

Gone but Not Forgotten: The End of Fractional Giving and the Search for Alternatives

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INTRODUCTION

More than ninety percent of the art on display in museums in the United States was acquired through private donations.¹ Furthermore, over eighty percent of new acquisitions made annually by museums occur via donation.² Although these gifts are certainly motivated by the altruism of individual donors, the availability of tax deductions creates a significant additional incentive to give. Thus, a tax system that encourages such donations has positive effects on both donors and museums. In making their gifts, donors are frequently motivated to choose the donation structure that results in the greatest possible tax deduction. However, other concerns, including the timing of the gift and associated deduction, whether to retain possession of the artwork during their lifetimes, and the possibility of combining a donation with income-generating activity also influence the form of donation chosen.

Until recently, the fractional gift was one method of donation that was particularly popular with collectors donating valuable and historically significant works.³ A fractional gift is made when a donor contributes a percentage of their full interest in a work or collection of works to a museum.⁴ Fractional giving provided substantial tax advantages to donors, who generally could retain the artwork until the gift was complete, take advantage of appreciation in the work's value by taking larger deductions when donating subsequent fractions, and spread the donations over sufficient time to deduct the work's full value.⁵ The Pension Protection Act of 2006, however, essentially ended fractional giving by eliminating these unique advantages.⁶

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1. Emily J. Follas, Note, "It Belongs in a Museum": *Appropriate Donor Incentives for Fractional Gifts of Art*, 83 NOTRE DAME L. REV. 1779, 1781 (2008).

2. *Id.*

3. *Id.* at 1782.

4. Elizabeth Dillinger, Note, *A Not So Starry Night: The Pension Protection Act's Destruction of Fractional Giving*, 76 UMKC L. REV. 1045, 1046 (2008).

5. Samuel G. Wiczorek, Winokur, *Lose, or Draw: Art Collectors Lose an Important Tax Break*, 8 HOUS. BUS. & TAX L.J. 90, 97 (2007).

6. Dillinger, *supra* note 4, at 1047.

This Note examines fractional giving and its pre-2006 impact and considers whether fractional giving can be revived through legislative reform or replaced through alternative forms of donation. Part I provides an overview of fractional giving before 2006 and discusses the provisions of the Pension Protection Act and the Act's impact. Part II evaluates the various reform attempts to revive fractional giving, including both legislative proposals and suggestions from legal scholars. Part III explores other forms of giving to museums and argues that none of these alternatives can fully replace the advantages of fractional giving. Finally, Part IV concludes by considering the likelihood of fractional giving being reestablished and proposing a new donation strategy for museums and collectors.

I. THE HISTORY OF FRACTIONAL GIVING AND THE PENSION PROTECTION ACT OF 2006

A. FRACTIONAL GIVING BEFORE 2006

1. The Importance of Fractional Giving

Prior to 2006, fractional gifts were a popular and advantageous method by which many donors chose to grant artwork to museums.⁷ To make a fractional gift, the donor contributed a fraction of her full interest in a work of art to a museum; in exchange, the donor received a tax deduction equal to the value of that fraction (i.e., the size of the fraction multiplied by the value of the full work).⁸ The museum became legal owner of that fractional interest and was thus entitled to use and display the work for the amount of time corresponding to its fraction of ownership.⁹ But, museums often chose not to take possession of their fractionally owned works, so the artwork frequently remained in the donor's possession.¹⁰ Furthermore, at a later time, donors could contribute subsequent fractions of the same work, and if the work had appreciated in value, the charitable deductions taken by those donors reflected that appreciation.¹¹ The determination of the work's value (and whether it had increased during the interim period) was made by the donor.¹²

As of 2006, works of art acquired through fractional donations comprised ten percent of new acquisitions by American art museums.¹³ However, because of the unique advantages of fractional giving, this ten percent included many works considered to be the "most valuable and historically significant pieces" ever

7. Wiczorek, *supra* note 5, at 98.

8. Follas, *supra* note 1, at 1789.

9. Dillinger, *supra* note 4, at 1046.

10. *See id.* at 1790–91.

11. *Id.* at 1790.

12. However, if the value of the donated fraction exceeded \$5,000 (which was very often the case), the donor was required to obtain a "qualified appraisal" of the work. 26 U.S.C. § 170(f)(11)(C) (2012).

13. Dillinger, *supra* note 4, at 1782.

donated.¹⁴ For example, the Walter H. Annenberg collection of Impressionist and Post-Impressionist paintings, drawings and watercolors was donated to the Metropolitan Museum via fractional giving.¹⁵ This gift was worth an estimated \$1 billion at the time it was announced; it consisted of more than fifty works by artists including Monet, Degas, Renoir, Manet, van Gogh, Gauguin, Cezanne, Matisse, Picasso and Braque.¹⁶

Prior to 2006, some of the country's largest and most prestigious museums relied very heavily on fractional giving as a source of donations. The San Francisco Museum of Modern Art (SFMOMA), which received the most fractional donations of any art museum, has more than eight hundred works in its permanent collection that started as fractional gifts.¹⁷ New York's Museum of Modern Art (MoMA) has received approximately 650 works through fractional giving.¹⁸ The Art Institute of Chicago currently has approximately two hundred fractional gifts completed or in progress.¹⁹ The benefits of fractional giving, however, did not just accrue to the country's foremost institutions. Mid-sized museums also received major fractional donations. The Baltimore Museum of Art (BMA) received Henry Ossawa Tanner's portrait of his father, *Bishop Benjamin Tucker Tanner* (1897), through fractional giving, which it called "the most important 19th-century American painting to enter the BMA's collection in over a quarter of a century."²⁰ Similarly, the Minneapolis Institute of Arts acquired an impressionist painting by Claude Monet worth multiple millions of dollars through fractional giving.²¹

2. The Structure of a Fractional Gift

The concept of the fractional donation is appealingly simple: the donor gives a portion of his full interest in a work or collection to a museum and is allowed a charitable deduction for the value of that percentage interest of the work or collection. Thus, for example, if a donor gave 10% of a sculpture valued at \$1 million to an art museum, he would be entitled to a charitable deduction of \$100,000.²²

14. Jeremy Kahn, *Museums Fear Tax Law Changes on Some Donations*, N.Y. TIMES, Sept. 13, 2006, at E1.

15. Dillinger, *supra* note 4, at 1047.

16. John Russell, *Annenberg Picks Met for \$1 Billion Gift*, N.Y. TIMES, March 12, 1991, at A1.

17. Follas, *supra* note 1, at 1782.

18. *Id.*

19. Dillinger, *supra* note 4, at 1047.

20. Jay Hancock, *Fractional Art Donations Prove Charity Starts at Home*, BALT. SUN, Feb. 4, 2007, at 1C.

21. Mary Abbe, *Law Could Hang up Donations of Artworks; Museums Are Worried that a Recent Tax Change Could Hamper Valuable Gifts*, STAR TRIB. (Minneapolis), Nov. 2, 2006, at 1A.

22. Taxpayers generally are not allowed to take a charitable contribution deduction for donations if they grant less than their full interest in donated property. For example, a donor who gave a museum a painting, but reserved all intellectual property rights in the work, would be ineligible for the deduction because he retained some rights in the work. But within tax law, an exception exists for donations that comprise an undivided portion of the taxpayer's full interest in the property. Fractional contributions of artwork fall under this exception. 3 RALPH LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 1576-77 (3d ed. 2005).

Following that 10% fractional gift, the donor could maintain ownership of his remaining 90% interest and could legally exercise the full scope of his property rights over that interest.²³ Thus, theoretically the donor could give the remaining interest in a fractionally donated work to his heirs through his will, sell the remaining interest to a private collector, or even give the remaining interest to other institutions. Museums, however, often required the donor to promise that the remaining interest in the work would be donated to the museum, either throughout the donor's lifetime or at some point after his death.²⁴

Under the pre-2006 tax laws, there were three unique advantages of fractional gifts that made them particularly appealing to potential donors of valuable and historically significant works. First, donors could use fractional giving to spread out charitable deductions over many years, timing their gifts to ensure the deduction of the full monetary value of the work or collection.²⁵ This was especially important for extremely valuable works or collections whose appraised value, if donated all at once, would exceed the cap on deductions for capital gains property.²⁶ Under the tax code, for appreciated property that is donated to charity, the total amount deductible may not exceed 30% of the taxpayer's adjusted gross income.²⁷ Although contribution amounts in excess of this 30% may be carried forward for up to five years after the year of the gift, the deduction cap might still prevent the donor from taking a deduction in the amount of the full value of extremely valuable works.²⁸ Fractional giving provided an important tool to solve this problem: it allowed taxpayers to spread out their contributions over a sufficient timeframe to take advantage of charitable deductions equal to the work's full value.²⁹

Second, fractional giving allowed taxpayers to take advantage of the appreciation in value of their work during the period of their giving.³⁰ At the time of the initial donation, the taxpayer's contribution was calculated as the percentage interest in the work donated multiplied by the total value of the work.³¹ Thus, if a donor gave 25% of a painting worth \$1 million, the initial value of his contribution would be \$250,000, and he would be entitled to a charitable deduction equal to that amount. If the work subsequently became more valuable, later gifts of additional

23. See Carolyn C. Clark & Jay W. Swanson, *Promised Gifts to Museums: Monet in the Bank?*, 6 PROB. & PROP. 12, 15–16 (1992).

24. *Id.* at 15.

