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## SURNAMED CHARITABLE TRUSTS: IMMORTALITY AT TAXPAYER EXPENSE

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I.	THE NAME GAME: ALTRUISM TAINTED WITH NARCISSISM .....	230
	A. <i>Praise by Association: Naming in General</i> .....	230
	B. <i>New Empirical Evidence that Founders Surname Almost Eighty-Five Percent of Charitable Trusts</i> .....	236
	C. <i>Immortality, Self-Aggrandizement, and Other Motives</i> .....	238
	1. <i>Possible Altruistic or Impersonal Motives</i> .....	238
	2. <i>Immortality and Self-Aggrandizement</i> .....	239
	D. <i>Charitable Trust Law Permits Surnames in Perpetuity</i> .....	240
	E. <i>Tax Law Considers Surnames Harmless</i> .....	242
II.	WHAT'S IN A NAME? THE POWER OF APPELLATION.....	244
	A. <i>Naming Rights in the Great Debate on Charitable Tax Subsidies</i> .....	244
	1. <i>Charitable Tax Benefits Are a Government Subsidy</i> .....	245
	2. <i>Tax Subsidies Should Be in Exchange for Public Benefits</i> ....	247
	B. <i>Giving Narcissus His Due: Possible Benefits</i> .....	251
	C. <i>Reflections on Narcissism as a Tragedy for Charitable Trusts</i> ....	253
	1. <i>Structural Features that Reduce Public Benefits</i> .....	253
	2. <i>The Inefficiencies of Adulation</i> .....	255
	3. <i>Discouraging Diversity and Community Involvement</i> .....	256
	4. <i>Inhibiting the Flow of Information and Promoting Isolationism</i> .....	258
	5. <i>Nepotism in Employment</i> .....	258
	6. <i>Uninformed and Biased Grant Making</i> .....	260
III.	VIABLE RESPONSE—A TEMPORAL RESTRICTION.....	261
	A. <i>Naming for Half a Century, Not Forever</i> .....	263
	B. <i>Tax Benefits Justify Regulation and Tax Regime Facilitates Enforcement</i> .....	264
	C. <i>Practical Considerations, Special Rules, and Exceptions</i> .....	265
	D. <i>Potential Counterarguments and Broader Issues</i> .....	268
	CONCLUSION: PAY-TO-PLAY CHARITY STYLE .....	270

APPENDIX A – EMPIRICAL RESEARCH COMPENDIUM .....	271
<i>Survey of Private Foundations Beginning with the Letter “P”</i> .....	271

Hotel chain magnate Leona Helmsley was the “[q]ueen of [m]ean” with her choleric demeanor, “sharp tongue and impatience with humanity.”<sup>1</sup> Her name is synonymous with “unbridled arrogance . . . belief in entitlement” and disdain for the less privileged.<sup>2</sup> At death, she bequeathed an estimated \$5 – \$8 billion to the Leona M. and Harry B. Helmsley Charitable Trust, in perpetuity.<sup>3</sup> The trust’s mission statement<sup>4</sup> initially provided that the trust could benefit “indigent people” and dogs, but Leona Helmsley subsequently deleted the reference to indigent people.<sup>5</sup> A philosophy professor compared Ms. Helmsley’s stewardship to “setting the money on fire in front of a group of poor people.”<sup>6</sup> A New York judge ruled that the trustees could use the funds for the benefit of dogs or for other charitable purposes.<sup>7</sup>

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1. Stephanie Strom, *Helmsley, Dogs’ Best Friend, Bequeathed Them Up to \$8 Billion*, N.Y. TIMES, July 2, 2008, at A1.

2. *Id.* The supercilious Helmsley was infamous for saying “only the little people pay taxes.” Claire A. Hill, *Tax Lawyers Are People Too*, 26 VA. TAX REV. 1065, 1068 (2007).

3. See Strom, *supra* note 1. At one time the Helmsleys owned the Empire State Building. Lesley Friedman Rosenthal, “*Redeveloping*” *Corporate Governance Structures: Not-for-Profit Governance During Major Capital Projects—A Case Study at Lincoln Center for the Performing Arts*, 76 FORDHAM L. REV. 929, 940 (2007).

4. The 1999 Helmsley trust document itself does not specify the charitable purpose. See Joanna Grossman, *Going to the Dogs? Leona Helmsley’s Dog, Trouble, Has Her Trust Slashed, but the Rest of the Nation’s Dogs May be Sitting Pretty*, FINDLAW, July 15, 2008, <http://writ.lp.findlaw.com/grossman/20080715.html>. Instead, Ms. Helmsley executed a separate “mission statement” which recites the trust purposes. Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38, 41–42.

5. See Toobin, *supra* note 4, at 41. “Helmsley’s relationship with dogs reflected some of the distemper of her dealings with humans.” *Id.* at 40.

