

# Philanthropic Freedom: What It Means and Why It Matters

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# Introduction

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The mission of The Philanthropy Roundtable is to foster excellence in philanthropy, protect philanthropic freedom, and help donors advance liberty, opportunity, and personal responsibility. This briefing focuses on philanthropic freedom—what it means and why it matters.

Philanthropic freedom is

- 1) the individual or organization's *freedom to* exercise human generosity by making voluntary charitable donations for the sake of the well-being and improvement of society, broadly understood, as well as
- 2) the individual or organization's *freedom from* restriction or coercion in the exercise of such generosity.

The Philanthropy Roundtable endeavors to protect both aspects of philanthropic freedom, supporting donors' ability to voluntarily donate their private funds how and where they like. We recognize that the voluntary nature of charitable giving lies at the heart of this nation's philanthropic tradition and is an essential prerequisite for continued generosity. Philanthropic freedom gives us the creative diversity of interests and approaches that has characterized centuries of American charity, resulting in a vibrant civil society.

The roots of philanthropic freedom can be found in common law's core principles concerning private property, i.e., the right to acquire, possess and dispose of one's assets. Those roots were strengthened in written law and further nurtured by the First Amendment freedoms enshrined in the American Constitution. Donors exercise their rights to freedom of expression, assembly, and religion when they engage in private charitable giving.

Philanthropic freedom, however, is not universally recognized, and criticisms of private philanthropy are nothing new. There was considerable antagonism in the late nineteenth and early twentieth centuries toward the great wealth amassed by men like Andrew

Carnegie and John D. Rockefeller, and also toward their plans to protect and direct that wealth through private foundations. "Money made through the labor of others is not theirs to give away" was a common refrain of progressive elites and of workers and their unions. During the hearings of the Commission on Industrial Relations held from 1912 to 1915, private foundations were characterized, in the testimony of Rev. John Haynes Holmes of the New York Church of the Messiah (and later board chairman of the American Civil Liberties Union), as "essentially repugnant to the whole idea of a democratic society." Commission Chairman Frank P. Walsh, a Kansas City labor lawyer, called big foundations "a menace to the welfare of society" and asked whether it would not be better to tax "all large incomes to pay for a scheme of accident, health, and old-age insurance."

The development of tax law around nonprofit organizations has also contributed to arguments against private philanthropy. Charitable tax exemption was firmly established in federal law in 1909, and the charitable deduction in 1917. This has led philanthropy critics like National Committee for Responsive Philanthropy President and CEO Aaron Dorfman and others to suggest that philanthropic assets are—at least in part—"public money" because they receive government "subsidies" in the form of tax deductions and exemptions. They are wrong. Such tax provisions are not subsidies, but rather protections that insulate private giving from government control (though not from reasonable regulation). Evelyn Brody and John Tyler recognized this in The Philanthropy Roundtable's 2012 publication, *How Public is Private Philanthropy?*, noting that "with the charitable deduction, the donor, not the government, decides whether to give at all, in what amounts and forms, to which qualified charities, and whether any designations or restrictions accompany the contributions."

Contemporary critics also echo many of the earlier complaints, arguing that private philanthropy is, by nature, anti-democratic and little more than

a convenient and tax-free vehicle to “mask” and “sanitize” the sources of wealth. Society would benefit, they claim, if charitable assets were instead paid in taxes because elected officials would be more likely to direct those resources to our most critical problems. Advocates of this sort of state-controlled centralization ignore what is truly democratic—a pluralistic system in which citizens are free to make decisions about the health and well-being of an

independent civil society, and equally free to take voluntary action in that sphere.

No matter where their arguments begin, the opponents of philanthropic freedom inevitably end up in the same place—calling for new rules and regulations that will limit or destroy your ability to decide where to give and how to give.

# Threats to Where You Give

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Threats to an individual donor’s or foundation’s mission have typically emerged as calls to create a “hierarchy” of charities that would eliminate or reduce an individual’s tax deduction for certain gifts and would also disallow their being counted in private foundations’ qualifying distributions. In 2008, however, the Greenlining Institute (a policy and activist organization focused on racial and social justice) and California Assemblyman Joe Coto attempted to use the concepts of “disclosure” and “transparency” to channel foundation grantmaking to a limited and prescribed group of charities when the Assembly passed AB 624.