25. Follas, *supra* note 1, at 1789.

26. Because museums retained and displayed the fractionally donated artwork, the donations met the § 170(e) "related use" requirement and thus their full, fair-market value was deductible. Under the "related use" requirement, taxpayers may only deduct the full fair market value of appreciated property that they have donated if the recipient of the property will put it to a use that is related to its general charitable function. 3 LERNER & BRESLER, *supra* note 22, at 1561–62. If the recipient instead sells the property, the deduction is reduced to the donor's basis in the property. *Id.* at 1562.

27. 26 U.S.C. § 170(b)(1)(B) (2012); Follas, *supra* note 1, at 1789.

28. Diana S.C. Zeydel et al., *What Estate Planners Need to Know About the New Pension Protection Act*, 105 J. TAX'N 199, 200 (2006).

29. Follas, *supra* note 1, at 1789.

30. *Id.* at 1790.

31. *Id.* at 1789.

fractions of the painting (and their associated charitable deductions) would also increase in value. Accordingly, if the donor's painting increased in value to \$2 million, and he chose to give a second 25%, this fractional gift would be valued at \$500,000.³² The ability to take advantage of subsequent appreciation became especially important to donors in the early 2000s when prices across the art market soared to record highs.³³

Third, and most controversially, fractional donors were generally able to keep their works hanging on their own walls, even as they gave away more of the work to museums and took corresponding charitable deductions.³⁴ Museums often did not exercise their full rights of possession until the final fractional gift was made, allowing donors to enjoy their works for substantially more time than they were entitled by their fractional ownership.³⁵

This practice had its origins in the 1988 Tax Court decision *Winokur v. Commissioner*.³⁶ In *Winokur*, the Commissioner of Internal Revenue challenged the charitable deductions James L. Winokur had taken for the 10% interest in a collection of forty-four works of art that he had donated to the Carnegie Institute in 1977 and for the additional 10% interest in the collection that he donated in 1988.³⁷ The deed under which Winokur gave the 10% interest stated, in part, that the Carnegie Institute was "entitled to possession of the Collection for that number of days during any twelve month period . . . which the value of the Interest bears to the value of the Collection."³⁸ This meant that for each 10% interest the Carnegie Institute acquired, they were entitled to possess the collection for 36.5 days per year. The Carnegie Institute, however, never took possession of any of the works in the collection during the two-year period.³⁹ Consequently, the Commissioner claimed that Winokur was not entitled to a charitable deduction because the 10% interests constituted future interests in the property, which, under § 170(a)(3) of the Internal Revenue Code, are not deductible.⁴⁰ The Tax Court rejected this argument and held that Winokur could take the deduction, writing:

Neither the statute nor the regulations require the donee organization to take physical possession of the donated property during the year immediately following the gift. In order for an undivided interest to be treated as a present interest and not a future interest, 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

32. Ashlea Ebeling, *Will Democrats Ride to Museums' Rescue?*, FORBES (Nov. 22, 2006), http://www.forbes.com/2006/11/21/beltway-museums-tax-biz-wash-cz_ae_1122beltway.html.

33. In 2005 alone, Christie's sales rose 74% and those of Sotheby's rose 37%. Catherine 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, 467 (2010–2011).

34. Follas, *supra* note 1, at 1791.

35. See Wieczorek, *supra* note 5, at 97–98.

36. *Winokur v. Comm'r*, 90 T.C. 733 (1988).

37. *Id.* at 735; Wieczorek, *supra* note 5, at 95–96.

38. *Winokur*, 90 T.C. at 734.

39. *Id.* at 735.

40. *Id.* at 736, 738.

donation equivalent to its undivided interest in the property⁴¹

Thus, as a result of the *Winokur* decision, for the purposes of charitable deductions, it became irrelevant whether the museums ever actually took physical possession of the fractionally donated work, so long as they had received a *right* to take possession should they choose.⁴² Following the *Winokur* decision, museums could accept fractional donations but could also decline to take physical possession of the work free from the concern that the Internal Revenue Service would disallow the donor's tax deductions.⁴³ Both museums and donors benefited from this arrangement; donors could enjoy their artwork full-time, and museums could avoid the expense of shipping and storing works for which they had no present need and could minimize the potential damage from moving fragile works.⁴⁴

B. THE PENSION PROTECTION ACT OF 2006

1. Motivations for Limiting Fractional Giving

Commentators have generally pointed to July 2005 as the beginning of the demise of fractional giving.⁴⁵ On July 6, 2005, *The Wall Street Journal* published the article "Joint Custody for your Monet: 'Fractional Giving' Hits the Art World, as Donors Share Works with Museums" by reporter Rachel Silverman.⁴⁶ This article described in detail the benefits of fractional giving, explaining that "[t]hese so-called fractional gifts can provide donors with significant tax breaks—while still allowing them to keep the art on their walls for part of the year."⁴⁷ Senator Charles Grassley, a Republican from Iowa, received a copy of this article, and, according to commentators, he reacted with surprise and anger.⁴⁸ He stated in an interview: "It isn't right for a donor to get a big tax break for supposedly donating a painting that hangs in his living room, not a museum, all year. A painting in a private living room doesn't benefit the public."⁴⁹

Senator Grassley raised two primary objections to fractional giving. First,

41. *Id.* at 740.

42. Follas, *supra* note 1, at 1791.

43. *Id.*

44. Wieczorek, *supra* note 5, at 97–98.

45. See, e.g., Kristina Gordon, *Where Is My Monet? Museums and Donors Lose an Important Incentive for Fractional Giving* 6 (2009) (unpublished paper) (on file with author); Wieczorek, *supra* note 5, at 98.

46. Rachel Emma Silverman, *Joint Custody For Your Monet: 'Fractional Giving' Hits The Art World, as Donors Share Works with Museums*, WALL ST. J., July 6, 2005, at D1.

47. *Id.*

48. David T. Leibell & Daniel L. Daniels, *Art Donors and Museums Rejoice*, TR. & EST. MAG., Sept. 2009, at 14–17. By the time he was taking on fractional gifts, Senator Grassley, the Chairman of the Senate Finance Committee, was already known as a crusader against loopholes and other abuses of the tax system, including those involving the nonprofit sector. He had also waged a fight against hunters who, after donating their trophy heads to museums, claimed deductions for the entire cost of their hunting expeditions. Stephanie Strom, *The Man Museums Love to Hate*, N.Y. TIMES, Dec. 10, 2006, at A1.

49. Dillinger, *supra* note 4, at 1057.

Grassley viewed the possibility of art donors obtaining inflated values for their works in order to increase their tax deductions as a significant potential source of abuse.⁵⁰ Because the artwork was being donated to the museums rather than being purchased through acquisition funds, critics of fractional giving claimed the museums had little interest in determining a work's exact value, while donors had a strong incentive to write off as large a donation as they could.⁵¹ Furthermore, critics contended that once museums acquire an initial fraction of a work, the work's market value tends to appreciate substantially because the decision of a museum to accept the work is seen as adding to its prestige.⁵² Thus, donors may get an unfair increase in the value of future deductions through the donation of just a small interest in a work.⁵³ Second, the potential for donors to give away substantial percentages of a work—while never physically parting with it until the final gift—was considered abusive.⁵⁴ “In Iowa, where I live, it's pretty simple. Giving is not keeping,” Senator Grassley said in an interview with National Public Radio. He added: “You couldn't give away 20 percent of your car to charity and still keep driving your car.”⁵⁵ He emphasized that tax deductions should not be available for individuals who have retained possession of their fractionally donated works.⁵⁶

Pablo Eisenberg, a senior fellow at Georgetown University's Center for Public & Nonprofit Leadership, shared Senator Grassley's perception of unfairness. In a 2006 article calling on Congress to eliminate fractional giving, Eisenberg wrote:

Wealthy Americans should be ashamed of themselves for letting their greed trump the notion of charitable generosity. Not only do they want ample tax deductions for their gifts but they also want to keep their gifts at home. Those donations aren't really gifts, although eventually the donated art objects will land in museums. They seem more like tax rip-offs.⁵⁷

Acting on his outrage, Senator Grassley inserted his proposal to limit fractional giving into the Pension Protection Act of 2006.⁵⁸ This substantial bill, which mainly dealt with the problem of underfunded pension plans, was passed during a rushed session immediately preceding Congress' 2006 summer recess; in fact, it was debated for a mere twenty minutes by the Senate and allotted only one hour for

50. Gordon, *supra* note 45, at 7.

51. During my research, I discussed the fractional giving problem with legal experts associated with several museum and related professional organizations. However, these individuals requested that they remain anonymous. Accordingly, when information from those interviews is used in this Note, there will be a citation to “Anonymous Interview.” These interviews are on file with the author.

52. Anonymous Interview.

53. *Id.*

54. Follas, *supra* note 1, at 1780–81.

55. David Schaper, *Fractional Giving of Art Threatened by New Rules*, NPR (Dec. 22, 2006, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=6663361>.

56. Follas, *supra* note 1, at 1792.

57. Pablo Eisenberg, *Congress Should End Special Tax Breaks for Art Gifts*, CHRON. PHILANTHROPY (Oct. 12, 2006), <http://philanthropy.com/article/Congress-Should-End-Special/55451/>.

58. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1218, 120 Stat. 780, 1080–83 (codified in scattered sections of the Internal Revenue Code, § 26 U.S.C. (2012)).

debate in the House.⁵⁹

2. PROVISIONS OF THE PENSION PROTECTION ACT THAT LIMIT FRACTIONAL GIVING

In order to combat the perceived abuses of fractional giving, the PPA introduced four significant limitations on these gifts: (1) limits on the circumstances under which a charitable deduction is available;(2) limits on the size of the potential deduction for each subsequent fraction given; (3) limits on the time duration of the fractional donation process; and (4) a physical possession requirement.⁶⁰

First, under the PPA, deductions are only available for works that are either wholly owned by the taxpayer, or, in the case of fractional gifts already in progress, jointly owned by the taxpayer and recipient organization. Under this limitation, fractional gifts are no longer available for taxpayers who co-own a work with another individual and wish to donate their partial interest fractionally.⁶¹ This restriction prevents a taxpayer from beginning a fractional donation process with one institution only to have his co-owners donate their interests in the same work to other institutions.⁶²

Second, and most controversially, the PPA eliminated any advantages to fractional donors from the appreciation of their partially donated works. Under the PPA, the initial fractional gift was valued for deduction purposes through the same method as before the PPA—the fair market value of the work multiplied by the percentage of the work given. Thus, if a taxpayer fractionally donated 10% of a painting worth \$1 million, he would have a \$100,000 deduction. The PPA, however, capped the maximum available deduction for subsequent donations to the lesser of (1) the fair market value of the work at the time the initial fraction was donated or (2) the fair market value of the work at the time of that subsequent gift.⁶³ This provision stripped donors of any ability to profit from an increase in value of their works after the initial fraction was given, and it penalized them if the work decreased in value. Additionally, as before the 2006 amendments, if the claimed deduction for any fraction donated exceeded \$5,000, donors were required to obtain a qualified appraisal of the work.⁶⁴ Thus, as a result of the PPA, donors were forced to bear the burden of appraisal costs even though they were denied any potential benefit if the appraisal indicated the work had appreciated in value.⁶⁵

Third, the PPA set a maximum donation period for fractional gifts, whereby

59. Dillinger, *supra* note 4, at 1059–60.

60. Pension Protection Act of 2006 § 1218(a); Stephen Liss & Bryan Galat, *Fractional Interest Gifts of Art—Back to Stay, or Going Away?*, 20 TAX’N EXEMPTS 32, 33 (2008).

61. Pension Protection Act of 2006 § 1218(a).

62. Liss & Galat, *supra* note 60, at 33.

63. Pension Protection Act of 2006 § 1218(a).

64. *Id.* “Qualified appraisal” is defined in the Internal Revenue Code as an appraisal which “1. Is treated . . . as a qualified appraisal under regulations or other guidance prescribed by the Secretary, and 2. Is conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance” 26 U.S.C. §170(f)(11)(E)(i) (2012).

65. Liss & Galat, *supra* note 60, at 34.

gifts must be completed by the earlier of (1) ten years after the initial fractional contribution was made or (2) the donor's death. Donors failing to comply with this provision would be punished through "recapture" of all of their deductions given by the IRS, forcing them to pay back a potentially significant amount of money.⁶⁶ The PPA did not apply retroactively, so donors did not lose their tax deductions for works donated fractionally prior to August 18, 2006, and works partially donated prior to that date were not subject to the maximum donation period.⁶⁷ But, the PPA provided that any contribution made after that date would be treated as the initial contribution, starting the ten-year clock and locking in the fair market value of the work for purposes of calculating deductions.⁶⁸ Thus, for example, if a donor contributed 10% of a painting worth \$1 million in July of 2006, he could take a deduction of \$100,000. Because this gift was made prior to August 18, there was no time limit imposed on completing the gift, so theoretically the donor could retain the remaining 90% interest for the remainder of his life and even pass it to his heirs upon death. However, if he subsequently chose to give a second 10% interest, say in July 2007, the donor's deduction would be limited to \$100,000, even if, in the intervening year, the value of the painting had increased to \$2 million. Furthermore, that additional 10% gift would "start the clock," meaning that the remaining 80% interest would have to be donated by July 2017 or the donor's death, whichever was sooner.

Finally, the PPA overruled the *Winokur* decision by requiring that the recipient museums take "substantial physical possession" of the artwork during the fractional donation period.⁶⁹ Museums failing to take "substantial physical possession" would disqualify the work as a fractional gift, resulting in the same recapture of the deductions discussed above.⁷⁰

3. Impact of the PPA

Museums immediately felt the impact of the PPA on charitable donations. Although no empirical study has been conducted to quantify the effects of the PPA, the consensus among scholars and museums professionals is that this statute effectively eliminated the practice of fractional giving overnight.⁷¹ Donors and their tax advisors determined that the ten-year time limit, the "substantial possession" requirement, and the disallowance of appreciation value effectively eliminated the three advantages of fractional giving that had made it so appealing.⁷²

66. Pension Protection Act of 2006 § 1218(a).

67. *Id.*

68. M. Jill Lockwood & Leslie B. Fletcher, *Recent Laws Revise Rules for Charitable Contribution Deductions*, 78 PRAC. TAX STRATEGIES 68, 74 (2007).

69. Although, whether the PPA requires museums to take possession of the works annually to meet the "substantial possession" requirement remains unclear. Anonymous Interviews.

70. Gordon, *supra* note 45, at 10. However, because the PPA does not apply retroactively, this requirement only applies to donations of subsequent fractions of gifts started before the passage of the PPA or new fractional gifts started after the passage of the PPA.

71. Anonymous Interviews.

72. Anonymous Interview.

Museums were hard-hit by this development. In 2006, the number of art and collectable donations to museums across the country fell by 17%.⁷³ Although it is difficult to determine what percent of this decline was attributable to the passage of the PPA, the statute certainly had an impact, particularly on the donation of valuable and historically significant works.⁷⁴ Museums that had relied particularly heavily on fractional donations were the most severely affected. SFMoMA, which had previously been the highest recipient of fractional donations, suffered an 80% drop in donation levels following the passage of the PPA.⁷⁵

The PPA not only ended new fractional gifts, but it also halted the progress of gifts that had been started before 2006. According to museum professionals, rather than making any subsequent donations, which would have started the ten-year time limit and locked in a fair market value, most donors have chosen to wait and give any outstanding interest in a work through their wills.⁷⁶ This not only resulted in a major loss to museums, but also it potentially placed many important artworks in jeopardy. Before the PPA, museums generally encouraged donors to give more and more fractions because the museum's right to make important decisions regarding the work's storage, conservation and display increased with each fraction given. Delaying any remaining gifts until the donor's death reduced the ability of museums to exercise these rights, potentially impeding conservation of delicate artwork and public access to them.⁷⁷

Almost immediately following the passage of the PPA, museum professionals began to lobby Congress for its amendment or repeal.⁷⁸ In October 2006, members of the House Ways and Means Committee and the Senate Finance Committee received letters from prominent museums and an appeal by the Association of Art Museum Directors (AAMD) calling for changes.⁷⁹ The content of these letters is essentially identical; each letter identified the same five main problems caused by the PPA that substantially dissuaded fractional giving and called for the same legislative solutions to amend the PPA and reinstate the tax advantages for fractional gifts.⁸⁰ The letters stressed that the PPA had produced a substantial negative impact, by dissuading donors from making new fractional gifts and by halting gifts already in progress.⁸¹ For example, in her letter to the members of the House Ways and Means Committee, Sara Geelan, Senior Counsel at the Guggenheim Museum, stated:

The rigidity of these rules and the harsh penalties to which donors may become

73. Karayan, *supra* note 33, at 470.

74. Anonymous Interview.

75. Karayan, *supra* note 33, at 470–71.

76. Anonymous Interview.

77. *Id.*

78. Dillinger, *supra* note 4, at 1064.

79. See Wieczorek, *supra* note 5, at 103 n.109.

80. See COMMITTEE ON WAYS & MEANS, U.S. HOUSE OF REPRESENTATIVES, 109TH CONG., WRITTEN COMMENTS ON H.R. 6364, THE "TAX TECHNICAL CORRECTIONS ACT OF 2006" (2006) [hereinafter WRITTEN COMMENTS ON H.R. 6364], available at <http://www.gpo.gov/fdsys/pkg/CPRT-109WPRT31496/html/CPRT-109WPRT31496.htm>.

81. *Id.*

subject will drastically reduce the number of gifts museums receive through the very useful charitable giving vehicle of fractional gifts. With fewer incentives to give works of art to museums, more donors are likely to delay making commitments to museums. As a result, more works will remain in private hands or be sold upon the death of the collector, rather than be given to museums for the enjoyment of the public.⁸²

The letters proposed five changes to the PPA, targeting aspects of the bill that had been most influential in ending fractional giving.⁸³ First, the letters called for fractional gifts that were already in progress when the PPA was enacted to be “grandfathered in,” so that the new law would not apply to subsequent donations of interests in these works.⁸⁴ For example, the letter by James Cuno, then-director of the Art Institute of Chicago, stressed that museums take into account in-progress gifts when making exhibition and acquisition plans.⁸⁵ Thus, the likely delay in the completion of these gifts (if covered by the PPA) could have significant detrimental effects on museum planning.⁸⁶

Second, the letters addressed a particular problem caused by the PPA’s recapture provision: the requirement that the final interest in the work be transferred before the date of death for donors who died before the ten-year time limit.⁸⁷ The letters stressed that this requirement was unreasonable in that the statute did not allow donors to provide for the contingency of unexpected death before the gift’s completion (and within the ten-year period) by donating any outstanding interests in the work through their will. Rather, by requiring that gifts 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,” the act penalized donors who died before completing their gifts by recapturing any charitable deductions they had taken.⁸⁸

Third, the letters advocated that the ten-year time limit on the fractional donation process be eliminated.⁸⁹ For example, the letter written by Millicent Hall Gaudieri and Anita Difanis (on behalf of the Association of Art Museum Directors) stressed that “[d]onors, who willingly give partial interests in a valuable museum quality work of art, should be able to avail themselves of the flexibility of giving their gift over their lifetimes if that best suits their financial and personal needs and

82. Letter from Sara Geelan, Assoc. Gen. Counsel, Solomon R. Guggenheim Found., to William M. Thomas, Chairman, House Comm. on Ways & Means, and Charles B. Rangel, Ranking Member, House Comm. on Ways & Means (Oct. 31, 2006), available at <http://www.gpo.gov/fdsys/pkg/CPRT-109WPRT31496/html/CPRT-109WPRT31496.htm>.

