's then-presiding officials) and the donor's intent. When accepting a restricted gift, the government tends to discount the likelihood that future circumstances might render the donor's specified charitable purpose impracticable, illegal, or politically untenable for a

Christopher J. Ryan, Jr., *An Historical and Empirical Examination of the Cy-Près Doctrine,* 48 ACTEC L.J. 289, 320-23 (2023) (describing courts' application of cy-près to such cases and revealing that judicial involvement in adjudicating the validity of racially restrictive trusts actually predated the Jim Crow era).

27. *See, e.g.,* RESTATEMENT (THIRD) OF TRS. § 28 cmt. a (AM. L. INST. 2003) ("A disposition to [a charitable] institution for a specific purpose . . . such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee . . . ."). For charitable gifts that are not construed as a charitable trust, violation of a donor's restriction can trigger a right of reverter or reentry belonging to the donor or their heirs. *See, e.g.*, Williams v. City of Kuttawa, 466 S.W.3d 505, 511 (Ky. Ct. App. 2015) (describing how donors "chose to ensure the purpose of the gift was fulfilled, not through management by a trustee, but by operation of law in the form of restrictive covenants and a reversionary interest"); Walton v. City of Red Bluff, 3 Cal. Rptr. 2d 275, 279 (Cal. App. Ct. 1991) (concerning a similar issue with property transfers); RESTATEMENT (SECOND) OF TRS. § 11 cmt. b (AM. L. INST. 1959) (noting that "if property is transferred upon a condition subsequent, the transferee can be compelled to hand over the property upon breach of the condition to the person entitled thereto, whether that person is the transferor or his estate or a third person to whom there is a gift over on breach of the condition").

28. *See* UNIF. TR. CODE §§ 410-417 (UNIF. L. COMM'N 2023).

29. *Id.* § 413; Cohen v. City of Lynn, 598 N.E.2d 682, 684 (Mass. App. Ct. 1992); *see also* Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1716 (2015) (explaining that "recently, cy pres reform has slowly but steadily chipped away at the primacy of donor intent and made it easier for institutions to reform restricted gifts through judicial intervention"). For an empirical analysis of more than 1,300 cy-près decisions, see Ryan, *supra* note 26.

municipality serving as a charitable fiduciary.[30] Such gifts obligate the government to subsidize compliance with (or litigate relief from) the donor's privately selected restrictions when future generations of elected officials determine that the original restrictions diverge from the community's current needs or priorities. Restricted charitable gifts can also expose the government to significant liability for gift maladministration when the gift requires the government to undertake functions for which it lacks institutional expertise, such as managing a trust's financial investments or operating a residential dormitory for schoolchildren. [31]

These observations lead us to conclude that donor-imposed restrictions governing a charitable gift should remain imposable and enforceable, but that governments should be far more circumspect about accepting a restricted charitable gift in the first place. On balance, it is often preferable for both the donor and the public to appoint private fiduciaries, rather than the government, to administer restricted charitable gifts. We therefore challenge the prevailing norm among federal, state, and local governments to accept restricted charitable gifts by default.

This Essay proceeds as follows: Part I surveys litigated disputes involving governmental acceptance of a restricted charitable gift. That survey identifies four fact patterns that tend to generate gift compliance litigation. Part II contains two proposals for reform: (1) the establishment of formal procedures through which the government can prospectively evaluate proposed gift restrictions; and (2) the specification of substantive criteria for gift acceptability to better guide the government when reviewing gift proposals and donors when considering whether to donate a restricted charitable gift to the government.

I. CHARITABLE GIFT COMPLIANCE LITIGATION

This Part surveys litigation involving restricted charitable gifts to the government. It identifies four fact patterns that are especially apt to generate disputes: (1) when donor restrictions violate public policy, (2) when donor restrictions and governmental priorities diverge, (3) when a restricted gift lacks sufficient funding to accomplish the donor's specified charitable purpose, and (4) when the government's maladministration of a gift subjects it to liability.

30. Private fiduciaries, such as churches, schools, and hospitals, also have a tendency to discount the potential obsolescence of the donor's charitable purpose. *See* Ryan, *supra* note 26, at 310-29.

31. *See infra* Section I.D.

A. Restrictions in Violation of Public Policy

Some of the most consequential civil-rights decisions by the U.S. Supreme Court have involved the government's acceptance of charitable gifts that were accompanied by donor-imposed restrictions that would later come to violate public policy. Indeed, those cases helped define the state-action doctrine that compels the government to comply with the U.S. Constitution when enforcing certain types of private restrictions.[32]

This Section focuses on charitable gifts containing restrictions that discriminate expressly on the basis of race, gender, or religion. Today, such discrimination is generally prohibited by the Fourteenth Amendment's Equal Protection Clause when that discrimination is performed or enforced by the government.[33] In the litigation examples described below, the gift restrictions did not violate public policy at the time of the gift but were challenged years later in response to subsequent changes in constitutional and antidiscrimination law. Disclaimer of the restricted gifts in the first instance, however, could have avoided both the litigation costs and societal harms caused by the underlying discrimination.

We begin with Stephen Girard's 1831 will, which allocated funds for the erection, maintenance, and operation of a school, but stipulated that the institution could only admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain."[34] Girard selected the City of Philadelphia as trustee because "he undoubtedly [wanted] to obtain an immortal trustee."[35] The school, Girard College, commenced operations in 1848 under the fiduciary oversight of Philadelphia's Board of Directors of City Trusts.[36]

In 1954, two Black students who were denied admission based solely on their race challenged Girard's racial restriction as a violation of equal protection.[37] The Pennsylvania Supreme Court enforced Girard's restriction after concluding that the gift was made "by a private individual disposing of his own property" who "certainly did not intend . . . to empower [the city] to [administer the school] in

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32. *See* Shelley v. Kraemer, 334 U.S. 1, 1 (1948).

33. U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

34. Pennsylvania v. Bd. of Dirs. of City Trs., 353 U.S. 230, 230-31 (1957).

35. *In re* Girard's Est., 127 A.2d 287, 296-97 (Pa. 1956).

36. 353 U.S. at 231. Pennsylvania Supreme Court Justice Musmanno's dissent in *In re Girard's Estate*, 127 A.2d at 318, compiled the many state and local legislative enactments that made it possible for the city to build and operate the school.

37. 353 U.S. at 231.

its public or governmental capacity."[38] But the U.S. Supreme Court reversed, holding that the state-action doctrine applied because a state agency operated the school.[39] Today, more than ninety percent of students at Girard College are African American.[40]

By accepting Stephen Girard's bequest, and, in particular, by agreeing to implement his racially discriminatory admissions policy, the City of Philadelphia invited upon itself an imponderable choice between two bad options. It could violate the donor's restriction because Girard's admission policy served no legitimate governmental purpose, thereby inviting the state attorney general or other private parties to sue the city to enforce compliance. Alternatively, Philadelphia could comply with the gift restriction by racially discriminating against its own citizenry at the behest of a deceased donor. The city chose the latter route, which had the effect of harming Black children who wished to attend the school and forcing Black taxpayers to subsidize the city's efforts in state and federal courts to perpetuate racial discrimination against Black Philadelphians.