6. *Id.* at 47 (quoting Professor Jeff McMahan of Rutgers University). “To bestow that amount of money is contemptuous of the poor, and that may be one reason she did it.” *Id.* Professor McMahan was particularly critical of Helmsley’s \$12 million bequest for the exclusive benefit of her nine-year old Maltese dog named Trouble. See *id.*

7. See Stephanie Strom, *Helmsley Trust Doesn’t All Have to Go to the Dogs, Judge Says*, N.Y. TIMES, Feb. 26, 2009, at A28 (“The court finds that the trustees may apply trust funds for such charitable purposes and in such amounts as they may, in their sole discretion, determine . . .”). In the initial tranche, the trustees distributed \$1 million to dog-related charities, including \$100,000 to Puppies Behind Bars. See Alex Dobuzinskis, *Part of Helmsley’s Trust Going to the Dogs*, REUTERS UK, Apr. 22, 2009, <http://uk.reuters.com/article/lifestyleleMolz/idUKTRE53L37C20090422>.

Helmsley's estate can take a tax deduction for the entire bequest;<sup>8</sup> it could have deducted that amount even if she had left the funds exclusively for the benefit of her favorite dog breed, the Maltese.<sup>9</sup> As a result, \$2.25 to \$3.6 billion that the estate otherwise would have paid in federal estate taxes,<sup>10</sup> which the government could have used for humanitarian projects such as poverty relief, environmental cleanup, and foreign aid, will preserve Helmsley's name forever and may go to the dogs. We, the taxpayers, effectively donated \$2.25 to \$3.6 billion for this perpetual testimonial.<sup>11</sup>

Family charitable trusts are controversial. Advocates and critics debate whether they provide sufficient public benefits in exchange for the generous tax subsidies.<sup>12</sup> Advocates point to the elephantine sums the Helmsleys, the Rockefellers, the Fords, and other outrageously wealthy families contribute.<sup>13</sup> A family charitable trust typically conducts no charitable activities directly, but instead functions as an endowment which makes annual grants to operating charities.<sup>14</sup> Advocates emphasize the success stories. Charitable trusts helped fund the Salk polio vaccine,<sup>15</sup> the community college system,<sup>16</sup> the 1960s "green-revolution" in agriculture,<sup>17</sup> the Sesame Street television series,<sup>18</sup> and a host of excellent academic institutions including Duke, Vanderbilt, Cornell, the University of Chicago, Johns Hopkins, and Rice.<sup>19</sup>

Critics emphasize that charitable trusts generally are available only for donors contributing \$3 million or more.<sup>20</sup> With income and estate tax de-

8. An estate can claim an estate tax deduction for the "amount of all bequests . . . to a trustee . . . if such contributions . . . are to be used . . . exclusively for . . . charitable . . . purposes, or for the prevention of cruelty to . . . animals." I.R.C. § 2055(a)(3) (2006).

9. Ray D. Madoff, Op-Ed., *Dog Eat Your Taxes?*, N.Y. TIMES, July 9, 2008, at A23 ("Mrs. Helmsley might have limited her beneficence to the Maltese breed . . . she favored, and that, too, would have been allowed as a [tax-deductible] 'charitable' purpose.").

10. If the \$8 million payment did not qualify for the charitable deduction, the estate would have paid a forty-five percent tax on that amount. See I.R.C. § 2001(c)(2)(B) (2006).

11. See Madoff, *supra* note 9.

12. The President of the Kaufman Foundation praises charitable trusts. "As an institution born out of democratic pluralism and a free-market economy, the foundation . . . serves as a mechanism for the reconstitution of wealth, and it plays the role of institutional entrepreneur, challenging other social institutions." Carl J. Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J.L. & PUB. POL'Y 355, 358 (2006); but see generally William H. Byrnes, IV, *The Private Foundation's Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. & TAX L.J. 496 (2004) (summarizing the debate from the time of King Henry VIII through the Tax Reform Act of 1969).

13. See Schramm, *supra* note 12, at 373-77, 402.

14. Madoff, *supra* note 9.

15. See Schramm, *supra* note 12, at 376 n.82 ("Salk was able to establish and equip his virus laboratory . . . because of a 1948 grant from the Sarah Scaife Foundation.").

16. *Id.* at 375 (funded by the Kellogg Foundation).

17. *Id.* at 376.

18. *Id.* at 374-75 (funded by the Carnegie Corporation in 1969).

19. *Id.* at 373-74.

20. See Foundation Source: Frequently Asked Questions, <http://www.foundationsource.com/aboutus/>

ductions, the government may subsidize over two-thirds of donations to charitable trusts.<sup>21</sup> These trusts can pay compensation to members of the founder family for management, investment, and other personal services.<sup>22</sup> Typically, a charitable trust annually pays over one percent of its assets in fees.<sup>23</sup> The tax laws obligate these trusts to pay less than four percent of their total assets annually as grants to operating charities.<sup>24</sup> If the trust generates an average annual return of at least five percent before expenses, the trust may never distribute the trust principal for charitable purposes, and the trust may last in perpetuity as a tribute to the founder family.<sup>25</sup> When these trusts make grants to operating charities, they may fund projects that provide dubious public benefits, such as training camps for yachtsmen who desire to represent the United States at sailing events in exotic foreign locations,<sup>26</sup> sports halls of fame,<sup>27</sup> civil war reenactments,<sup>28</sup> or drag racing strips.<sup>29</sup>

Critics also emphasize that the founder can act as sole trustee with the power to handpick the lucky charities that will receive grants each year.<sup>30</sup> This system encourages grant seekers to flatter, cajole, and form cozy cabals with the founder who controls the purse strings and provides the founder with high social status and prestige. The founder's scions can enjoy this superior social status in perpetuity as successor trustees. The private benefits to the rich, and the concomitant expenses to taxpayers, can be excessive when compared to the contribution to the public good.