83. See WRITTEN COMMENTS ON H.R. 6364, *supra* note 80.

84. *Id.*

85. Letter from James Cuno, President, Eloise W. Martin, Dir., and Julia E. Getzels, Exec. Vice President, The Art Institute, to Charles E. Grassley, Chairman, Comm. on Fin., Max Baucus, Ranking Member, Comm. on Fin., William M. Thomas, Chairman, House Comm. on Ways & Means, and Charles B. Rangel, Ranking Member, House Comm. on Ways & Means (Oct. 31, 2006), available at <http://www.gpo.gov/fdsys/pkg/CPRT-109WPRT31496/html/CPRT-109WPRT31496.htm>.

86. *Id.*

87. See WRITTEN COMMENTS ON H.R. 6364, *supra* note 80.

88. *Id.*

89. *Id.*

desires.”⁹⁰ Their letter went on to suggest as an alternate that, at the time of donation of the initial fraction, donors could be required to complete the gift during their lifetimes or at their death.⁹¹

Fourth, the letters recommended that the substantial physical possession requirement be waived in cases where transportation could potentially damage the work or where taking physical possession of the work would cause the museum hardship.⁹² Gaudieri and Difanis’ letter stressed that “very fragile, very large, or very rare works often should not be subject to travel or frequently moved.”⁹³

Fifth, the letters called for the restoration of the fair market deduction, allowing donors to benefit from the appreciation of their works when making subsequent fractional gifts.⁹⁴ The letters suggested that to avoid the potential abuse of inflated valuations, all donations exceeding \$1,000,000 could be reviewed by the IRS Art Advisory Panel.⁹⁵

In addition to calling for these five amendments, the letters highlighted a significant “mismatch problem” between the treatment of fractional gifts under the PPA and the estate and gift tax implications of these gifts.⁹⁶ Fortunately for donors

90. Letter from Millicent Hall Gaudieri, Exec. Dir., and Anita M. Difanis, Dir. of Gov’t Affairs, Ass’n of Art Museum Dirs., to Charles E. Grassley, Chairman, Comm. on Fin., Max Baucus, Ranking Member, Comm. on Fin., William M. Thomas, Chairman, House Comm. on Ways & Means, and Charles B. Rangel, Ranking Member, House Comm. on Ways & Means (Oct. 30, 2006), available at <http://www.gpo.gov/fdsys/pkg/CPRT-109WPRT31496/html/CPRT-109WPRT31496.htm>.

91. *Id.* Prior to 2006, this was the established practice of many museums that accepted fractional gifts.

92. See WRITTEN COMMENTS ON H.R. 6364, *supra* note 80.

93. Letter from Millicent Hall Gaudieri and Anita M. Difanis to Charles E. Grassley et al., *supra* note 90.

94. See WRITTEN COMMENTS ON H.R. 6364, *supra* note 80.

95. *Id.*

96. *Id.* The mismatch problem was caused by the PPA’s ceiling on charitable deductions, pegged at the fair market value of the work when the first fraction was given. This limitation could create a “mismatch” between the value of a work for purposes of estate or gift taxes and its deductible value, potentially resulting in donors owing taxes on works that had been completely donated. Sara Geelan provided an excellent illustration of this problem in the estate and gift tax contexts in her letter to the House Ways and Means Committee. To illustrate the estate tax implications, assume a donor “gave an initial 10% fractional interest in a work of art worth \$1 million and gave the remaining 90% of the work to the museum as a bequest in his will when he died five years later. Letter from Sara Geelan to William M. Thomas and Charles B. Rangel, *supra* note 82. If at the time of the donor’s death the work of art was worth \$2 million, the \$1.8 million value of the donor’s 90% interest in the work would be includable in his estate for estate tax purposes. *Id.* However, his estate tax deduction for the gift of his 90% interest would be limited to \$900,000 (90% of the \$1 million value that the time of his initial contribution). *Id.* Therefore, the donor’s estate would be liable for estate tax on \$900,000 (the \$1.8 million value, less the \$900,000 deduction), despite an entirely charitable transfer of the art.” *Id.* Similarly, regarding the gift tax effects, assuming that “the donor in the above example did not die, but gave an additional contribution of 10% of the work five years after the initial gift, his income tax deduction would be limited to \$100,000 (10% of the fair market value on the date of the initial gift), and so would his charitable gift tax deduction. *Id.* However, the donor would incur gift tax on the \$200,000 value of the gift on the date of the additional contribution, offset only by a \$100,000 deduction.” *Id.* The letters stressed that the mismatch problem served as an unfair penalty on donors who had complied with all requirements of the PPA but were unfortunate enough to have donated a work that had increased in value. Letter from James Cuno, Eloise W. Martin and Julia E. Getzels, to Charles E. Grassley et al., *supra* note 85; Letter from Millicent Hall Gaudieri and Anita M. Difanis to Charles E. Grassley et al.,

and museums, however, the mismatch problem was fairly quickly corrected through the passage of the Tax Technical Corrections Act of 2007 (TTCA).⁹⁷ Some scholars initially heralded the TTCA as a cure-all, claiming that it “cleared the way for gifts of fractional interests in tangible personal property to resume.”⁹⁸ Despite these optimistic predictions, however, the TTCA had little effect. It failed to address any of the five concerns highlighted in the letters, and thus it did not alter the provisions of the PPA that made fractional giving unappealing.⁹⁹

II. THE AFTERMATH OF THE PENSION PROTECTION ACT

Since its passage in 2006, the PPA has remained highly controversial within the art world. Seen as a gross overreaction to a minor potential for tax abuse (and likened, by some, to “swatting flies with sledgehammers”¹⁰⁰), it has been the subject of criticism by donors, museum professionals and legal scholars. Despite several serious attempts at reform, the problems highlighted in the letters by Anita Difanis, James Cuno, Sara Geelan and others have remained unresolved. This section discusses legislative reform efforts undertaken in an attempt to revive fractional giving and proposals made by legal scholars. This section concludes that despite earnest attempts, fractional giving is unlikely to return to pre-2006 levels in the near future because it is improbable that the legislative reform will succeed, and because most of the proposed reforms do not fully restore the pre-2006 advantages of fractional giving.

A. PROPOSED LEGISLATIVE SOLUTIONS¹⁰¹

The first serious attempt to reform the PPA was the Promotion of Artistic Giving Act of 2007 (PAGA), a bill that was introduced in 2007 but never received a vote.¹⁰² PAGA proposed three significant changes to the PPA. First, PAGA tried to reencourage gifts by younger donors and gifts of more substantial collections by eliminating the ten-year time limit on donations; as an alternative to the limit, it provided that deductions would be recaptured if the gift were not completed within

supra note 90; Letter from Sara Geelan to William M. Thomas and Charles B. Rangel, *supra* note 82. Unless this problem was corrected, the letters concluded, it would be unwise for any taxpayer to donate fractionally because of the potential that the work could increase in value and subject the donor to an additional tax burden. Letter from James Cuno, Eloise W. Martin and Julia E. Getzels, to Charles E. Grassley et al., *supra* note 85; Letter from Millicent Hall Gaudieri and Anita M. Difanis to Charles E. Grassley et al., *supra* note 90; Letter from Sara Geelan to William M. Thomas and Charles B. Rangel, *supra* note 82.

97. Tax Technical Corrections Act of 2007, Pub. L. No. 110-172, § 3(d), 121 Stat. 2473, 2474 (codified in scattered sections of I.R.C., 26 U.S.C. (2012)).

98. Liss & Galat, *supra* note 60, at 32.

99. Gordon, *supra* note 45, at 12–13.

100. Liss & Galat, *supra* note 60, at 33.

101. For a comparison of these proposals, see *infra* Appendix 1.

102. Promotion of Artistic Giving Act of 2007, H.R. 3881, 110th Cong. (2007); Karayan, *supra* note 33, at 473–74.

nine months of the donor's death.¹⁰³ Second, PAGA eliminated the PPA's disallowance of any increased value of deductions caused by the appreciation of a fractionally donated work. Instead, PAGA required that the IRS Art Advisory Panel evaluate any fraction contributed with a claimed deduction value exceeding \$1,000,000.¹⁰⁴ Supporters claimed that this provision addressed any potential abuses through over-valuation while still allowing donors a fair market value deduction.¹⁰⁵ Third, PAGA (which was proposed before the TTCA was passed) eliminated the mismatch problem through the same mechanism adopted in the TTCA.¹⁰⁶ Interestingly, PAGA did not address the PPA's substantial possession requirement, despite the fact that it had received serious criticism from museum professionals concerned about the dangers that excessive travel posed to fragile artwork.¹⁰⁷

Following the failure of PAGA, New York Senator Charles Schumer attempted to remedy the problems caused by the PPA through introducing a new bill, S. 1605, in August 2009. After its introduction in the Senate, S. 1605 was referred to the Senate Finance Committee, but it too never received a vote.¹⁰⁸ On May 10, 2011, Senator Schumer introduced S. 931, which was identical to S. 1605.¹⁰⁹ Yet again, after it was referred to the Senate Finance Committee, S. 931 met the same fate as its predecessor.