Although probably unthinkable at the time, the better option would have been to disclaim Girard's gift at the outset, sparing Philadelphia from implementing the restriction and later litigating its constitutionality. If the city's disclaimer had led to an alternate appointment of a private trustee, a student aggrieved by the discriminatory admissions policy could have challenged Girard's restriction on other legal grounds and likely prevailed.[41] Had the city appointed a private fiduciary, it could have ensured that private parties, rather than the government, would bear the litigation costs.

The 1911 will of Augustus Bacon contained a similarly discriminatory charitable gift restriction and produced similar litigation. Bacon, the U.S. Senator from Georgia, donated a tract of land known as Baconsfield to Macon, Georgia.[42] Bacon's will stipulated that the land "was to be used as 'a park and pleasure ground' for white people only" because "while he had only the kindest feeling for the Negroes he was of the opinion that 'in their social relations the two races (white and negro) should be forever separate.'"[43] The city kept the park

38. 127 A.2d at 293.

39. 353 U.S. at 231.

40. *See Student Population at Girard College*, NICHE, https://www.niche.com/k12/girard-college-philadelphia-pa/students [https://perma.cc/PUA4-JQQL].

41. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 185-86 (1976) (holding that a private school's racially discriminatory admissions policy violated the federal prohibition against racial discrimination in the making of private contracts under 42 U.S.C. § 1981 (2024)).

42. Evans v. Newton, 382 U.S. 296, 297 (1966).

43. *Id.*

segregated for decades, but in response to 1960s civil-rights litigation, it began admitting Black people.[44]

Members of the park's Board of Managers then sued to replace the park's existing trustees with new trustees who would comply with the racial segregation mandated by the gift's express terms.[45] Senator Bacon's heirs also intervened, seeking a reversion of the property if the court did not remove the park's existing trustees.[46] The Georgia Supreme Court upheld the appointment of the heirs' hand-picked trustees, explaining that "Bacon had the absolute right to give and bequeath property to a limited class."[47] But, once again, the U.S. Supreme Court reversed on state-action grounds.[48]

On remand, the state supreme court concluded that the trust's sole purpose of maintaining a racially segregated park had become impossible.[49] The court found that the trust had terminated, so it imposed a resulting trust in favor of Bacon's heirs.[50] The U.S. Supreme Court affirmed the state court's ruling, which returned the park to the donor's heirs rather than modify the trust to avoid a violation of public-accommodations laws prohibiting racial discrimination.[51]

In terminating the trust and returning the park to Bacon's heirs, the state courts "concluded, in effect, that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated."[52] That finding led the Supreme Court to hold that the trust's termination had "eliminated all discrimination against Negroes in the park by eliminating the park itself, and [that] the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access

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44. *Id.*

45. *Id.* at 297–98.

46. *Id.*

47. Evans v. Newton, 138 S.E.2d 573, 577 (Ga. 1964).

48. *Evans*, 382 U.S. at 299 ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

49. Evans v. Newton, 148 S.E.2d 329, 330 (Ga. 1966) ("[I]f new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the will of Senator Bacon.").

50. *Id.* at 330-31.

51. Evans v. Abney, 396 U.S. 435, 439 (1970).

52. *Id.* at 443.

to the park's facilities had it continued."[53] The property thus ceased operation as a public park, reverted to Senator Bacon's heirs, and was sold to developers.[54]

In the Baconsfield matter, had the government disclaimed the gift at the outset, the donated land would have reverted to Senator Bacon's heirs and would not have been enjoyed by the public as a park. But that is what happened to the property anyway. Thus, a disclaimer would have achieved the same result while avoiding the harm caused by years of racial discrimination against Black citizens wishing to visit the otherwise-public park. As in the Girard College case, it also would have avoided forcing Black taxpayers to subsidize the city's ratification of the donor's racial animus.

More recently, courts have invoked the cy-près doctrine to modify discriminatory restrictions that had become unenforceable against a municipal trustee under the state-action doctrine.[55] As noted briefly above, the cy-près doctrine permits judicial modification of restrictions imposed by a charitable trust in a manner consistent with the donor's general charitable intent if the donor's chosen charitable purpose is (or has become) "unlawful, impracticable, impossible to achieve, or wasteful."[56]

Consider, for example, *In re Certain Scholarship Funds*, which involved a public school's administration of gifted scholarship funds. According to one of the gifts' original terms, the scholarship could only be awarded to a "worthy protestant boy."[57] Rather than accepting the state attorney general's proposal to cure the state-action problem by replacing the public-school trustee with private fiduciaries, the state supreme court held that New Hampshire's cy-près doctrine compelled a modification that would retain the public trustee but excise gender and religious discrimination from the gift terms.[58] The court noted that such modification was consistent with donative intent, crediting the trial court's finding that "the primary intent of [the] testators was not to discriminate against women and non-Protestants, but to assist the students . . . in their pursuit of higher education."[59] Donor intent matters in such cases because the bedrock principle of testamentary freedom instructs courts to implement the donor's

53. *Id.* at 445.

54. *See* Megan Rosinko, *Baconsfield: Macon's Missing Park*, MEDIUM.COM (May 3, 2019), https://medium.com/the-bearfaced-truth/baconsfield-macons-missing-park-1fe5ec37cocb.

55. *See, e.g.*, *In re* Crichfield Tr., 426 A.2d 88 (N.J. Super. Ct. Ch. Div. 1980) (modifying trust's gender restriction that could not be carried out by public school trustees).

56. UNIF. TR. CODE § 413 (UNIF. L. COMM'N 2023).

57. *In re* Certain Scholarship Funds, 575 A.2d 1325, 1325 (N.H. 1990).

58. *Id.* at 1329 ("[T]he court must ask whether its first priority is to end the discrimination or to preserve it by substituting a private administrative mechanism that would, if chosen by the testator, have carried no unconstitutional implication.").

59. *Id.* at 1328.

expressed preferences unless "the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."[60]

Enlightened observers living in the twenty-first century might take for granted the current state of constitutional and antidiscrimination law. Surely any government today would be compelled by law or political pressure to reject a restricted gift requiring it to discriminate based on race, religion, or gender, would it? But the prevailing laws and norms of today are the wrong yardstick for predicting the legal and social durability of newly proposed gift restrictions, even ones that are likely to be viewed as benign by a contemporary audience. After all, the discrimination that Girard and Bacon enshrined in their gifts were both legal and socially acceptable back in their day. Those gift restrictions did not become unenforceable until the law and public policies concerning protected-class discrimination subsequently evolved many years later.