This fierce debate has ignored an important feature—the founder's ability to surname a charitable trust in perpetuity. Charitable trust law authorizes surnamed trusts and provides no convenient mechanism to force a name change even hundreds of years after the founder's death. Tax law

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faqs.asp (last visited Dec. 29, 2009) ("Traditionally, the rule of thumb stated that a private foundation did not make sense unless the initial funding was \$3–5 million.").

21. See *infra* notes 151–165 and accompanying text.

22. A charitable trust may pay reasonable fees to a substantial contributor. Treas. Reg. § 53.4941(d)-3(c)(1) (as amended in 1984); see *infra* notes 241–52 and accompanying text.

23. COUNCIL OF FOUNDATIONS, FOUNDATION MANAGEMENT REPORT 10 (2004) ("The median total investment and charitable administrative expense as a percentage of noncharitable use assets for all 360 foundations was 1.21 percent . . .").

24. Generally, a private foundation must distribute five percent of its net assets annually for charitable purposes. See I.R.C. § 4942(e)(1) (2006). The expenses paid to family members and others, however, reduce the required charitable distribution. See I.R.C. § 4942(g)(1)(A) (2006). In response to a challenge in 2003, Congress confirmed that these tax-exempt trusts can count fees paid to the founder's family and others toward the five percent figure. See *infra* note 266; see also Madoff, *supra* note 9.

25. Founders typically design charitable trusts to last forever. See 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS, § 365, at 109 n.1 (4th ed. 1989) [hereinafter "SCOTT ON TRUSTS"] ("[M]ost charitable trusts are of indefinite duration.").

26. Rev. Rul. 64-275, 1964-2 C.B. 142.

27. Rev. Rul. 68-372, 1968-2 C.B. 205.

28. Rev. Rul. 67-148, 1967-1 C.B. 132.

29. *Lions Associated Drag Strip v. United States*, 64-1 T.C. ¶ 9283 (S.D. Cal. 1963).

30. Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 435 (1960).

treats the use of a surname as harmless. A founder's ability to surname can provide a significant benefit to the founding family at the expense of the common good. This Article introduces the topic into the debate, provides new empirical evidence, and proposes a viable legislative response.

Part I discusses the burgeoning popularity of naming rights and provides original empirical evidence that founders surname approximately eighty-five percent of the time. Combining this new empirical evidence with available IRS statistics indicates that there are over 60,000 surnamed charitable trusts in the United States<sup>31</sup> with assets in excess of \$370 billion.<sup>32</sup>

Part II demonstrates that the government subsidizes forty-five percent to sixty-seven percent of contributions to family charitable trusts and asserts that the government should demand substantial public benefits in return. A founder's right to surname for a *restricted time* can benefit society by inspiring the wealthy founder to contribute money, time, and energy to benefit worthwhile charitable projects. The founder may be a maverick philanthropic wizard with an innovative charitable vision to improve the quality of life.

Nevertheless, a *perpetual* surname can have serious adverse consequences. Even after the dynamic founder and the next generation have passed on, the surname will continue to haunt the charitable trust. The family may be loath to abdicate control as long as the trust bears the surname. The perpetual surname discourages diversity and community involvement on the board of trustees, restricts the flow of information, promotes nepotism in hiring, and inhibits the channeling of grant funds to effective charitable projects. For example, all other things being equal, if one foundation's name is Save the Puppies and the other's name is the Leona Helmsley Foundation, volunteers and other outsiders who can bring experience, talent, and diversity will be more enthusiastic about seeking a position at Save the Puppies. Also, more grant seekers will find, and therefore submit proposals to, Save the Puppies.

Part III proposes a nuanced approach. The proposal would require that a charitable trust omit the surname after a period of years. Prior reform proposals aimed at different aspects of charitable trusts required action within twenty-five years, and Congress rejected those proposals as too radical.<sup>33</sup> Accordingly, this proposal would allow surnames for fifty years.

Part III also considers the practical implications for many charitable trusts, including national multipurpose surnamed charitable trusts. The new requirements would not apply to publicly supported charities,<sup>34</sup> trusts

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31. See *infra* note 94 and accompanying text.

32. See *infra* note 94 and accompanying text.

33. See *infra* notes 262–266 and accompanying text.

34. For example, the proposal would not apply to the William J. Clinton Presidential Foundation

dedicated to support one publicly supported charity with the same surname,<sup>35</sup> or trusts underwritten by publicly traded corporations. Although beyond the scope of this Article, Part III raises other important issues involving diversity, transparency, and accountability.

## I. THE NAME GAME: ALTRUISM TAINTED WITH NARCISSISM

### A. Praise by Association: Naming in General

Naming rights abound. You can buy the rights to name a new monkey species for \$650,000,<sup>36</sup> or a villain in a British novel for 10,000 pounds.<sup>37</sup> A couple donated \$100,000 to the Museum of Contemporary Art in Manhattan “to see [their] names writ large—on the museum’s four restrooms.”<sup>38</sup> An incorporated assassin paid tribute to its nemeses when the Orkin Pest Control Company contributed \$100,000 to name the O. Orkin Insect Zoo in the National Museum of Natural History at the Smithsonian Institute.<sup>39</sup>

Basketball’s best played G-E-I-C-O instead of H-O-R-S-E as part of the 2009 NBA All-Star weekend.<sup>40</sup> Professional race car drivers compete for the Sprint Cup.<sup>41</sup> Golfers drive, chip, and putt for the Fed Ex Cup.<sup>42</sup>

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because it receives substantial funds from many different sources. *See infra* note 303.