S. 1605 and S. 931 proposed three major changes to the PPA. First, they revised the timing and structure required for a fractional gift. The bills provided that a donor's initial fractional contribution must equal at least a 10% interest in the work.¹¹⁰ At the time of this initial gift, the donor and museum are required to make a binding contract under which the donor agrees to grant at least a 20% interest in the work within eleven years and to contribute all remaining interests in the work by the earlier of his death or twenty years.¹¹¹ Second, S. 1605 and S. 931 amended the valuation of subsequent donations, allowing donors to take advantage of the appreciation in the value of their works, but disallowing full market value deductions, even for works that do not appreciate. Under the bills, deductions are calculated by multiplying the fair market value of the artwork by the donor's remaining interest in the property and then by multiplying that number by the percent interest in the work being contributed.¹¹² Thus, if a donor contributes 25% of a work worth \$1 million, his initial contribution is valued at \$250,000 and he can take a deduction equal to that amount. But, if he later chooses to donate an

103. Gordon, *supra* note 45, at 14.

104. *Id.* at 13–14.

105. Follas, *supra* note 1, at 1803.

106. *Id.*

107. *Id.*

108. S. 1605, 111th Cong. (2009); Karayan, *supra* note 33, at 485. Senate Bill 1605 had three cosponsors: Senator Johnny Isakson of Georgia, Senator John F. Kerry of Massachusetts and Senator Tom Udall of New Mexico. S. 1605.

109. S. 931, 112th Cong. (2011).

110. *Id.*

111. S. 1605.

112. Karayan, *supra* note 33, at 486.

additional 25%, he is only entitled to a deduction worth \$187,500 (25% of his remaining \$750,000 interest in the work), rather than the full \$250,000 value of the interest that he donated. This “haircut” reduces the amount of the allowed deduction for each subsequent fraction that is given. Third, S. 1605 and S. 931 amended the PPA’s physical possession requirement. The bills provided that donors can choose between, on the one hand, apportioning physical possession of the work with the recipient museum in a manner reflecting the percent ownership or, on the other hand, allowing the recipient museum complete physical possession of the work.¹¹³ Failure to comply with either option still results in recapture of the donor’s tax deductions.¹¹⁴

Senator Schumer and his staff received substantial assistance from the AAMD in writing this proposed legislation.¹¹⁵ The resulting bills, however, appeared to be a compromise between the reforms desired in the art world and the provisions of the PPA. Indeed, many museum professionals were disappointed with their provisions, including the twenty-year time limit for completing the donation and the “haircut” on deductions for subsequent donations.¹¹⁶ Because of these shortcomings, many museum professionals view S. 931 as insufficient to revive fractional giving.¹¹⁷

B. REFORM PROPOSALS FROM LEGAL SCHOLARS

Almost immediately following the passage of the PPA, legal scholars began considering strategies to revive fractional giving while still addressing the perceived abuses that Senator Grassley and others identified. Although these scholars disagree about the extent of the potential for abuse under pre-PPA fractional giving, there is unanimity in the beliefs that the PPA was a disproportionate response to the perceived problems and that it will end fractional giving by eliminating its unique incentive structure.¹¹⁸ Legal scholars have presented a number of reform proposals, which generally are very similar to the provisions of the PAGA and S. 1605/S. 931.

Writing in 2008 before passage of the TTCA, Samuel Wieczorek was one of the earliest academics to address this issue.¹¹⁹ He focused largely on the mismatch problem¹²⁰ (which has since been resolved in the TTCA). He also called for amendments to the PPA under which the time limit for completion of donations would be increased from ten years to twenty years.¹²¹ Under Wieczorek’s proposal, donors who died within that time period without completing their donations could avoid recapture of their deductions if their remaining interest in the

113. S. 931; S. 1605.

114. Karayan, *supra* note 33, at 487.

115. Anonymous Interviews.

116. *Id.*

117. *Id.*

118. For a comparison of these scholarly proposals, see *infra* Appendix 2.

119. See Wieczorek, *supra* note 5.

120. *Id.* at 104–05.

121. *Id.* at 111–12.

artwork was transferred through their wills.¹²² Furthermore, museums would not be required to take possession of a fractionally donated work until it had been completely donated.¹²³

Elizabeth Dillinger was similarly critical of the PPA's elimination of fractional gifts.¹²⁴ Dillinger proposed a "five-point plan" to "save fractional giving": (1) permit deductions for the fair market value of works, including appreciation value; (2) eliminate the ten-year time limit on fractional donations, and instead require that donations be completed within a short period of time after the donor's death; (3) eliminate the requirement that museums take "substantial physical possession" of fractionally donated works; (4) remove the prohibition of joint fractional donations by co-owners of works; and (5) require appraisals in order to value donated fractions worth more than \$100,000, and impose strict penalties for inflated valuation.¹²⁵

Kristina Gordon was more supportive of the PPA.¹²⁶ She argued that, although the ten-year time limit on donations and disallowance of increased deductions from appreciation may disincentivize donations, the "substantial physical possession" requirement will provide increased access to artwork for the public.¹²⁷ Gordon minimized the problems associated with transporting artwork to and from museums to meet this requirement, claiming that "this is a concern that a museum deals with on a regular basis, essentially every time it acquires a new piece of art."¹²⁸ To reform the PPA, Gordon proposed that Congress allow deductions to reflect the appreciation of artwork, but she also proposed that a qualified appraisal be required and that the time limit on donations be increased to twenty years.¹²⁹ Gordon supported the valuation system for deductions proposed in S. 931, under which a "haircut" reduces the value of each subsequent fractional gift.¹³⁰ Furthermore, under Gordon's plan, fractional gifts that were already in progress prior to 2006 would be "grandfathered in" such that the PPA would not apply to subsequent fractional donations of these works.¹³¹

Emily Follas also called for an intermediate approach that she claimed would encourage fractional donations while, admittedly, not entirely eliminating the potential for abuse.¹³² She would reform the PPA by implementing a "relaxed possession requirement"¹³³ to relieve museums of the burden of taking substantial possession of works. She would also increase the time limit for donations to twenty years and institute reforms allowing donors to take advantage of the

122. *Id.*

123. *Id.*

124. *See* Dillinger, *supra* note 4.

125. *Id.* at 1070–73.

126. *See* Gordon, *supra* note 45.

127. *Id.* at 26.

128. *Id.* at 25.

129. *Id.* at 27–29.

130. *Id.* at 27.

131. *Id.* at 29.

132. *See* Follas, *supra* note 1, at 1807.

133. *Id.* at 1807.

appreciation of their works but requiring them to obtain qualified appraisals to prevent abuse.¹³⁴

Catherine Karayan was generally supportive of the PPA.¹³⁵ She argued that building a permanent collection through substantial donations is becoming less important to museums, and instead museums should focus on increasing public programming and temporary exhibits.¹³⁶ Indeed, Karayan asserted that fractional giving may not be worth reviving through PPA reform; even prior to 2006, only a small percentage of donated works were given fractionally, and other forms of giving already provided substantial tax incentives for donation.¹³⁷ In fact, Karayan argued that “a tax policy that encourages only a moderate amount of donations may help museums move away from their dependency on donors.”¹³⁸ However, despite her belief in the declining importance of donations to museums, Karayan recognized that if retention of fractional giving is desirable, then the provisions of the PPA were too harsh.¹³⁹ To revive fractional giving, she had four proposals: (1) that the ten-year time limit on donations be increased to twenty years; (2) that donors be allowed to complete their donations through their wills if they die within the time limit without risking recapture; (3) that there be an exception to the substantial possession requirement for “fragile or unwieldy art”; and (4) that donors be permitted to take advantage of appreciations in value with a qualified appraisal requirement.¹⁴⁰

C. FRACTIONAL GIVING MAY NEVER RETURN

The failure to pass any legislation reforming the PPA suggests that fractional giving may never fully return and indeed that its old form may have been effectively eliminated for good. Without legislative reform, the PPA will continue to impose harsh restrictions on fractional gifts, which have already resulted in the virtual elimination of these gifts.¹⁴¹

Additionally, even if the proposed legislative reforms had been enacted, they would have failed to revive fully the incentives that made fractional giving appealing to donors of valuable and historically significant works.¹⁴² Thus, the number of these gifts would likely not have returned to their previous levels. It is true that Senator Schumer’s proposed legislation, S. 1605 and S. 931, addressed some of the harshest aspects of the PPA: the ten-year time limit, the cap on deductions and the substantial possession requirement. But, the Schumer bill failed to restore the advantages of fractional giving before 2006. Under Senator Schumer’s bills, although donors could take advantage of the appreciation in value

134. *Id.* at 1807–08.

135. *See* Karayan, *supra* note 33.

136. *Id.* at 479–80.

137. *Id.* at 482.

138. *Id.* at 483–84.

139. *Id.* at 484.

140. *Id.* at 484–85.

141. Anonymous Interviews.

142. *See infra* Appendix 1.

of their works through larger subsequent donations, this was offset by the “haircut” that applied to subsequent deductions through valuing the deduction as the fraction given times the donor’s remaining interest in the work. Thus, regardless of whether a work appreciates in value or not, donors are denied the opportunity to deduct the full market value of their donation.

Furthermore, although Schumer’s proposed twenty-year time limit on the donation process was an improvement over the PPA’s ten-year limit, it likely was still insufficient for young donors or individuals who would like their surviving spouses to be able to enjoy the work during the remainder of their spouses’ lifetimes. Given these two major disadvantages of the Schumer legislation, even if the bills had been passed, donors may still have chosen instead to donate through their wills because testamentary donations would allow both the donor full enjoyment of the work throughout his life and a deduction equal to the work’s full market value.¹⁴³ This outcome would be undesirable for museums, both because their access to the works would be significantly delayed and because of the risk that donors might change their minds and instead sell the work or give it to family members.