Lessons learned from the state-action cases above, therefore, remain relevant because restrictions that seem benign when judged by the prevailing social norms of today could later violate the public policies of tomorrow. Indeed, changes in the law can alter the public-policy landscape both profoundly and abruptly. For one example of how quickly policy can shift, state and local public universities recently began reviewing their ability to comply with charitable gifts restricting scholarship recipients to underrepresented racial and ethnic groups after the Supreme Court's 2023 decision declaring affirmative action in college admissions unconstitutional.[61]

B. The Divergence Between Donor Restrictions and Governmental Priorities

Charitable gift restrictions are enforceable in perpetuity,[62] a feature that allows the consequences of governmental acceptance to reverberate across generations. For gifts large enough to stand the test of time, as they are often intended to do, the longevity of charitable gift restrictions can interfere with the ability of future government officials to allocate public resources optimally according to

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60. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2011); Fantin v. Fantin, No. FSTCV166027439S, 2017 WL 4872858, at *21 (Conn. Super. Ct. Sept. 6, 2017) (noting that "Americans consider testamentary freedom to be among our country's cherished rights").

61. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 223 (2023); Sarah Donaldson, *Ohio Reviewing Race-Based Scholarships After Supreme Court Affirmative Action Ruling*, NAT'L PUB. RADIO (May 18, 2024, 9:06 AM ET), https://www.npr.org/2024/05/18/1252172578/ohio-affirmative-action-diversity-university-scholarships [https://perma.cc/BZ5U-ED36].

62. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.3(2) (AM. L. INST. 2011) ("The Rule Against Perpetuities does not apply to . . . a trust or other donative disposition of property solely for charitable purposes.").

current needs. When the government determines that a donor's restriction no longer aligns with current priorities, courts are generally unwilling to modify the original gift terms without proof that the donor's restriction has become illegal and impossible. And when a court does authorize modification on grounds of impossibility or impracticability, judicial approval often comes after years of costly litigation that could have been avoided entirely by disclaiming the restricted gift in the first place.

Consider, for example, *Kapiolani Park Preservation Society v. City and County of Honolulu*, which involved a restricted gift of parkland donated to the Hawaiian government in 1896.[63] The donor's gift agreement expressly prohibited the lease or sale of any donated parkland; later that same year, the territorial legislature codified the terms of the donor's gift agreement into law.[64] In 1913, however, the legislature repealed the 1896 statute, replacing it with new legislation that conveyed ownership to Honolulu as a trustee. The 1913 statute did not retain the 1896 statute's prohibition against leasing parkland, but the leasing restriction recited in the donor's original gift agreement was never expressly revoked or stricken by a court or legislature.[65]

The leasing restriction's enforceability went uncontested until the 1980s, when the city sought to lease 10,000 square feet of parkland adjacent to the Honolulu Zoo to a restaurant concessionaire for a fifteen-year term.[66] A neighboring park preservation society opposed the development and filed a civil action challenging the city's authority to enter into the proposed lease.[67] In defense of the city's development plans, the municipality argued that when the legislature repealed the 1896 statute containing the original lease prohibition, the 1913 statute nullified both the prior statute and the donor's restriction.[68] The state supreme court disagreed, finding that the U.S. Constitution's Contract Clause prevented the territorial legislature from "impair[ing] the obligations of the contract under which the trust was created."[69] The state supreme court thus held that the 1913 statute did not confer the city with leasing authority that the original gift agreement expressly prohibited.[70]

Ordinarily, decisions about whether to lease public lands or to offer dining amenities on public property belong to the government. But in *Kapiolani*, the

63. 751 P.2d 1022, 1025 (Haw. 1988).

64. *Id.* at 1025-26.

65. *Id.* at 1026.

66. *Id.* at 1024.

67. *Id.*

68. *Id.* at 1026.

69. *Id.* at 1027.

70. *Id.*

government's acceptance of a charitable gift of land allowed neighboring residents to successfully upend the government's plan to offer public dining amenities to park-goers by enforcing restrictions imposed by a long-deceased donor. As an application of testamentary freedom, courts decided the case correctly: the donor had a right to impose a lease prohibition, and the government accepted the gift subject to that restriction.

From the government's perspective, however, the case offers another cautionary tale about the long-term costs of accepting gift restrictions that might seem benign by contemporary standards (such as a prohibition on leases dated back to 1896). Here, the gift restriction did not prohibit the city from operating its own dining amenity, so the restriction and subsequent enforcement proceeding served only to prevent the government from outsourcing the proposed dining operation in the manner it deemed most expedient: by leasing a portion of the parkland to a private concessionaire. More recently, in 2022, *Cleveland Botanical Garden v. Worthington Drewien* concerned a 1882 gift of land to the City of Cleveland subject to the following express requirements: that the grounds be maintained in a "condition as to make it an attractive and desirable place of resort;" that the site be "known forever by the name Wade Park;" and that the park "be open at all times to the public."[71] The gift terms also provided that "if the grounds aforesaid or any part thereof shall be perverted or diverted from the public purposes and uses herein expressed, the said property and every part thereof to revert to me or my heirs forever."[72] After accepting the gift, the city delegated the park's maintenance and operation to a professional operator now known as the Cleveland Botanical Garden (CBG).[73] In 2003, the heirs of the donor challenged CBG's implementation of a new policy of charging patrons for admission to its buildings, gardens, conservatory, and parking facility as violations of the original gift terms.[74]

After nearly two decades of litigation, the state supreme court held that the heirs' reversionary interests remained enforceable "because those interests are original to the root of title,"[75] but that the city had not violated the donor's restriction.[76] The court found that the interpretation advocated by the heirs would place the city in the untenable position of having an obligation to maintain an

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71. Cleveland Botanical Garden v. Worthington Drewien, 216 N.E.3d 544, 546 (Ohio 2022).

72. *Id.* at 546-47.

73. *Id.* at 547.

74. *Id.* at 547-48 (noting that the "heirs did not seek to enforce their reversionary interest in the park property").

75. *Id.* at 553.

76. *Id.* at 550 ("This opinion thus agrees with the trial and appellate courts' analyses and conclusions that CBG's operation of facilities, buildings, gardens, and a parking garage, and its charging fees to maintain those operations, is consistent with the terms of the Wade deed.").

attractive, freely accessible park, while also complying with an obligation to seek permission from all heirs before closing any portion of the park for maintenance, cleaning, or community events.[77] Unlike in *Kapiolani*, the city ultimately prevailed. But Cleveland's victory in the state supreme court was costly and hard-fought, having generated at least twelve lower-court decisions along the way.[78]

Another recent case, *In re Bierstadt Paintings Charitable Trust*, involved a prominent local doctor's gift in charitable trust of valuable artwork to the City of Plainfield, New Jersey, in 1919.[79] The city publicly displayed the artwork without issue until 2019, when municipal officials determined that one of the paintings — Albert Bierstadt's "The Landing of Columbus," which had appraised at $15 million — contained "racist implications" that public officials believed would cause irreparable harm to the city's predominantly nonwhite community unless sold.[80] Invoking the doctrine of cy-près, the city filed a petition in state court for permission to sell the Columbus painting, as well as another painting from the same donor that the city did not contend to be objectionable.[81] The city proposed to allocate proceeds from the sale to local educational and recreational programs.[82]

The court denied the city's petition for relief. Notably, the court found "there was no indication that [the donor] intended for the trustee to sell the works," even though the terms of the original gift did not expressly prohibit such a sale.[83] To ascertain the donor's intent, the court admitted extrinsic evidence, from which the court concluded the donor intended for the city to retain the artwork.[84] The court then denied cy-près modification because the alleged change