35. *See infra* note 300 and accompanying text.

36. Kevin Post, *Nature’s Way/Name Game Played with Many Species*, THE PRESS OF ATLANTIC CITY, Mar. 7, 2006, at A4, available at 2006 WLNR 3858929 (Golden Palace Casinos of Atlantic City purchased the “naming rights to a foot-high primate in South America.”). In addition, McDonald’s, the fast-food chain, purchased the right to name a palm in Madagascar now known as *Dypsis mcdonaldiana*. *Id.*

37. *Book a Chance to Be a Villain*, DAILY POST (Liverpool, UK), June 17, 2008, at 9, available at 2008 WLNR 11408614; *Villain Name Going, Gone*, BIRMINGHAM MAIL (UK), June 26, 2008, at 4, available at 2008 WLNR 12006845 (“The chance to name the villain in Andy McNab’s next book sold for pounds 10,000 at auction.”). One columnist proposes that “big corporations [be allowed] to buy sponsorships to big storms.” Mike Gruss, *Naming Rights to Storms Could Benefit Disaster Relief*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), May 3, 2008, at 1, available at 2008 WLNR 8267582 (suggesting the “Toyotathon Twister”).

38. Michael Gross, *Charities Get Inventive with Name-Dropping*, MSNBC, June 14, 2008, <http://www.msnbc.msn.com/id/25147900> (last visited Dec. 29, 2009).

39. Michael Gross, *Name-Dropping*, CONTRIBUTE, May/June 2007, at 48, available at [http://www.contributemedia.com/trends\\_details.php?id=76](http://www.contributemedia.com/trends_details.php?id=76).

40. Basketball “has utterly ruined a fantastic idea. The league renamed the H-O-R-S-E contest to G-E-I-C-O. To clarify: Instead of spelling horse, the players spell Geico.” Mike Freeman, *H-O-R-S-E Cents: NBA Sells Slice of Americana to Glue Factory*, CBSSPORTS.COM, Feb. 13, 2009, <http://www.cbssports.com/print/columns/story/11375241>. “They [will be] . . . playing G-E-I-C-O, thanks to the insurance company paying a premium for the name change.” Darren Rovell, *Game of G-E-I-C-O Will Be All-Star Weekend Highlight*, CNBC, Feb. 12, 2009, <http://www.cnbc.com/id/29164195>.

41. Anthony Andro, *Dale Earnhart Jr. Good for NASCAR Even As the Bad Guy*, DALLASNEWS.COM: SPORTSDAY, Feb. 18, 2009, <http://www.dallasnews.com/sharedcontent/dws/spt/motorsports/stories/021909dnspomotorsreport.352a86c.html>. They formerly competed for the Nextel Cup. *See generally* [www.nascar.com](http://www.nascar.com) (last visited Dec. 29, 2009).

42. *See generally* [www.pgatour.com/fedexcup](http://www.pgatour.com/fedexcup) (last visited Dec. 29, 2009).

Professional sports teams have played in stadiums, domes, and parks named for commercial enterprises<sup>43</sup> since Anheuser-Busch Brewery changed the name of the home of the St. Louis Baseball Cardinals to Busch Stadium in 1953.<sup>44</sup>

After Citigroup purchased the naming rights to the New York Mets' baseball stadium for \$400 million in 2006<sup>45</sup> and the U.S. Government subsequently transferred \$45 billion to bailout the financial giant,<sup>46</sup> clever wags suggested a new name—"Citi/Taxpayer Field."<sup>47</sup> Any surnamed charitable trust deserves a similar quip because typically the government underwrites from forty-five percent to sixty-seven percent of the total donations through tax benefits.<sup>48</sup> Perhaps the tax laws should refer to these entities as "taxpayer-subsidized foundations" rather than "private foundations."<sup>49</sup> This Article will refer to these entities created by one founder as "charitable trusts" or "family charitable trusts."

Many tax-exempt entities regularly sell naming rights as advertising. Corporations make substantial "contributions" to sponsor college football bowl games in exchange for naming rights.<sup>50</sup> This practice became so

43. Professional football teams play at Bank of America Stadium (Charlotte, North Carolina); FedEx Field (Washington, D.C.); The Edward Jones Dome (St. Louis, Missouri); Lincoln Financial Field (Philadelphia, Pennsylvania); Monster Park (San Francisco, California); Heinz Field (Pittsburgh, Pennsylvania); and Ford Field (Detroit, Michigan). See <http://www.stadiumsofprofootball.com/nfc.htm> (last visited Dec. 29, 2009). Named baseball stadiums include AT&T Park (San Francisco, California); AutoZone Park (Memphis, Tennessee); Coca-Cola Field (Buffalo, New York); Coors Field (Denver, Colorado); Dr. Pepper Ballpark (Frisco, Texas); Miller Park (Milwaukee, Wisconsin); Minute Maid Park (Houston, Texas); PETCO Park (San Diego, California); Pringles Park (Jackson, Tennessee); U.S. Steel Yard (Gary, Indiana); and Whataburger Field (Corpus Christi, Texas). See *List of Sports Venues with Sole Naming Rights*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/List\\_of\\_sports\\_venues\\_with\\_sole\\_naming\\_rights](http://en.wikipedia.org/wiki/List_of_sports_venues_with_sole_naming_rights) (last visited Dec. 29, 2009). Dunkin' Donuts Center is a multiuse indoor arena in Providence, Rhode Island. *Id.*