Finally, Senator Schumer’s bills failed to address adequately the problems with the PPA’s substantial possession requirement. While the bill gives donors the option between (1) apportioning physical possession of the work between themselves and the recipient museum according to percent ownership or (2) giving the recipient museum complete physical possession, for donors of extremely delicate or cumbersome works the first option is likely to be logistically impossible. Thus, these donors are effectively required to give the museum complete possession of the work upon the initial gift, effectively eliminating one of the major advantages of fractional giving. Moreover, this proposal did nothing to address the problems that occur when it is not in a museum’s best interest to take possession—instances when storage and display would be expensive, inconvenient or inconsistent with the museum’s exhibition plans. These three substantial shortcomings of Senator Schumer’s proposed legislation suggest that even if these bills had been passed, any resulting increase in fractional giving would likely not fully return to pre-2006 levels.

Similarly, enactment of any of the scholarly proposals would also likely fail to fully revive fractional giving, for such proposals very closely track the provisions of PAGA and the Schumer legislation. Dillinger’s “five point plan” would have the greatest impact because her reforms essentially eliminate the PPA in its entirety, returning fractional giving to its pre-2006 state (with the minor addition of an appraisal requirement for donations worth more than \$100,000). But, because Dillinger’s reforms are even more radical than those contained in Schumer’s legislation, the likelihood that they would be proposed, let alone adopted, is very remote.

The proposals made by Karayan, Follas and Wiczorek—under which donors would be allowed to deduct the full market value of their donated work, including

143. 3 LERNER & BRESLER, *supra* note 22, at 1604.

appreciation; the substantial possession requirement would be relaxed; and the time limit for completing the donation would be increased to twenty years—also could increase fractional giving but likely not back to pre-2006 levels. The major deterrent under these systems would be the twenty-year time limit, which, as discussed above, might lead some potential donors to donate works through their wills instead. Furthermore, as with Dillinger’s proposal, these reforms are more radical than the unsuccessful attempts in the PAGA and Schumer legislation, and thus they are unlikely to pass.

Finally, Gordon’s reforms, although less radical and thus potentially more palatable to the legislature, fail to resolve several of the major problems in the PPA. Gordon supports the “haircut” provision of the Schumer legislation, which denies donors deductions equal to the full value of their donated works. Furthermore, Gordon’s proposal leaves the PPA’s substantial possession requirement intact, for Gordon argues that the potential for damage and the difficulty in transport and storage are exaggerated. This claim runs counter to the concerns of museum professionals, who emphasize that the requirement of transport back-and-forth from the museum is either completely unrealistic (for very large, cumbersome pieces) or highly precarious (for fragile works). Retaining the substantial possession requirement would significantly deter donors who were considering giving works whose transport would pose potential difficulties. Thus, Gordon’s proposals would likely be only moderately successful in restoring fractional giving.

III. ARE THERE REASONABLE ALTERNATIVES TO FRACTIONAL GIVING?

Given that the PPA essentially eliminated fractional giving and possible reforms would likely not result in the return to pre-2006 fractional giving levels, it is important to consider alternative forms of donation that might be reasonable replacements. To replace fractional giving fully, an alternative contribution method should provide donors with the same advantages as fractional giving, by: (1) providing a mechanism whereby deductions could be spread out over sufficient time such that donors could take advantage of their full value; (2) permitting donors to increase their deductions if the value of their work increases; and (3) allowing donors to maintain at least some possession of the work throughout the donation process. Furthermore, some donors may even continue to give under an alternative that only shared some advantages of fractional giving; thus, the impact of donations lost as a result of the PPA could be less than expected under an adequate substitute. If a reasonable alternative were available, museums could promote this alternative to donors and potentially avoid losing contributions from individuals who, in the absence of any of the advantages of fractional giving, would instead choose to sell or retain their artwork.

This part describes possible alternative methods of donation and evaluates whether they could function as reasonable replacements to fractional giving by

providing any of the same advantages.¹⁴⁴

A. COMPLETE *INTER VIVOS* CHARITABLE TRANSFER

In a complete *inter vivos* charitable transfer, the donor would give up his entire interest in a work or collection to the museum in a single transfer made during his lifetime.¹⁴⁵ In contrast to a fractional gift, the donor would not be entitled to retain possession of the work or collection once it was donated. Because the donor's entire interest is given in a single transfer, there is no opportunity for the donor to benefit from any appreciation in value after the transfer. Although the donor would be entitled to deduct the value of the work or collection from his income, this deduction would be capped at 30% of his adjusted gross income for the year of the donation (although any excess over that amount could be carried forward and deducted for the subsequent five years).¹⁴⁶ For gifts of extremely valuable, historically significant works, this limitation might not be sufficient for the donor to deduct the full value of the work or collection. Not surprisingly, these types of works were those most often donated through fractional giving prior to 2006. Thus, it seems unlikely that donors who were previously motivated by the advantages of fractional giving would see complete *inter vivos* charitable transfers as a viable alternative.

B. LEASEBACK

Under a leaseback arrangement, a donor gives a work or collection to a museum and arranges to lease it back for a set period of time at its fair rental value.¹⁴⁷ Unlike complete *inter vivos* charitable transfers, a major advantage of the leaseback is that a donor can retain possession of the work throughout the period of the lease. Donors may take a charitable deduction for the entire value of the work or collection donated¹⁴⁸ (although, as discussed above, because of the 30% cap donors who give extremely valuable works may not be able to deduct the work's full value).¹⁴⁹ No deduction is available for the payments under the lease, and the donor cannot benefit from the work's appreciation.¹⁵⁰

There are several additional major problems with leasebacks that would prevent these arrangements from replacing even some of the lost fractional gifts. First, fair rental value of valuable and historically significant works would likely be prohibitively expensive—even for very wealthy collectors. At the same time, if the

144. For an evaluation of possible replacements to fractional giving, see *infra* Appendix 3.

145. 3 LERNER & BRESLER, *supra* note 22, at 1055.

146. 26 U.S.C. § 170(b)(1)(B) (2012); Follas, *supra* note 1, at 1788–89.

147. 3 LERNER & BRESLER, *supra* note 22, at 1582–83.

148. *Id.*

149. 26 U.S.C. § 170(b)(1)(B).

150. Lerner and Bresler define a leaseback as occurring when a collector “donate[s] a collection to a charity and then seek[s] to lease it back at its fair rental value.” 3 LERNER & BRESLER, *supra* note 22, at 1582. However, the authors stress that under the Internal Revenue Code, “the rent paid is not a deductible charitable gift.” *Id.*

museum failed to charge fair rental value, the IRS might claim that the donor had a retained life estate in the work or collection, which would be taxable as part of the donor's gross estate.¹⁵¹ Second, most museums would be unlikely to agree to such arrangements. The leaseback would likely be perceived as contrary to the museum's societal obligation to make works generally available.¹⁵² Finally, the rent paid under the lease might constitute unrelated business income taxable to the museum, which is highly undesirable.¹⁵³ Thus, the leaseback is likely not a viable replacement for fractional giving.

C. BARGAIN SALE

In a bargain sale arrangement, the owner sells a work or collection to a museum for less than the fair market value, with the difference between the fair market value and the sales price comprising a donation to the museum.¹⁵⁴ For tax purposes, the basis of the work or collection is allocated between the sale and gift portions, and the sales portion is subject to capital gains or ordinary income tax, while a charitable deduction is allowed for the gift portion.¹⁵⁵ Like the complete *inter vivos* charitable transfer, the donor is not entitled to retain possession of the work after the bargain sale. Furthermore, because its entire interest is sold in one transaction, the donor cannot take advantage of any appreciation in the work after the sale.

The bargain sale cannot function as a reasonable alternative for donors who previously would have chosen fractional giving. Fractional giving was particularly advantageous to donors who wanted to maximize their ability to take advantage of tax deductions by prolonging the donation process. In contrast, the bargain sale is more appealing to donors with some charitable intentions, but who need to produce income by selling a valuable work or collection.¹⁵⁶ Furthermore, the bargain sale relies on museums having sufficient acquisition funds to purchase a work or collection, even at a discounted price. Given that fractional donation was generally used to donate extremely valuable works or collections, it is unlikely that most museums would have the funds to make this kind of purchase.

D. LOAN

Donors reluctant to part with their works or collections may choose to loan them

151. *Id.* at 1583. Museums and other tax-exempt organizations are taxed at the applicable corporate tax rates on any unrelated business income. 26 U.S.C. § 511.

152. Anonymous Interviews.

153. 3 LERNER & BRESLER, *supra* note 22, at 1583.

154. According to Lerner and Bresler, "[a] bargain sale of a collection to a charitable organization occurs when the collection is sold to charity for an amount less than its fair market value by an individual with donative intent. A bargain sale has elements of both a sale and a gift. The sale element is the sales price the collector charges. The gift element is the difference between the sales price paid by the charity and the fair market value of the collection sold to the charity." *Id.* at 1584.

155. *Id.* at 1585.

156. *Id.*

to museums. Loans of artwork to museums are common, especially for special exhibitions. But § 2503 of the Internal Revenue Code provides that “any loan of a qualified work of art shall not be treated as a transfer.”¹⁵⁷ Thus, no charitable deduction is available to individuals who loan their work or collection to a museum, and the work or collection would be includable in the owner’s estate at his time of death.¹⁵⁸ Because of these factors, loans cannot function as a replacement for fractional giving.