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77. *Id.*

78. *See* Cleveland Botanical Garden v. Drewien, No. 13-812284, 2017 WL 11711749 (Ohio Ct. Com. Pl. Apr. 17, 2017); 2017 WL 11711748 (Ohio Ct. Com. Pl. May 18, 2017); 2018 WL 11467329 (Ohio Ct. Com. Pl. Apr. 24, 2018); 2018 WL 11467330 (Ohio Ct. Com. Pl. Apr. 24, 2018); 2018 WL 11260355 (Ohio Ct. Com. Pl. Aug. 13, 2018); 2019 WL 13248047 (Ohio Ct. Com. Pl. Feb. 05, 2019); 2019 WL 11583187 (Ohio Ct. Com. Pl. Apr. 10, 2019); 2019 WL 13248045 (Ohio Ct. Com. Pl. Apr. 19, 2019); 2019 WL 13248046 (Ohio Ct. Com. Pl. Apr. 19, 2019); 2019 WL 8955198 (Ohio Ct. Com. Pl. Dec. 06, 2019); 2019 WL 13248048 (Ohio Ct. Com. Pl. Apr. 19, 2019); Cleveland Botanical Garden v. Drewien, 153 N.E.3d 700 (Ohio Ct. App. 2020).

79. *In re* Bierstadt Paintings Charitable Tr., No. A-0529-20, 2021 WL 3057076, at *1 (N.J. Super. Ct. App. Div. July 20, 2021).

80. *Id.* (summarizing the city's allegation "that the 'Columbus' painting 'no longer provides aesthetic enjoyment to the community' and is a 'source of constant controversy' and therefore the charitable purpose of the trust [had become] impracticable").

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at *3.

in public sentiment did not render the city's continued ownership of the paintings impossible or impracticable.[85]

Even when governments succeed in modifying a gift restriction, the litigation required to obtain court approval can be slow and expensive. In *United States ex rel. Smithsonian Institution*, the Smithsonian Museum—a federal institution established by Congress in 1846—sought court approval to modify a 1920 gift restriction that mandated the continuous public display of "ethnographic objects," including "nineteen bronze sculptures . . . of the Congolese people" that the donor himself had fabricated.[86] The museum claimed that compliance with the gift's public-display mandate was impractical for several reasons, including incompatibility "with the Smithsonian's mission because the sculptures portray outdated colonial stereotypes."[87] The federal district court for the District of Columbia ultimately granted the Smithsonian's petition for cy-près relief, finding that "the exhibit would not reflect contemporary cultural and societal concerns and would therefore be inconsistent with the Museum's mission."[88] That decision, however, was slow and costly, arriving seven years after the first complaint from the donor's heir and four years after the Smithsonian initially petitioned for court approval to modify the restriction.[89]

These cases demonstrate that courts are often reluctant to grant a government's request to repurpose restricted charitable gifts to reflect current community needs and priorities: in *Kapiolani Park*, an 1896 restriction thwarted the government's plan nearly a century later to offer a dining concession at the public zoo; in *Bierstadt Paintings*, the court construed a 1919 gift of artwork to prohibit the government from selling the assets in 2019 even in the absence of a written gift agreement expressly restricting the sale. Even when governments succeed in modifying a gift restriction, the litigation required to obtain court approval is often very slow and enormously expensive: in *Cleveland Botanical Garden*, courts issued rulings on at least twelve occasions; in *Smithsonian Institution*, the

85. *Id.* at *5-6.

86. United States *ex rel.* Smithsonian Inst., No. 17-mc-3005, 2021 WL 3287739, at *1 (D.D.C. Aug. 2, 2021).

87. *Id*. at *3.

88. *Id*. at *4. Unlike the court in *In re Bierstadt Paintings Charitable Trust*, the *Smithsonian Institution* court concluded that the donor's continuous display requirement had become impracticable: "[T]he Museum's mission is to educate its visitors, and exhibitions that reflect contemporary cultural and societal concerns are necessary to accomplish that goal. Consequently, enforcement of the Agreement which requires the Museum to continue to display a collection which has already been exhibited for nearly a century interferes with the Museum's mission and is therefore impracticable." *Id*.

89. *Id.* at *2.

museum's courtroom victory came after seven years of conflict with the donor's heir and four years of litigation.

C. Insufficient Funding to Implement the Donor's Charitable Purpose

Another fount of litigation involves the government's acceptance of a restricted charitable gift that lacks sufficient funding to carry out the donor's specified charitable purpose. That dilemma imposes burdens on the government to either appropriate public funds to cure the shortfall or to bend over backwards to identify alternative uses for the gift in line with the donor's charitable purpose. Because insufficiency of funding to accomplish the donor's charitable purpose is often foreseeable before the government accepts a charitable gift, disclaiming rather than accepting insufficiently funded charitable gifts can avoid the costs and burdens of post-acceptance modification litigation.

In *Town of Milton v. Attorney General*, for instance, a donor named Edwin Wadsworth devised his residuary estate to the Town of Milton, Massachusetts, "for the purpose of establishing and maintaining a Public Hospital," a facility that the town lacked at the time of Wadsworth's death, which could have been between the years of 1899-1901.[90] However, in 1903, an unrelated charitable corporation established a small public hospital known as Milton Hospital.[91] Because Milton Hospital served the charitable purpose intended by Wadsworth, the town retained and invested Wadsworth's bequest for decades rather than spend it on a building that would duplicate an existing public facility.[92]

By 1939, however, Milton Hospital's twenty-six-bed wooden structure no longer adequately served the town's population.[93] The Wadsworth bequest could be applied to fund the construction of a new public hospital, but the gift's outstanding balance fell short of the amount necessary to build a new facility.[94] Even if the Wadsworth fund had been sufficient to construct a new facility, it would have been economically infeasible for the town to operate and sustain two separate public hospitals.[95]

The town petitioned for court approval to transfer the Wadsworth fund to the Milton Hospital's charitable corporation to enable the latter to construct a

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90. Town of Milton v. Att'y Gen., 49 N.E.2d 909, 910 (Mass. 1943).

91. *Id.* at 910.

92. *Id.* at 910–11.

93. *Id.* at 911.

94. *Id.* at 910-11 (noting that the Wadsworth fund had appreciated in value to $195,000 but that construction of a new public hospital would cost $207,600).

95. *Id.*

new hospital facility with the combined resources.[96] The state attorney general, however, opposed the petition, arguing "that by accepting the gift, the town became bound to supply from its own funds all the money needed, in addition to the Wadsworth Fund, to build, equip and maintain the hospital according to the literal provisions of the will."[97]

The court agreed with the town "that there should not be a duplication of hospital facilities in Milton, and that the fund should be consolidated in some way with the funds of Milton Hospital . . . to prevent such a duplication."[98] But the court found that the record was insufficient to support the town's assertion that allocating the Wadsworth fund to Milton Hospital's charitable corporation was the closest possible alternative to the donor's original intent, as required by the cy-près doctrine.[99] Thus, amid World War II, the Massachusetts Supreme Court remanded the case for yet another round of litigation rather than clear the way for the construction of a sorely needed new medical facility.