44. See *Naming Rights*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Naming\\_rights](http://en.wikipedia.org/wiki/Naming_rights) (last visited Dec. 29, 2009).

45. See Daniel Gross, *Ills de la Citi: Should the Troubled Bank Cancel its \$400 Million Sponsorship of the New Mets Stadium?*, NEWSWEEK, Nov. 24, 2008, <http://www.newsweek.com/id/170692> (Citigroup will pay the \$400 million over twenty years).

46. See Jessica Shambora, *Poor Sports*, FORTUNE, Mar. 2, 2009, at 89, available at 2009 WLNR 3079269.

47. Editorial, *Field of Extremes: Our Opinion*, STATEN ISLAND ADVANCE, Nov. 28, 2008, at A18, available at 2008 WLNR 22837106.

48. See *infra* notes 151-165 and accompanying text.

49. See I.R.C. § 509(a) (2006) (defining "private foundation").

50. In 1991, Mobil Oil donated over \$1 million to the Cotton Bowl Association, a tax-exempt organization, and negotiated the following rights: (i) the name of the game would become the "Mobil Oil Cotton Bowl"; (ii) all the players' uniforms would have the name of Mobil Oil; (iii) the telecast would mention Mobil Oil at least four times during the broadcast; and (iv) both end zones would prominently display the name "Mobil Oil." JOEL S. NEWMAN, FEDERAL INCOME TAXATION 561-62 (4th ed. 2008). Initially, the IRS attempted to tax the charity on the \$1 million payment under the unrelated business income tax regime. See I.R.S. Tech. Adv. Mem. 9147007 (Nov. 22, 1991), available at 1991 WL 779696; and I.R.S. Announcement 92-15, 1992-5 I.R.B. 51 (Jan. 17, 1992), available at 1992 WL 786303. The IRS, however, soon retreated. See *Taxation of Tax Exempt Organizations' Income from Corporate Sponsorship*, 58 Fed. Reg. 5687 (proposed Jan. 22, 1993), available at 1993 WL 10498. In the Taxpayer Relief Act of 1997, Congress enacted a compromise that allows the chari-

widespread that in 1997, Congress changed the tax law to provide that unless the charity observes certain restrictions when hyping the corporate sponsor, the otherwise tax-exempt charity must pay income taxes on the contributions received from the corporate sponsor.<sup>51</sup> The 1996 Atlanta Committee for the Olympic Games sold the rights to be commercial sponsors of the Olympics.<sup>52</sup> Credit card companies pay to partner with charities, coveting the rights to use the charity's name, logo, or distinctive symbol on a credit card.<sup>53</sup> These practices are so pervasive that the motive has its own moniker—the “halo effect.”<sup>54</sup>

Charities routinely grant naming rights in exchange for donations to significant fundraising campaigns. On a recent visit to the Washington University School of Law, also known as Anheuser-Busch Hall,<sup>55</sup> on the Danforth campus,<sup>56</sup> I strolled past the portrait of Fred Kuhlman in the vestibule and read the inscribed plaque regarding his lifetime contributions. I soon arrived at the Lasater Library Lobby, and before entering the Janite Lee Reading Room, I gazed at the almost lifesize portrait of Ms. Lee and a placard proclaiming that Ms. Lee was born in Pusan, South Korea, on April 5, 1941. After bypassing the Proost Family Study, I shuffled past windows made possible by the beneficence of Michael T. Hannafan, J.D., Class of 1970, and Mr. and Mrs. Donald W. Paule, J.D., Class of 1966.<sup>57</sup>

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ty to avoid the unrelated business income tax if it satisfies certain conditions. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 965(a), 111 Stat. 788, 893-94 (1997) (codified at I.R.C § 513(i) (2006)).

51. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 965(a), 111 Stat. 788, 893-94 (1997) (codified at I.R.C § 513(i) (2006)).

52. 1996 Summer Olympics, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/1996\\_Summer\\_Olympics](http://en.wikipedia.org/wiki/1996_Summer_Olympics) (last visited Dec. 29, 2009) (“To pay for the games, Atlanta relied on commercial sponsorship . . . .”); see also *Commercialized? Q & A: Sergio Zyman*, CRAIN'S CHI. BUS., Sept. 29, 2008, at 33 available at 2008 WLNR 18821851 (“The 1996 Atlanta Games were called one of the most-commercialized Olympics in history.”). “Worldwide Olympic Partners” for the 2008 Olympic Games in Beijing included Coca-Cola, GE, Kodak, McDonald's, VISA, and Samsung. See Beijing 2008 Olympic Games Worldwide Partners, <http://en.beijing2008.cn/bocog/sponsors/sponsors/> (last visited Nov. 9, 2009).