E. JOINT PURCHASE AGREEMENT

Joint purchase agreements are relatively new donation structures. They remain very unusual, but they present some of the same advantages to museums and donors as the fractional gift.¹⁵⁹ Under a joint purchase agreement, a museum and a donor (or several donors) agree to purchase a work of art jointly, apportioning ownership interests proportionally to the percentage of the purchase price paid by each party.¹⁶⁰ As with a fractional gift, each joint owner has the right to possess the work for a fraction of time consistent with his or her ownership interest.¹⁶¹ When the work is initially purchased, each individual donor agrees to give his interest in the work to the museum, either at some later date or upon his death.¹⁶² Because the donation is valued when the work is later given to the museum, the deduction available to a donor or his estate may increase to reflect any appreciation in the value of the work occurring since it was initially purchased.¹⁶³

Because joint purchase agreements allow donors to retain possession in proportion to their ownership interest and take advantage of appreciation in the work’s value when it is eventually donated, some museum professionals believe that joint purchase agreements provide a possible alternative to fractional giving.¹⁶⁴ Even these professionals acknowledge, however, that joint purchase agreements cannot fully replace fractional giving because of two significant drawbacks. First, unlike fractional gifts, joint purchase agreements do not provide an immediate charitable deduction—the deduction is delayed until the work is donated. Second,

157. 26 U.S.C. § 2503 (2012); *see also* 3 LERNER & BRESLER, *supra* note 22, at 1586. As a result of the Technical and Miscellaneous Revenue Act of 1988, which amended section 2503 of the Internal Revenue Code, a loan of a work of art to a museum is not treated as a transfer that is subject to federal gift tax. 3 LERNER & BRESLER, *supra* note 22, at 1586; *see also* BRUCE R. HOPKINS, *THE TAX LAW OF CHARITABLE GIVING* 240 (4th ed. 2011).

158. 3 LERNER & BRESLER, *supra* note 22, at 1586. Because under the Internal Revenue Code a loan is not treated as a transfer of the owner’s interest in the artwork to the museum, the owner is not treated as having made a “charitable contribution” for purposes of section 170 and thus no tax deduction is available. Thus, the owner is considered to have retained ownership of the artwork throughout the duration of the loan, so, at the owner’s death the artwork is considered to be part of the owner’s taxable estate.

159. Anonymous Interview.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

joint purchase agreements require that the museum use its acquisition funds to obtain its partial interest in the work. Since many works previously donated via fractional giving were extremely valuable, it might be difficult for museums to provide these funds to acquire even a partial interest in similarly significant works through joint purchases.

Nevertheless, museums have made some major joint acquisitions, demonstrating the potential of this donation structure despite these shortcomings. For example, the Dallas Art Museum recently acquired the \$2.5 million Gerhard Richter painting *Stadtbild Mü* jointly with two major donors.¹⁶⁵ This work was a significant addition to the museum's already exceptional Richter collection, as the painting is a prime example of the influence of World War II on Richter's work.¹⁶⁶

F. PROMISED GIFT

A promised gift is made when a donor and a museum form a contractual agreement that a specified work or collection will be given to the museum upon the donor's death.¹⁶⁷ The donor retains the work during his lifetime. Under the tax law, a donor cannot take a deduction at the time the promised gift agreement is executed, because the IRS does not consider a transfer of property interest to have been made.¹⁶⁸ Rather, the IRS provides that a tax deduction is only available when "it is possible to determine that the transfer must be made and that the transfer will be of a determinable amount,"¹⁶⁹ generally upon the donor's death. When the work is transferred, the donor's estate can take a deduction equal to the work's full market value, including any appreciation that occurred between that the time the gift was promised and the donor's death.¹⁷⁰

According to museum professionals, since 2006 there has been an increase in promised gifts, and these promises are being used to replace partially the fractional gifts lost as a result of the PPA.¹⁷¹ Prior to 2006, many museums were reluctant to accept promised gifts, steering donors instead toward the fractional gift because it provided the museum with a real property interest in the work or collection. Since the passage of the PPA, however, many museums have reconsidered this practice, and the proportion of promised gifts has increased.¹⁷² This increase may be partially attributable to the fact that, like the fractional gift, the promised gift can "lock in" a donor, obtaining a commitment to future donation of the artwork. But, unlike fractional gifts, which give the museum a property interest at the time of the initial gift, promised gifts are just a promise. Thus, there is always a danger that the donor will renege on promised gifts. Indeed, the enforceability of a donor's

165. Claire Frankel, *Joining the Dallas Union*, FIN. TIMES, May 26, 2007, at 9.

166. *Fast Forward: Contemporary Collections for the Dallas Museum of Art*, DALLAS MUSEUM OF ART, http://www.dm-art.org/View/PastExhibitions/dma_205590 (last visited Mar. 3, 2013).

167. Clark & Swanson, *supra* note 23, at 14.

168. I.R.S. Priv. Ltr. Rul. 93-03-007; *see also* Treas. Reg. § 1.170A-1 (2008).

169. *See* 3 LERNER & BRESLER, *supra* note 22, at 1579.

170. Treas. Reg. § 1.170A-1.

171. Anonymous Interview.

172. *Id.*

promise is often an open question. While section 90 of the *Restatement on Contracts* provides that a charitable pledge is binding, even in the absence of consideration or reliance, many states do not follow the Restatement, leading to variability in the enforceability of these promises.¹⁷³ Furthermore, museums generally do not want to need to sue donors or their estates to enforce promises.¹⁷⁴ Thus, while promised gifts currently function to replace some of the fractional gifts lost as a result of the PPA, they can only function as a partial replacement because a charitable deduction is not available until the donor's death and because promised gifts are not always enforceable.

G. *INTER VIVOS* CHARITABLE REMAINDER TRUST

In an *inter vivos* charitable remainder trust, an individual sets up a trust under which a specific amount is distributed, at least annually, to one or more designees.¹⁷⁵ The distribution period must either be for the lives of the designees or for a specified period that does not exceed twenty years.¹⁷⁶ At the end of the period, the trust terminates, and its remaining assets are distributed to a charitable organization.¹⁷⁷ The grantor of a charitable remainder trust is entitled to a tax deduction, taken at the time the trust is created, equal to the present value of the remainder interest.¹⁷⁸

Ralph Lerner and Judith Bresler argue that charitable remainder trusts can serve as an advantageous method of donating a work or collection to a museum.¹⁷⁹ Lerner and Bresler suggest that the collector fund the trust using a valuable work or collection rather than cash.¹⁸⁰ The work or collection would not remain in the trust; rather, the trust would then sell the work or collection and would use the proceeds from that sale for the trust's payments.¹⁸¹

Lerner and Bresler write that under certain circumstances, the charitable remainder trust funded by artwork can function in a similar manner to the bargain sale: a museum can obtain a work or collection at a discounted price, and the collection can take advantage of an immediate charitable deduction while retaining some income.¹⁸² Specifically, Lerner and Bresler propose that the work or collection funding the trust be sold to a museum, and then the museum shall be designated as the charitable remainderman of the trust.¹⁸³ Under this arrangement,

173. Clark & Swanson, *supra* note 23, at 14.

174. Anonymous Interview.

175. 3 LERNER & BRESLER, *supra* note 22, at 1586.

176. *Id.*

177. *Id.* at 1586–87.

178. HOPKINS, *supra* note 157, at 149.

179. 3 LERNER & BRESLER, *supra* note 22, at 1610–11.

180. *Id.* at 1609–10.

181. *Id.* at 1610.

182. *Id.* at 1611. Lerner and Bresler's example discusses the use of a testamentary charitable remainder trust for this purpose, while I am focused on the use of an *inter vivos* charitable remainder trust, because it is more similar to a fractional gift. However, there are no meaningful differences between the mechanics and tax law implications of the two approaches.

183. *Id.*

a significant amount of the museum's original purchase price would be returned to the museum when the trust terminated and the remainder interest was distributed.¹⁸⁴ A major advantage of this arrangement over the bargain sale is that because the charitable remainder trust—not the collector—sells the artwork, the sale is tax-exempt, thereby increasing the proceeds for both the grantor and the museum.¹⁸⁵

However, there are several significant disadvantages to the *inter vivos* charitable remainder trust, which will prevent it from serving as a reasonable replacement to fractional gifts. First, in an *inter vivos* charitable remainder trust, the donor would have to sell the work or collection immediately upon the trust's creation; therefore, the grantor could neither retain the works nor benefit from any appreciation in their value. Second, the grantor might not benefit from the full value of the charitable deduction because the deduction is taken all at once when the trust is created and thus might exceed the deduction limit.¹⁸⁶ Third, and most importantly, although the museum would eventually be returned a potentially significant fraction of its purchase price when the trust terminates, the museum is required to make a large payment to acquire the artwork initially and to fund the trust. Because acquisition budgets are limited, it might be impossible to create these trusts funded by the significant pieces that were normally donated via fractional giving.

H. *INTER VIVOS* CHARITABLE LEAD TRUST

Alternatively, collectors can choose to create an *inter vivos* charitable lead trust. This arrangement functions as the reverse of a charitable remainder trust—the charitable designee receives its interest first, in the form of payments made over a fixed period, and when the trust terminates a designated individual or individuals receives the remainder interest.¹⁸⁷ In contrast with the *inter vivos* charitable remainder trust, the charitable lead trust provides a tax advantage in the form of a reduction in the gift tax, so that the tax liability to the grantor for the remainder interest is reduced by the actuarial value of the payments made to charity.¹⁸⁸

Lerner and Bresler also suggest that the charitable lead trust can function as a mechanism for collectors to sell their works to a museum at a bargain price in a system in which grantors fund the trust with a work or collection, sell the artwork to a museum, and then designate the museum as the beneficiary of the trust's charitable payments.¹⁸⁹ Unfortunately, the charitable lead trust suffers from two of the same disadvantages as the charitable remainder trust: the grantor cannot retain the works and the museum must make a large upfront payment to acquire the works. Furthermore, an additional disadvantage of the charitable lead trust is that it is not a tax-exempt entity, so the sale of the artwork to fund the trust is subject to

184. *Id.* at 1610–11.