Once again, another seemingly benign restricted gift ultimately served to impede the government's management of public resources (here, the provision of hospital services). The donor cannot be faulted for failing to anticipate the future construction of another hospital, let alone that other hospital's subsequent obsolescence. However, without judicial modification, the precise language of the donor's restriction could be construed to require an inefficient duplication of hospital facilities rather than to permit allocating the resources to an existing entity prepared to help fund construction. That litigation seems to have needlessly consumed municipal resources that could have been devoted more directly to public healthcare services.

Another case decided in the same decade, *Fairbanks v. City of Appleton*, presented facts similar to *Milton*. *Fairbanks* entailed a bequest for the sole purpose of constructing a public facility (this time, a home for the elderly), where the gift amount was insufficient to fund the full cost of construction, and where an existing facility served the same charitable purpose.[100] Several years after the donor's death, the bequest remained unspent, so the donor's heirs sued the city to terminate the charitable trust and revert the outstanding balance.[101] But, unlike in *Milton*, the state supreme court in *Fairbanks* invoked cy-près to grant relief on

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96. *Id.* at 910-11.

97. *Id.* at 911.

98. *Id.* at 912-13.

99. *Id.*

100. Fairbanks v. City of Appleton, 24 N.W.2d 893, 894, 896 (Wisc. 1946) (explaining that "the amount of the trust fund is inadequate for erecting and maintaining an Old People's Home and there . . . is a City Home for elderly people of Appleton, owned and operated by the city").

101. *Id.* at 893, 895.

grounds of impossibility (i.e., the gift amount was inadequate to accomplish the donor's charitable purpose).[102] The court modified the trust's purpose to include maintenance of the existing old-age home, while still limiting the application of trust assets to funding only those portions of the existing facility that complied with the donor's mandate (i.e., that elderly residents "enjoy the comforts of life at reasonable rates and for reasonable compensation").[103]

Cases like *Milton* and *Fairbanks* reveal that governments are sometimes willing to accept restricted charitable gifts that contemplate major public-works projects without adequate funding from the donor. Courts may ultimately approve modifications that redirect such gifts to a similar charitable purpose, but forcing the government to incur litigation costs to alter the donor's restrictions can undermine and delay the delivery of charitable benefits to the public. In *Milton* and *Fairbanks*, both donors almost certainly would have agreed to the ultimately-approved modifications because the alternative applications remained faithful to their respective charitable purposes.

When a donor is still alive, the government can discuss the acceptability of a restricted gift's proposed terms. The donor can then decide whether to relax or remove the restriction in light of the government's objection. But those discussions between the donor and government often fail to occur in the context of charitable bequests because the government is not usually involved in the donor's estate-planning process and does not learn of the restriction until after the donor's death. At that point, the restriction is irrevocable, so the government may accept the gift, in which case it must comply with any restrictions or obtain judicial approval to modify them. Or the government may disclaim, in which case the gift passes to the next eligible taker in the donor's estate plan.[104]

The government cannot negotiate with a deceased donor, so its best option may be to disclaim even the most anodyne of restricted gifts, such as an earmark for hospital construction, because the alternative — modification litigation — can be slow, costly, and unpredictable.

D. Governmental Liability for Gift Maladministration

The government's administration of a restricted charitable gift can implicate liability-creating legal obligations, such as general tort and fiduciary duties of care, impartiality, and loyalty.[105] This Section explores the application of those

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102. *Id.* at 895-97.

103. *Id.* at 894, 896-97.

104. *See* UNIF. PROB. CODE § 2-1106 (UNIF. L. COMM'N 2019).

105. *See, e.g.*, 2 U.S.C. § 159 (2024) (authorizing enforcement of "the provisions of any trust accepted by" the Library of Congress Trust Fund Board); Fitzgerald v. Baxter State Park Auth.,

duties to the government as the donee of a restricted charitable gift and the government's sovereign immunity for liability in such claims.

When administering a restricted charitable gift, a government donee differs from private fiduciaries in two respects. First, the government's assumption of fiduciary duties may require statutory approval.[106] Second, sovereign immunity may absolve governmental trustees of liability for breach of fiduciary duty unless waived.[107] However, neither protection against governmental liability is ironclad.

Remember, for instance, *Woodward School for Girls, Inc. v. City of Quincy*. In *Quincy*, a charitable beneficiary sued the municipal trustee for imprudently investing most of the trust corpus in fixed-income assets. For decades, that investment strategy failed to generate any capital appreciation.[108] The state supreme court found that Quincy's failure to "take any steps to protect the Adams Fund's principal against inflation . . . alone was sufficient to constitute a breach of its fiduciary duty."[109] The state supreme court also ruled that Quincy had "impliedly waived" the defense of sovereign immunity, reasoning that when the city "agreed to serve as trustee, it assumed the fiduciary duties of that role, including the

385 A.2d 189, 202 (Me. 1978) (explaining that where evidence supported "the donor's desire to impose a fiduciary obligation upon the State," the state agency "was performing a trustee function as well as a governmental function, and it must be held accountable to that more stringent standard"). Relatedly, in the special context of land held in trust by the government for the benefit of indigenous people, "the conduct of the government as trustee is measured by the same strict standards applicable to private trustees." Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1167-68, 1169 (Haw. 1982) (summarizing the government's "fiduciary" obligations as trustee). For a general description of fiduciary duties, see UNIF. TR. CODE § 801 (UNIF. L. COMM'N 2023) (describing the "duty to administer trust"); *id.* § 802 (concerning the "duty of loyalty"); *id.* § 803 (requiring "impartiality"); *id.* § 804 (requiring "prudent administration").

106. *See* Story v. Snyder, 184 F.2d 454, 456 (D.C. Cir. 1950) ("[G]ifts to the United States which involve any duty, burden, or condition, or are made dependent upon some future performance by the United States, are not accepted by the Government unless by the express authority of Congress.").

107. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) (stating that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit" (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941) (citations omitted)).

108. Woodward Sch. for Girls, Inc. v. City of Quincy, 13 N.E.3d 579, 583, 585, 592, 595-96 (Mass. 2014).

109. *Id.* at 594. While the court upheld the liability finding, it vacated the $3 million judgment against Quincy because the lower court had applied the wrong methodology for calculating damages. *Id.* at 584, 596-98 ("On remand, an assessment of what a prudent investor would have done requires expert testimony on the minimum level of growth equities that would have been prudent for an income-only fund, with consideration of the potential shifts over the lengthy period at issue.").

consequences for not fulfilling these duties."[110] The court emphasized that the municipality had taken "on a responsibility beyond its inherent or core government functions and therefore serve[d] in a capacity that could just as easily be accomplished by a nongovernmental entity."[111]

In the disturbing case of *C.J.S. v. Board of Directors of City Trusts*, an elementary-school boarding student at Girard College (the same school created by the 1831 will of Stephen Girard)[112] sued the Board of Directors of City Trusts (the Board) for its failure to train "Residential Assistants" properly on protocols for protecting children against sexual misconduct.[113] The lawsuit named the Board as defendant because a state statute had established the Board as the legal entity responsible for "administer[ing] estates bequeathed to . . . Girard College."[114] The plaintiff claimed that, as a result of the Board's failure, he was repeatedly raped and sexually assaulted inside the school's dormitory by older students.[115] The city asserted the defense of sovereign immunity, but the court, upon considering the precise language of the state's immunity abrogation statutes, found that the Board was not covered by sovereign immunity, either as a state agency or a local authority.[116]

Courts, however, have ruled inconsistently on the applicability and scope of sovereign immunity to restricted charitable gifts. For instance, in a prior case with nearly indistinguishable facts from *C.J.S.* (i.e., sexual-misconduct claims asserted by a Girard College residential student against the same Board), a Pennsylvania trial court dismissed the plaintiff's complaint on sovereign-immunity grounds.[117] On appeal, the plaintiff conceded the Board's entitlement to

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110. *Id.* at 601.