53. See, e.g., *Sierra Club, Inc. v. Comm'r*, 86 F.3d 1526 (9th Cir. 1996). A credit card with a charity connection may be called an “affinity credit card.” NEWMAN, *supra* note 50, at 562.

54. Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 7 n.27 (1994) (“The commensurate benefit that corporations expect to receive is the result of the generally favorable public perception of transfers to charity (and charitable organizations), known as the ‘halo effect.’”); Elizabeth M. Roberts, Note, *Presented to You by . . . : Corporate Sponsorship and the Unrelated Business Income Tax*, 17 VA. TAX REV. 399, 401 (1997).

55. In case any passerby is unaware of the brewery's philanthropy, the engraved name “Anheuser-Busch Hall” appears in stone above the main entrance. For a “historical campus tour” of Anheuser-Busch Hall, see Washington University in St. Louis, *Historical Campus Tour: Danforth Campus, Anheuser-Busch Hall*, <http://www.wustl.edu/tour/danforth2/anheuser-busch-hall.html> (last visited Dec. 29, 2009).

56. The Danforth family controlled Ralston-Purina Corporation, the world's largest producer of cat litter, and made multiple fortunes. See Purina, *William H. Danforth, Founder*, <http://www.purina.com/company/Danforth.aspx> (last visited Dec. 29, 2009).

57. For a similar description of a walk through the University of Illinois College of Law, see John D.

Naming rights are restrained only by the creativity of the parties. For the right price, philanthropists can attach their names to an entire building, a wing, or a room at academic institutions or health care facilities. One enthusiastic patron stated, “I know it says in the Bible it is better to give, but I still enjoy having my name on the building.”<sup>58</sup> In New York, “should you get hit by a cab strolling from the David Koch Theater to the Steven Schwarzman Library, don’t worry—the ambulance can take you to the N.Y.U. Langone Medical Center.”<sup>59</sup> Since the Atlantic Committee for the Olympic Games raised money by selling commemorative bricks in Centennial Olympic Park in 1996,<sup>60</sup> commemorative walkways have become commonplace.<sup>61</sup> The practice extends to steps on a staircase, theater seats, lockers at a college football stadium,<sup>62</sup> park benches, and trees.<sup>63</sup> Big donors now expect naming rights, and a charity may be unable to raise significant funds for projects which do not offer naming rights.<sup>64</sup> An affluent donor may prefer to contribute for a new classroom rather than a roof-patch or a rebuilt generator.

While these practices reveal donor motivations, these naming rights have minimal impact beyond the positive impact on fundraising. These naming rights do not impede the charity’s efforts to fulfill its mission, usually attach to only a small fraction of the institution’s facilities or activities, and expire with the depreciation, disposal, or destruction of the named tangible article.<sup>65</sup>

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Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 657 (2001).

58. Patricia M. Jones, *Gift Has Name For It*, CHI. TRIB., Jan 10, 1999, at C1 (quoting Gerald Ratner, whose name adorns the student athletic complex at the University of Chicago); see also Colombo, *supra* note 57, at 657.

59. Gary Weiss, *The Price of Immortality*, PORTFOLIO.COM, Oct. 15, 2008, <http://www.portfolio.com/executives/features/2008/10/15/Profile-of-Billionaire-David-Koch/> (last visited Dec. 29, 2009).

60. See Bert Roughton, Jr., *Olympic Facelift: A Master Plan for Downtown; Payne Proposes “Olympic Legacy”*, ATLANTA J. CONST., Nov. 19, 1993, at A1, available at 1993 WLNR 2369244.

61. See Colombo, *supra* note 57, at 657 n.3

62. See John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 378 n.2 (2005); Eric Gibson, *Giving Without Giving a Darn Who Gets the Credit*, WALL ST. J., Aug. 3, 2001, at W13; Kathleen Teltsch, *The Memorial Alumni Boulder—Colleges Are Naming Anything and Everything to Get Donors’ Bucks*, S.F. CHRON., July 4, 1993, at 5, available at 1993 WLNR 2607110 (the opportunity to name individual lockers in the men’s football team locker room sold for \$1,000).

63. See Eason, *supra* note 62, at 378 n.3.

64. See *id.* at 450 (“[H]uge philanthropic undertakings in the modern era of fundraising almost by definition anticipate a major donor who will likely expect prominent name recognition for [the] contribution.”).

65. The situation could be more significant if the charity grants the donor a perpetual naming right. For example, the heirs of Avery Fisher alleged that the Fisher name must accompany any philharmonic concert hall in New York used by the Lincoln Center in perpetuity. See *id.* at 450–51. The parties eventually settled the dispute. Lincoln Center agreed to name a building exterior after Avery Fisher, but reserved the right to name interior portions of that building for other donors. See Gross, *supra* note 39, at 48; see also *infra* note 125.