185. *Id.* at 1587–88.

186. 26 U.S.C. § 170(b)(1)(B) (2012).

187. 3 LERNER & BRESLER, *supra* note 22, at 1612.

188. HOPKINS, *supra* note 157, at 163.

189. 3 LERNER & BRESLER, *supra* note 22, at 1613.

capital gains tax.¹⁹⁰ Therefore, the *inter vivos* charitable lead trust is not a fully viable replacement for fractional giving.

I. COMBINED *INTER VIVOS* CHARITABLE LEAD AND REMAINDER TRUSTS

Finally, Lerner and Bresler make an interesting proposal that charitable lead and remainder trusts may be combined to form a more beneficial vehicle for donating artwork.¹⁹¹ Under this method, which could only be used to donate a collection of works (not a single piece), the grantor's collection would be split in two parts, with one portion funding a charitable lead trust and the other funding a charitable remainder trust.¹⁹² The works in each trust would be sold to the same museum, and the museum would be designated as the charitable remainderman of the remainder trust and the beneficiary of the lead trust's charitable payments.¹⁹³ At the time the trusts were created, the grantor could take an income tax deduction equal to the present value of the remainder interest in the remainder trust, and the gift taxes on remainder interest in the lead trust could be reduced by the actuarial value of its payments to the museum.¹⁹⁴

This donation vehicle combines the benefits of the two trusts in that both the museum and the trusts' designated beneficiaries would be eligible to receive some immediate payments, rather than forcing either party to wait for the remainder interest. This might be more advantageous to the museum than a remainder trust alone because the museum would immediately begin receiving payments through the charitable lead trust, returning some of the funds outlaid to acquire the artwork. Furthermore, a potential advantage to donors is that the tax deduction is split between an income tax and a gift tax deduction, reducing the income tax deduction amount and increasing the likelihood that the donor will be able to take advantage of the full deduction over time. Under this combined arrangement, however, the donor still cannot retain possession of the donated works.

Ultimately, the combined *inter vivos* charitable lead and remainder trusts provide a better alternative to fractional giving than either of these donation vehicles alone. However, a major limitation of all three options is that the museum must make a large, upfront payment to acquire the work or collection. Although the structure of the remainder and lead trusts can be designed to provide that the museum is returned a large percentage of the purchase price, availability of the cash

190. *Id.* at 1617.

191. In their book, Lerner and Bresler suggest combining testamentary charitable lead and remainder trusts, rather than *inter vivos* trusts. *Id.* at 1615. However, the *inter vivos* trusts can be similarly combined. I believe that the use of *inter vivos* trusts, as opposed to testamentary trusts, is a better potential substitute for fractional giving because the tax deductions are available during the lifetime of the collector.

192. *Id.* at 1616.

193. Indeed, according to Lerner and Bresler, in creating the trust, the grantor would not even be required to designate the particular museum that would be receiving the collection. *Id.* Rather, the governing instruments of both trusts could permit the trustee to designate the charitable beneficiary. *Id.* This would provide greater flexibility for the trustee to negotiate with different institutions potentially interested in acquiring the collection. *Id.*

194. The author thanks Professor Lawrence Newman for his insight on this point.

to make the initial payment will still pose a major obstacle. Thus, to the extent this vehicle is used, it probably is not a viable option for the acquisition of extremely valuable works, but it has the potential to function as an alternative for collections that fall within the museum's acquisition budget.

IV. CONCLUSION: PREDICTIONS FOR THE FUTURE AND A PROPOSED STRATEGY FOR DONORS AND MUSEUMS

Unfortunately for museums, it seems that fractional giving in its pre-2006 form may be gone for good. The harsh provisions of the Pension Protection Act have eliminated the unique advantages that made this donation vehicle appealing. The proposed solutions of legislators and legal scholars are unlikely to be enacted, and even if they were, they would not provide the same advantages as existed prior to the PPA.¹⁹⁵

Nevertheless, museums remain highly dependent on donors, and donors' willingness to give artwork is still strongly influenced by tax advantages. Although fractional giving is no longer an advantageous method of donation for the vast majority of donors, there remains a variety of other forms of giving. While none of these alternatives is a perfect substitute for fractional giving, many of them still offer substantial tax advantages to potential donors.

To regain the donations lost as a result of the PPA, museum professionals need to stop longing for the return of pre-2006 fractional giving and instead work within the donation structures that currently exist. Thus, I believe that the most workable solution is for museum professionals and donors to individualize the structure of donations for each specific circumstance and choose the best fit from among the different alternatives. Three of the potential alternative forms of giving discussed above—the promised gift, the joint purchase agreement and the combined *inter vivos* charitable lead and remainder trusts—are the most promising substitutes. Each case will involve balancing the preferences of the donor with other factors, such as the museum's acquisition budget. Although none of these alternatives provide all the advantages of fractional giving, they do provide some advantages that appeal to potential donors;¹⁹⁶ in fact, even prior to 2006, ninety percent of art was donated through methods other than the fractional gift.¹⁹⁷ Recouping this ten percent of extraordinarily valuable gifts will require creative tax planning and even compromises by donors and museums in some areas.

Use of these alternative donation structures may raise logistical challenges that did not exist with the fractional gift. Donors and recipients will have to weigh the costs and benefits of the different alternatives; these mechanisms may require more complex tax planning and the advice of knowledgeable tax professionals. This may be a significant barrier to the smallest museums, which likely do not have in-house legal counsel. But the works donated through fractional giving pre-2006 were generally among the most valuable received by museums, and the recipient

195. See *infra* Appendix 1.

196. See *infra* Appendix 3.

197. See Follas, *supra* note 1, at 1781–82.

museums were frequently among the country's largest. These donors and large museums were generally advised by legal counsel with the requisite expertise to engage in this type of planning. Thus, donors are likely to continue to work with legal counsel when making similarly valuable gifts today. From the museum's standpoint, it will be easiest for a large institution with its own in-house legal counsel to navigate the more complex planning now required. This will continue to disadvantage mid-sized and smaller museums that lack such resources.

Ultimately, art museums have and will continue to depend on major donations. The fractional gift was a useful mechanism, which has effectively ended since 2006. However, there are alternative structures which, although not a perfect replacement, should be utilized to benefit donors and museum recipients.

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APPENDIX 1—COMPARING THE IMPACT OF THE PPA, PAGA AND S. 1606/931 ON THE THREE ADVANTAGES OF FRACTIONAL GIVING:

Pre-2006 fractional giving	PPA	PAGA	S. 1605/931
No time limit on completing the gift	Gift must be completed by the earlier of (1) ten years after the initial contribution, or (2) the donor's death	Gifts must be completed within 9 months of donor's death	Donor must give 20% within 10 years and complete gift within 20 years
Subsequent donations are valued at work's fair market value	Maximum value of subsequent donations is capped at the lesser of (1) fair market value at the time of initial donation, or (2) a lower, depreciated value	Deductions can be taken for a work's fair market value, but contributions exceeding \$1 million must be appraised	Subsequent donations are valued at the fair market value of the work times the remaining interest, multiplied by the fraction donated
Donors generally retain possession of the work until the gift is complete	The museum must take "substantial physical possession" during the donation period	The museum must take "substantial physical possession" during the donation period	The museum must take "substantial physical possession" during the donation period, or take full possession

**APPENDIX 2—COMPARING SCHOLARLY PROPOSALS TO AMEND
THE PPA:**

PPA	Wieczorek	Dillinger	Gordon	Karayan	Follas
Gift must be completed by the earlier of (1) ten years after the initial contribution, or (2) the donor's death	Gift must be completed in 20 years; donors who die before completing can give in their wills	Gift must be completed shortly after the donor's death	Gift must be completed in 20 years; donors who die before completing can give in their wills	Gift must be completed within 20 years; donors who die before completing can give in their wills	Gift must be completed within 20 years
Maximum value of subsequent donations is capped at the lesser of (1) fair market value at the time of initial donation, or (2) a lower, depreciated value	No change from the PPA	Deductions should reflect the work's fair market value, and donations worth more than \$100,000 must be appraised	Subsequent donations are valued at the fair market value of the work times the remaining interest, multiplied by the fraction donated, and qualified appraisals are required	Deductions should reflect the work's fair market value and qualified appraisals are required	Deductions should reflect the work's fair market value and qualified appraisals are required
The museum must take "substantial physical possession" during the donation period	Physical possession is not required until the gift is complete	Physical possession is not required until the gift is complete	No change from the PPA	An exception to the substantial possession requirement for "fragile or unwieldy art"	Physical possession is not required until the gift is complete

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**APPENDIX 3—EVALUATING WHETHER POSSIBLE REPLACEMENTS
TO FRACTIONAL GIFTS PROVIDE ANY OF THE ADVANTAGES OF
FRACTIONAL GIVING:**

Fractional Giving	Donor can retain possession of the work	Donor can benefit from appreciation in the work's value	Donor can take an immediate charitable deduction, while ensuring the deduction of the donation's full value
Complete Inter Vivos Transfer	No	No	No
Lease-back	Yes	No	No
Bargain Sale	No	No	No
Loan	Yes	Yes	No
Joint Purchase	Yes	Yes	No
Promised Gift	Yes	Yes	No
Remainder Trust	No	No	No
Lead Trust	No	No	No
Combined Trusts	No	No	No