The bill would have required disclosure of private foundation board, staff, and grantee demographics, including the racial and gender composition; the number of grants and grant dollars awarded to organizations specifically serving specified communities of ethnic minorities, lesbian, gay,

bisexual, and transgender people, disabled people, and other underrepresented communities; the number of grants and grant dollars awarded to organizations where 50% or more of the board members or staff are ethnic minorities; and the number of grants and grant dollars awarded to predominantly low-income communities.

In response, The Philanthropy Roundtable joined forces with several California foundations and other organizations to issue public statements opposing AB 624. The Roundtable noted that the legislation would pick winners and losers among the state’s charities, with the winners “serving a select few predetermined causes.” After an agreement was reached between the bill’s author and a coalition of California’s largest foundations, AB 624 was pulled from Senate consideration. Concerned that Greenlining was active in other states, Roundtable members went on to secure legislation in Florida,

Tennessee, and Texas that restricts those states from attempting to direct foundations' charitable missions or demanding personal information about trustees, staff, and grantees.

Nonetheless, the hierarchy threat remains. Although the vast majority of philanthropic dollars still come from ordinary citizens, the number of middle-class donors is shrinking as concerns around "billionaire philanthropy" rise. In the midst of a two-pronged crisis spotlighting both health and race, there are renewed calls for private philanthropy to revamp its giving priorities and focus on "more democratically controlled charity organizations." Little distinguishes these calls from comments made in 2008 by then-Congressman Xavier Becerra (now California Attorney General): "I start off with the proposition

that if you're getting a tax subsidy, another taxpayer must make up for what you're not paying. That subsidy should serve a good purpose.... Statistics I've seen suggest that only one in 10 [charitable] dollars serves poor people or disadvantaged people. I have to wonder where the other nine dollars are going."

The Philanthropy Roundtable and allied organizations must continue to remind critics that donors are indeed giving to "good purposes" when they support K-12 and higher education, conservation, mental health, faith communities, arts and culture, workforce development, animal welfare, international relief, and so many other causes that serve the public good.

## Threats to How You Give

### Private Foundations

The structure, policies—and most of all, the membership—of a foundation's board are critical to its success. Board members must bring to their work a combination of integrity, competence, humility, and honesty in order to fulfill their responsibilities as stewards of a foundation's missions. Threats to good governance, then, are among the most serious threats to philanthropic freedom.

Such threats include proposed bans or limits on any compensation of private foundation trustees, such as that in the 2004 Senate Finance Committee White Paper: "Under the proposal, compensation to trustees of a nonoperating private foundation would not be permitted; or, in the alternative, would be permitted up to a statutorily prescribed de minimis amount." A more recent proposal has suggested that any compensation or travel reimbursement paid to family members who serve as foundation staff or trustees be excluded from qualifying distributions.

There have also been calls to require "independent directors" (non-family members) on boards of family foundations. Private foundations have no



restrictions on board composition, even allowing for an entire board to be members of one family. Family foundations are therefore vulnerable to government mandates that would increase the minimum number of board members beyond those that a small family can responsibly provide or impose specific demographic requirements.

In a wealth-tax white paper written in early 2019 for then-Democratic presidential candidate Elizabeth Warren, Emmanuel Saez and Gabriel Zucman recommended that the assets of private foundations be taxed “until the time such funds have been spent or moved fully out of the control of the donor.” A similar recommendation has been taken up by Chuck Collins of the Patriotic Millionaires group (discussed in greater detail below). Utilizing the “public money” argument, Collins has proposed ensuring “that tax write-offs for charity can only be claimed by donors when they relinquish dominion and control over the destination and management of donated funds”—a pointed attack on both donor intent and family foundations.

Proposals to increase mandatory payout for private foundations are not new but are attracting more supporters—and far more publicity—in 2020. Most notable, perhaps, are the so-called Patriotic Millionaires, a group of high-net-worth individuals and foundation leaders who have called on Congress to consider a “charity stimulus” measure that would double the mandated annual foundation payout over the next three years, from 5% to 10%. In a July 16 op-ed in *The Chronicle of Philanthropy*, The Philanthropy Roundtable rebutted this proposal:

This radical rule change bypasses the foundation boards that are the rightful stewards of their endowments. Determinations about how much foundations give beyond the mandatory 5% should be left to those who understand their missions, are obligated to honor them, and have the authority to change direction as conditions warrant.