Even when a good name on a tangible structure goes bad, it causes mere temporary embarrassment, rather than a serious diminution of the public benefits provided by the charity. Tyco CEO Dennis Kozlowski donated a fortune in his heyday, and in exchange the Seton Hall Business School became Dennis Kozlowski Hall in 1997.<sup>66</sup> The name Kozlowski subsequently became synonymous with corporate greed. He was infamous for his excessive spending, including a \$2 million toga party on the Mediterranean island of Sardinia featuring singer Jimmy Buffet and X-rated ice sculptures; other Kozlowski excesses included \$30,000 opera glasses, a \$16,000 dog-shaped umbrella stand, and a \$6,000 shower curtain in his maid's bathroom, all at company expense.<sup>67</sup> A New York court eventually convicted Kozlowski of grand larceny and sentenced him to eight and one-third to twenty-five years in prison.<sup>68</sup> "[T]wo other buildings *on Seton Hall's campus alone* . . . [were] named for convicted or accused corporate malfeasants."<sup>69</sup>

Many similar situations have arisen since the mid-1990s. Richard Scrushy's name "adorn[ed] . . . buildings, schools and athletic facilities across Alabama,"<sup>70</sup> but after the donations, the U.S. Attorney's Office alleged that, as president of HealthSouth Corporation, he was the mastermind of a \$3 billion accounting fraud.<sup>71</sup> Alfred Taubman donated \$15 million to Harvard to fund the "Taubman Center for State and Local Government" while he was the chairman of Sotheby's Auction House.<sup>72</sup> Brown University had the Taubman Center for Public Policy, and the University

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66. See Posting by Jack Siegel to CharityGovernance.com, *Naming Rights: A Reminder Regarding Bad-Boy Clauses*, [http://www.charitygovernance.com/charity\\_governance/2005/08/naming\\_rights\\_a.html#more](http://www.charitygovernance.com/charity_governance/2005/08/naming_rights_a.html#more) (Aug. 19, 2005, 11:17 CST) (discussing Kozlowski's \$3 million contributions to Seton Hall). The rotunda of the university's library also bore Kozlowski's name. See *id.*

67. See William A. Drennan, *Enron-Inspired Nonqualified Deferred Compensation Rules: "If You Don't Know Where You're Going, You Might Not Get There"*, 73 TENN. L. REV. 415, 415 (2006). Kozlowski was president of Tyco Corporation, a publicly traded company. The Tyco shareholders lost \$80 billion under his leadership. See *id.* In addition, Cambridge University has the Kozlowski Professorship of Corporate Leadership and Accountability, which Professor Eason describes as "oxymoronic." Eason, *supra* note 62, at 386; see also Christine Dugas, *Tyco Sues Former Chief over Self-Serving Gifts*, USA TODAY, Sept. 15, 2002, at 3B (recognizing that Kozlowski established the professorship with a \$1 million donation), available at 2002 WLNR 4495162.

68. See Jamie L. Gustafson, Note, *Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U. L. REV. 685, 696 (2007); see also Siegel, *supra* note 66. In July of 2005, Kozlowski reportedly contacted Seton Hall's president and requested that the university remove his name because of "his ongoing affection for the University, as well as his desire to spare Seton Hall any further adverse attention or distraction from its educational mission." *Id.*

69. Eason, *supra* note 62, at 395.

70. *Id.*

71. See Pamela H. Bucy et al., *Why Do They Do It?: The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN'S L. REV. 401, 435 n.235 (2008) ("Almost one year to the day that he was acquitted on the fraud charges, Scrushy was convicted on federal bribery charges . . . [and] sentenced to 6 years and 10 months . . ."); Eason, *supra* note 62, at 395. See also John R. Wilke & Chad Terhune, *Scrushy May Be Indicted Today*, WALL ST. J., Nov. 4, 2003, at A3.

72. Eason, *supra* note 62, at 395.

of Michigan had a medical center and architectural college named for Mr. Taubman.<sup>73</sup> Subsequently prosecutors convicted Mr. Taubman of price-fixing, and the court sentenced him to a year and a day in prison and ordered him to pay a \$7.5 million fine.<sup>74</sup> Harvard also received \$5 million to fund the Kokkalis Program for the “strengthening of democracy and free market economies in the Balkans and nearby countries” but authorities subsequently investigated Mr. Kokkalis, a Greek telecommunications magnate, for “betraying his country as a Cold War spy for communist East Germany.”<sup>75</sup> Northwestern University had Andersen Hall, named for the founder of the accounting firm implicated in—and destroyed by—the Enron financial scandal.<sup>76</sup> Villanova University, the University of Missouri, and other institutions had analogous incidents.<sup>77</sup>

Although a charitable institution may endure some short-term embarrassment when circumstances tarnish a donor’s name, it seems unlikely that a naming right for a particular building or other item of tangible property will have a significant impact on the ability of a large publicly sup-

73. *See id.*

74. *See id.* *See also* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1659–60 (2008); Matthew Benjamin, *An Embarrassment of Riches*, U.S. NEWS & WORLD REP., Dec. 30, 2002, at 36, available at 2002 WLNR 14714946; Marcella Bombardieri, *Harvard Benefactor in Furor Abroad*, BOSTON GLOBE, Mar. 10, 2003, at A1, available at 2003 WLNR 3454355; Ameet Sachdev, *What’s a School To Do When Fallen CEO’s Name On Wall?*, CHI. TRIB., Oct. 14, 2003, at 1, available at 2003 WLNR 15301634.

75. Eason, *supra* note 62, at 396.

76. *See id.* at 400 n.91.