111. *Id.*

112. *See supra* Section I.A.

113. C.J.S. v. Bd. of Dirs. of City Trs., No. 11-1471, 2011 WL 3629171, at *1 (E.D. Pa. Aug. 17, 2011).

114. *See id.* ("The Board was established by a Pennsylvania statute to administer estates bequeathed to the City of Philadelphia, including Girard College. Pursuant to the statute, the Board and Girard College are one legal entity." (citations omitted)).

115. *Id.* at *1-2.

116. *Id.* at *6-7. The court quoted approvingly from an unrelated case involving Girard College:

> The Board does not oversee an entity created by the City of Philadelphia but rather a trust created by Stephan Girard; and it is not answerable to public officials or ultimately to the electorate, but rather has a fiduciary duty to carry out Girard's wishes, to the extent allowed by law, and not the public's. Furthermore, although the Board is tasked with administering charitable trusts in which the City is named as trustee, . . . it operates independently of the City except for its annual report to the City[.]

Id. at *7 (quoting City of Philadelphia v. Cumberland Cnty. Bd. of Assessment Appeals, 18 A.3d 421, 427 (Pa. Commw. Ct. 2011) (citation omitted)).

117. Moore v. Bd. of Dirs. of City Trs., 809 A.2d 420, 421 (Pa. Commw. Ct. 2001).

sovereign immunity, arguing instead that Girard College and its managers could be sued directly for their misconduct.[118] The appellate court disagreed, concluding that "Girard College does not act independently of the Board charged by statute with control over all aspects of College's operations."[119] The court affirmed dismissal because the plaintiff had conceded the Board's entitlement to sovereign immunity for claims against the school.[120]

As these cases reveal, the risk exposure accompanying the government's acceptance of restricted charitable gifts can include tort and fiduciary liability without the protection of sovereign immunity. That liability risk, in turn, suggests that the government should exercise extreme caution when evaluating whether to accept (or retain) a restricted charitable gift that expressly or implicitly imposes fiduciary or managerial obligations of gift administration.

II. POLICY IMPLICATIONS

Our survey of litigated disputes involving restricted charitable gifts to the government suggests that, in too many cases, the government's acceptance imposes costs that can significantly undermine the public benefits produced by this form of philanthropy. We therefore believe that, while donor-imposed restrictions governing charitable gifts should remain imposable and enforceable, the government should be far more circumspect about accepting a restricted charitable gift in the first place. We submit that, on balance, it is better for both the donor and the government to allow private fiduciaries to administer restricted charitable gifts.

Our proposal for a more robust invocation of disclaimer rights is a forward-looking measure designed to help governments evaluate donor-imposed restrictions *prior* to accepting a charitable gift. Disclaimer rights are unlikely to provide relief for governments that have already accepted a restricted charitable gift because disclaimers are generally barred after accepting the property interest.[121] After acceptance, the government must generally obtain court approval to modify a restriction. Alternatively, a government seeking to return a restricted gift could try enacting a statute mandating disposal of the gifted property, but if

118. *Id.*

119. *Id.* at 422.

120. *Id.*

121. *See* UNIF. PROB. CODE § 2-1113(b)(1) (UNIF. L. COMM'N 2019) ("A disclaimer of an interest in property is barred if [the disclaimant accepts the interest sought to be disclaimed] before the disclaimer becomes effective . . . .").

challenged, courts would have to decide whether the disposal statute prevails over the disclaimer bar.[122]

For the government, a policy of subjecting restricted-gift proposals to more exacting scrutiny prior to acceptance would create a better process for flagging restrictions that are likely to generate long-term compliance problems and costly modification litigation. While the precise manner in which compliance might become problematic may be unforeseeable, the likelihood of a permanent restriction prompting a need for future modification seems inherently foreseeable. A review process that invites public participation, perhaps akin to the notice-and-comment procedures in administrative law, could help ensure that any restrictions agreed to by the government could be vetted transparently and allow the affected local community to air any objections. Such a policy might also persuade donors to contribute charitable gifts to the government property without imposing inflexible restrictions.

For donors who care about the enforcement of their restrictions, a governmental policy of rejecting burdensome restrictions might encourage the appointment of private corporate fiduciaries to administer restricted charitable gifts. Donors can exact stricter compliance with their gift restrictions by appointing corporate fiduciaries that enjoy perpetual existence,[123] and by utilizing other administrative mechanisms such as the appointment of trust directors empowered to supervise, remove, and sue corporate charitable trustees if they fail to comply with the donor's mandate.[124] Unlike elected government officials, who must respond to evolving public sentiment and changes in public policy compelled by the state-action doctrine, private fiduciaries need not balance their legal obligations to remain faithful and obedient to the donor's charitable purpose against the public interest, constitutional constraints, or political considerations. The appointment of a private fiduciary might also reduce the government's

122. Such action is not without precedent. In 1972, the federal government passed an Act authorizing the acquisition of Mar-a-Lago from a bequest by Marjorie Merriweather Post, but, in 1980, Congress mandated by statute that the property be returned to the donor's estate. *See* Pub. L. No. 96-586, § 4(b), 94 Stat. 3381, 3386 (1980) ("The Secretary of the Interior shall . . . take such measures, consistent with the terms and conditions of the deed of conveyance from Marjorie M. Post to the United States of America, dated December 18, 1972, as may be necessary to transfer the property described in the order of designation of the Mar–A–Lago National Historic Site to the Majorie Merriweather Post Foundation of the District of Columbia."). Federal law would likely preempt state disclaimer law to the extent of any conflict, but the same would not be true for state or local gift-disposal legislation.

123. *See* Est. of Cahen, 394 A.2d 958, 963 (Pa. 1978) (describing a corporate trustee as "an institution with theoretically perpetual life" and explaining that "[a]ssurance of continuity of supervision is obtained by the selection of a corporate fiduciary") (quoting JAMES CASNER, ESTATE PLANNING 1161 (3d ed. 1961)).