While some donors are committed to giving while living or to sunsetting their foundations or donor-advised funds, others are committed to missions that demand long-term grantmaking. These include family foundations seeking multi-generational involvement, place-based funders in areas with limited philanthropic assets, and those focused on complex problems like global poverty or environmental sustainability.

One-size-fits-all legislation that drastically increases spending in the here and now might well destroy

philanthropy’s capacity to respond effectively to the next major crisis.

## Donor-Advised Funds

The popularity of donor-advised funds (DAFs) has skyrocketed over the past several years, and a rapidly increasing number of donors are using them for their charitable giving. Unfortunately, this has also attracted the attention of philanthropy critics, who refer to DAFs as “warehouses of wealth” that serve primarily as tax-avoidance vehicles for the wealthy. Several threats to philanthropic freedom focus specifically on those DAF characteristics that donors find particularly attractive: simplicity in establishing them, flexibility around the timing of gifts, and the protection of donor privacy.

Simplicity in establishing DAF accounts – Because the sponsoring organizations of DAFs are 501(c)3 organizations, a donor gets an immediate tax deduction for the irrevocable charitable gift made to establish his or her account. *Despite the fact that the sponsoring organization is, in law, the owner of the funds in a DAF account, critics argue that a deduction should be taken only when a gift is made to a “working charity”—a proposal that creates confusion around tax law and adds a level of unnecessary complexity for donors and sponsoring organizations alike. They have also recommended that private foundation grants to DAFs not be counted toward the 5% payout requirement despite the many valuable ways private foundations utilize DAFs in their giving.*

Flexibility around the timing of gifts – Unlike private foundations, neither DAFs nor individual DAF accounts have a mandatory distribution requirement. Donors can choose the giving schedule that best works for their missions and charitable plans. Collectively, DAF hosts have reported payouts of nearly 20% annually, and have proven to be reliable sources of funding for nonprofits during periods of economic decline. This was true during the 2008 recession; a recent survey from the Community Foundation Public Awareness Initiative indicated that DAF grants from 64 community foundations surveyed grew by 58% in March/April 2020 compared to the same time frame in 2019. Moreover, because DAF money is irrevocably

committed to charitable purposes, balances that do grow over time increase philanthropic giving in future years. *Despite the fact that DAFs have proven to be both effective and responsive philanthropic vehicles, their critics continue to demand time limits and payout mandates, both of which will disrupt a donor's long-range giving plans.*

Protection of donor privacy – Donor privacy is an especially important benefit of DAFs. Although the sponsoring organization is required by law to disclose its grants, that disclosure does not include the name of the DAF account from which the gift originated. The individual accountholder chooses whether the fund's name and any contact information are disclosed to the receiving charity. Donor privacy ensures that donors may give even to controversial philanthropic causes without fear of harassment and reprisal. It also protects those who choose to give anonymously for a variety of good reasons, including deeply held moral or religious beliefs, a sense of humility, a wish to lead a more private life, and the desire to minimize solicitations

from other organizations. *Yet donor privacy in DAFs is under attack, most recently in a California bill that would create a new classification for donor-advised funds and sponsoring organizations and allow the attorney general to make rules implementing reporting requirements. A.B. 2936 was referred to the Senate Judiciary Committee after passing the California Assembly in June, but recent spikes in COVID cases statewide caused legislative delay and the bill will not be heard by the committee this year.*

The Philanthropy Roundtable has been actively working against any proposals to change the rules around DAFs in ways that that would restrict how donors can utilize this convenient and effective vehicle for their charitable giving. In California, the Roundtable is working closely with colleagues, including the League of California Community Foundations and Southern California Grantmakers, to oppose any DAF legislation that would threaten donor privacy, and also is monitoring potential actions in other states as more legislatures attempt to implement similar policies.

# Conclusion

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Donors should anticipate that attacks on philanthropy will continue, as will assaults on the free enterprise system which underpins the creation of the private wealth that makes philanthropy possible. As pressure increases to transfer more private wealth to government, the “you didn’t build that” mentality will threaten economic and philanthropic freedom alike. Holding firm to the beliefs that private philanthropy is essential to a free society and that voluntary private action offers the most effective solutions for many of society’s most pressing challenges, The Philanthropy Roundtable will continue to monitor, report on, and vigorously oppose those who would limit donors’ freedom to choose the purposes and paths of their charitable giving.





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