124. *See* JAMES CASNER, JEFFREY N. PENNELL & REID KRESS WEISBORD, ESTATE PLANNING § 4.1.15.1 (Wolters Kluwer CCH 2024).

temptation to circumvent procedures for modifying gift restrictions by invoking the nuclear option — exercising the state's power of eminent domain to condemn gifted real property.[125]

Applying these lessons, this Part provides two proposals for reform. First, we recommend formal procedures through which the government could prospectively review and, if appropriate, reject proposed gift restrictions prior to acceptance. Second, we recommend substantive criteria to guide the government's consideration of restricted gift proposals and to place prospective donors on notice of factors the government will consider in deciding whether to accept a gift.

A. Formal Procedures for Governmental Review and Public Participation

A threshold question implicated by the government's power to accept or reject a restricted charitable gift is what procedures it will follow when reviewing a gift proposal, soliciting public participation, and formalizing a decision to accept or reject a gift. Instituting formal procedures for conducting a more careful review of restricted charitable gifts can help governments make better decisions that avoid future litigation and compliance costs. For a sample of regulatory options, we considered the handful of state statutes that have already implemented formal gift-approval procedures.

In Maine, proposed gifts to the government must be submitted for review to the applicable municipal legislative body, which must provide the donor with written notification of acceptance or rejection.[126] In Minnesota, gift acceptance requires a vote of approval by a two-thirds majority of the municipality's governing body.[127] Other statutes are more deferential to local governments. South

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125. *See, e.g.*, Jalkut v. City of Quincy, 234 N.E.3d 328, 330 (Mass. App. Ct. 2024); City of Palm Springs v. Living Desert Rsrv., 82 Cal. Rptr. 2d 859, 864 (Cal. Ct. App. 1999); State v. Rand, 366 A.2d 183, 186 (Me. 1976); Hartford Nat. Bank & Tr. Co. v. Redevelopment Agency of City of Bristol, 321 A.2d 469, 470 (Conn. 1973); Hiland v. Ives, 228 A.2d 502, 506 (Conn. 1967) ("The fact that the Hubbard Park property had been accepted and dedicated as a public park did not impair the state's sovereign power to condemn the property."); *cf.* RONALD CHESTER, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 439 (2024) (noting that condemnation by eminent domain of property necessary to carry out a charitable purpose may constitute an impossibility ground for applying cy-près).

126. ME. STAT. tit. 30-A, § 5654 (2025); *see* Austin v. Inhabitants of York, 57 Me. 304, 305 (Me. 1869) ("The object of the statute is to secure to the inhabitants of the town, previous intelligible notice of the subjects to be acted upon."); Perry v. Town of Friendship, 237 A.2d 405, 408 (Me. 1968) (holding that the procedure was satisfied where "voters were alerted by the warrant to the fact that the testatrix had made a testamentary provision in favor of the Town and that they were called to vote acceptance or rejection of that provision").

127. MINN. STAT. § 465.03 (2025). *But see* City of Fergus Falls v. Whitlock, 77 N.W.2d 194, 197 (Minn. 1956) (stating that MINN. STAT. § 465.03 did not apply to the city's acceptance of

Carolina, for example, delegates to the "proper authorities of such municipality" determination of whether a donor's "conditions [are] reasonable, and [in] the best interests of such municipality."[128] South Dakota authorizes municipalities to accept restricted charitable gifts if "agreed to by the governing body and board."[129] Meanwhile, in New York, the secretary of state is empowered "to accept and administer as agent of the state any gift, grant, devise or bequest, whether conditional or unconditional," but only "[w]ith the approval of the governor."[130]

The choice of which particular legislative body, agency, or public official should be designated to conduct a review of charitable gift proposals might vary according to local custom, the size of the governmental unit, and the availability of existing personnel assigned to related tasks. For example, while Minnesota requires gift approval by vote of the municipality's governing body, South Carolina allows the governmental unit to delegate approval to "proper authorities."[131] Another possibility might be to delegate the decision to a standing committee of the legislative body. Most importantly, whichever agency or official is ultimately tasked with reviewing restricted charitable gift proposals should be equipped with clear criteria for considering the merits and empowered to reject gifts that fail to satisfy general standards of acceptability.

The design of formal procedures for governmental review could be informed by models already prevalent in the private sector, where philanthropy experts advise nonprofit organizations to routinize procedures for reviewing gift proposals. The National Council of Nonprofits, for instance, recommends formalizing, enforcing, and publicizing a standing institutional policy governing the acceptance of charitable gifts to avoid liabilities and responsibilities that the nonprofit organization is not prepared to undertake.[132] To manage donor expectations, some charitable gift acceptance policies expressly warn donors that the

charitable trusts for the benefit of a public park, which was governed by a since-repealed statute that did not require acceptance by a two-thirds majority); Schaeffer v. Newberry, 50 N.W.2d 477, 482 (Minn. 1951) (stating that the city's acceptance of a charitable trust "need not be express, but may be inferred from conduct of the trustee").

128. S.C. CODE ANN. § 51-15-230 (2025).

129. S.D. CODIFIED LAWS § 9-38-32 (2025). The statute also authorizes municipalities to "establish a policy for the acceptance of gifts of personal property of value below an amount determined by the governing body." *Id.*

130. N.Y. EXEC. LAW § 152(23) (McKinney 2025).

131. *See* MINN. STAT. § 465.03; S.C. CODE ANN. § 51-15-230.

132. *Gift Acceptance Policies*, NAT'L COUNCIL NONPROFITS (2025), https://www.councilofnonprofits.org/running-nonprofit/fundraising-and-resource-development/gift-acceptance-policies [https://perma.cc/MM2X-QNVK].

charity will conduct a formal review or consult with legal counsel before accepting certain types of gifts.[133]

At a minimum, we believe that a governmental process for the review and approval of charitable gifts should contain the following three key features: (1) clear procedures for submission and review of a restricted gift proposal; (2) an opportunity for public participation and input (perhaps akin to the administrative law concept of notice and comment); and (3) a requirement that any decision to accept a restricted gift be approved by the governing legislative body or the government office to which the legislature has delegated the decision. Such procedures would prevent the government from passively accepting a restricted charitable gift by inaction while facilitating a more careful and transparent consideration of the merits with the benefit of public input.

B. Substantive Criteria for Gift Acceptance

A thoughtful gift acceptance policy should include substantive criteria to guide the government's decision of whether to accept or reject a restricted donation. Specifying and publicizing gift acceptance criteria would also place donors on notice, thus allowing them to adjust their estate plans to satisfy the government's acceptability standards or to select an alternative donee, such as a private charity or fiduciary, to receive and administer the gift.

In developing substantive criteria, governments might consider the most frequently disputed restrictions identified by our litigation survey. A litigation-averse approach, for example, might presumptively reject any restricted charitable gift unless: (1) the gift terms expressly authorize modification without court approval whenever any current or future law renders a restriction unenforceable under the state-action doctrine; (2) the gift terms expressly waive the right of any donor or the donor's successors to enforce restrictions in court; (3) the donor (or donor's estate) demonstrates that the gift is adequately funded to accomplish the donor's stated charitable purpose; and (4) the gift terms expressly immunize the municipality for liability for breach of fiduciary duty. Such a presumption would reduce the government's cost of complying with and modifying donor-imposed restrictions should they later become impracticable.

Substantive gift-acceptance criteria might also build on the accumulated wisdom of charitable nonprofit organizations in the private sector. For example, the Nonprofit Risk Management Center has identified several factors that private charities should consider as part of a comprehensive gift-acceptance policy, including (1) alignment with the donee's core values, (2) compatibility between the donor's purpose and the donee's use, (3) impact of gift acceptance on the

133. *Id.*

donee's reputation, (4) degree to which the gift benefits the donor rather than the donee, (5) consistency of gift acceptance in light of prior practice, (6) anticipated expense or difficulty associated with gift implementation, and (7) impact on donor incentives for future gifts.[134] Such criteria could serve as a blueprint for developing gift-acceptance policies in the public sector because governments confront similar considerations as private nonprofits when reviewing the acceptability of charitable gifts. In many cases, the above criteria can be considered inexpensively without imposing unreasonable burdens on smaller governments that lack adequate staffing or resources to conduct elaborate feasibility studies.

Our proposal recommends a governmental acceptance policy containing features that donors will probably regard as unfriendly, such as a presumption that gifts should be rejected unless restrictions can be modified without judicial approval or unless the gift expressly exonerates the government for fiduciary liability. We view this disincentive as a feature rather than a bug because we believe the public interest in charitable assets can be better served by discouraging the government's acceptance of restricted charitable gifts.

A rational donor who views the enforceability of restrictions as an essential inducement would opt to structure their gift differently, such as by naming a private corporate fiduciary to supervise and administer the gift (perhaps coupled with the appointment of a trust protector to supervise the corporate trustee).[135] Channeling restricted charitable gifts to private corporate fiduciaries rather than to governmental donees would force donors to internalize the cost of administering and enforcing their own restrictions. It would also enable corporate fiduciaries with greater sophistication and experience than the government in such matters to vet the proposed gift more carefully before accepting legal responsibility for carrying out the donor's restrictions.[136]

While it is true that private fiduciaries might be even less accountable to the public for their administration of charitable gifts than government donees, donors seeking to avoid public scrutiny have already discovered ways to opt out of

134. *Sample Gift Acceptance Policies*, NONPROFIT RISK MGMT. CTR. 2, https://nonprofitrisk.org/wp-content/uploads/2020/06/11sam05ple-gift.pdf [https://perma.cc/GR53-A4QW].

135. *See* UNIF. DIRECTED TR. ACT § 2(9) (NAT'L CONF. COMM'RS UNIF. STATE L. 2017) (defining "trust director").

136. For example, an important consideration for any corporate fiduciary would be the adequacy of the gift amount to carry out the donor's charitable purposes after covering the full cost of gift administration—a factor that our research shows the government tends to discount or overlook. The government can bare the risk of accepting underendowed gifts by drawing on public resources to subsidize unfunded compliance and administration costs, but doing so consumes public funds in furtherance of a privately designated charitable purpose not selected through a democratic process. In contrast, private fiduciaries have powerful incentives to decline such trustee appointments because uneconomic trusts can imperil the fiduciary's compensation.

the traditional mechanisms of charitable oversight. Indeed, a modern trend of philanthropy has shifted toward the privatization of charitable activities, as wealthy donors resort to taxable forms of philanthropy to avoid the regulations and restrictions applicable to tax-deductible gifts and tax-exempt nonprofit organizations.[137]

We also acknowledge that a policy of discouraging restricted charitable gifts to the government could incentivize donors to utilize private fiduciaries to accomplish controversial charitable purposes that a government would be expected to reject on public policy grounds. But donative transfers that are contrary to public policy are already unenforceable even when implemented by private fiduciaries, and donors already have the option of attempting to accomplish such goals *soto voce* by appointing a private fiduciary. We see little upside to entangling the government in such transactions.

Another potential side effect of subjecting restricted charitable gifts to more exacting scrutiny is that donors might reconsider their philanthropy entirely and abandon plans to make a charitable gift at all. The litigation history of restricted charitable gifts to the government suggests that the long-term costs of such restrictions might outweigh the philanthropic benefits enjoyed by the public, though we acknowledge that other commentators might evaluate the relative costs and benefits of restricted charitable gifts differently.

CONCLUSION

Testamentary freedom broadly empowers donors to impose restrictions governing the future use of gifted property. But donors who exercise that power should bear all direct and indirect costs implicated by their gift restrictions. Restricted charitable gifts to the government often have the effect of shifting the costs of administration, compliance, and modification from the donor to the government. The government, in turn, is usually uncompensated for serving as the donor's charitable fiduciary and assumes the risk of governmental liability for gift maladministration or fiduciary breach.

The administration of restricted charitable gifts can also be incompatible with the traditional functions of government that serve the public. The acceptance of restricted charitable gifts can obligate the government to devote public resources to complying with the donor's privately selected terms or to funding litigation to obtain court approval to modify the gift restriction. Compliance with a gift restriction can also problematically align the government with the donor's idiosyncratic viewpoints which may be out of step with public

137. *See, e.g.*, Dana Brakman Reiser, *Disruptive Philanthropy: Chan-Zuckerberg, the Limited Liability Company, and the Millionaire Next Door*, 70 FLA. L. REV. 921, 921 (2018).

sentiment. Why, for example, should the Black taxpayers of Macon, Georgia, have been forced to subsidize litigation seeking to enforce the donor's discriminatory intent to deprive Black citizens of accessing public parkland?

Restricted gifts can also force the government to provide services for which it lacks institutional competence. What institutional expertise, for example, made the small city of Plainfield, New Jersey, a suitable curator of valuable works of fine art such as the Bierstadt paintings? Small cities like Plainfield are not usually in the business of collecting fine art. Likewise, why should anyone expect the City of Philadelphia to be capable of competently and safely operating a residential boarding school for elementary school children such as Girard College? Large cities like Philadelphia operate schools, public housing, and homeless shelters, but they are not usually in the business of operating dormitories for young children.

Unlike philanthropic donees in the private sector, where industry best practices encourage charities to adopt transparent gift-acceptance policies, most governments do not appear to have formalized procedures or criteria for evaluating the acceptability of restricted charitable gifts. That is problematic because the practice of accepting restricted charitable gifts by default deprives the government of an opportunity to consider the potential long-term implications of a donor's gift restrictions prior to acceptance. Our litigation survey of disputes involving charitable gift restrictions and governmental donees reveals a host of costly consequences that could have been averted by a more circumspect gift-acceptance policy. The frequency and severity of those disputes show that restrictions that can seem benign at the outset can become illegal, impracticable, or risky to administer as the decades pass, social norms evolve, and circumstances change.

We believe that donor-imposed restrictions governing a charitable gift should remain imposable and enforceable, but the government should be far more circumspect about accepting a restricted charitable gift in the first place. Governments should consider establishing formal, transparent procedures for evaluating the acceptability of restricted charitable gifts. The officer or body deputized with authority to conduct such evaluations should be empowered to disclaim restricted gifts that fail to satisfy the government's criteria for gift acceptance.

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