77. Villanova University named its basketball arena du Pont Pavilion after a donation from John du Pont, a member of a fabulously wealthy family, but changed the name with the family’s consent after John du Pont “was found guilty in the 1996 murder of Olympic wrestling gold medalist Dave Schultz.” *Naming Rights*, *supra* note 44.

In 2004, the University of Missouri named its new basketball arena Paige Sports Arena after the daughter of two major donors to the university, but “[a]fter allegations of academic fraud against the daughter surfaced, her parents removed her name from the arena.” Keith Herbert, *Lawmakers Call Citibank Out: Treasury Urged to Cancel Troubled Bank’s \$400M Name Deal for Mets’ Park*, NEWSDAY, Jan. 30, 2009, at A3, available at 2009 WLNR 1779901.

A professor at the University of Missouri is the Kenneth L. Lay Chair in Economics. *See* Christian Basi, *MU Economics Professor Appointed Ken Lay Chair in Economics*, NEWS BUREAU: UNIV. OF MO., Apr. 21, 2008, <http://munews.missouri.edu/news-releases/2008/0421-Ken-lay-chair.php>. Ken Lay became infamous for his fiscal shenanigans as president of Enron Corporation. *See* Carrie Johnson, *Former Chairman of Enron Charged: Indictment Against Lay to Be Unsealed Today*, WASH. POST, July 8, 2004, at A1; Robert Trigaux, *USF Business Dean Hopes It Is Not Too Late to Teach Ethics*, ST. PETERSBURG TIMES, Jan. 13, 2003, at 1E, available at 2003 WLNR 15669535. A jury convicted Mr. Lay in May of 2006 for deceiving investors, but the judge vacated the conviction after Mr. Lay died on July 5, 2006. Greg Farrell, *Trial Judge Vacates Conviction of Late Enron Founder Lay: Justice Department Still Plans to Pursue Forfeiture*, USA TODAY, Oct. 18, 2006, at 3B, available at 2006 WLNR 18046941.

In addition, in *Stock v. Augsburg College*, No. C1-01-1673, 2002 WL 555944 (Minn. Ct. App. Apr. 16, 2002), Mr. Stock contributed \$500,000 and the college agreed to name a wing in a new facility after him, but unfavorable publicity followed. The donor was publicly disgraced for having sent letters denouncing interracial marriage. The school refused to name the wing after Mr. Stock. Although the statute of limitations barred the donor’s family from enforcing the naming restriction, the court stated that it would have otherwise forced the school to forfeit the donation for failing to comply with the naming condition. *Id.* at \*6.

ported institution to fulfill its charitable mission. Even when circumstances sully the names of Kokkalis, Kozlowski, Scrushy, and Taubman, Harvard University, Seton Hall, Brown University, and the University of Michigan continue to provide quality education and otherwise fulfill their charitable missions. Seton Hall may actually benefit from the Kozlowski affair. After the school removed Kozlowski's name, it quickly announced that it would "offer the naming opportunity . . . to another donor,"<sup>78</sup> providing Seton Hall with the opportunity to sell the naming rights twice. In contrast to naming rights for physical structures, this Article asserts that the perpetual presence of a surname in the name of a charitable trust will diminish the benefits that society should otherwise enjoy.

*B. New Empirical Evidence that Founders Surname Almost Eighty-Five Percent of Charitable Trusts*

Anecdotal evidence that founders surname charitable trusts is ubiquitous. The robber barons of the early industrial age funded enormous surnamed charitable trusts,<sup>79</sup> perhaps in an attempt to cleanse family names tarnished by disclosure of egregious business practices. John D. Rockefeller, Andrew Carnegie, Russell Sage, W.K. Kellogg, Eli Lilly,<sup>80</sup> and other early industrialists established charitable trusts.

Similarly, the tycoons of each passing decade have employed surnamed charitable trusts, from Henry Ford in the 1940s<sup>81</sup> to Bernard Madoff,<sup>82</sup> T. Boone Pickens,<sup>83</sup> and Bill and Melinda Gates in the new millennium.<sup>84</sup> While this anecdotal evidence indicates the prevalence of these perpetual naming rights, this Article presents broader evidence.

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78. Siegel, *supra* note 66.

79. "The accumulated industrialist wealth of the late nineteenth century U.S. industrial revolution ushered in the next phase of the charitable institution, the private foundation. Before the twentieth century, only five foundations had been established, whereas over sixty foundations were recorded by 1910." Byrnes, *supra* note 12, at 530-31.

80. *Id.* at 531-32 (discussing private foundations for Rockefeller, Carnegie, Sage, Kellogg, and Lilly).

81. Henry Ford's charitable trust was controversial. In 1916 Ford testified before a Congressional committee that he opposed charity because it "weakened the self-reliant spirit of men." *Id.* at 535 (citing STAFF OF S. COMM. ON INDUSTRIAL RELATIONS, 64TH CONG., INDUSTRIAL RELATIONS: FINAL REPORT AND TESTIMONY SUBMITTED TO CONGRESS 7630 (Comm. Print 1916) [hereinafter WALSH COMM'N]). However in 1947, the Ford family contributed huge amounts of Ford stock into a charitable trust to reap enormous tax benefits, provide limited amounts for charity, and ensured that the stock did not fall into the control of outsiders. See Byrnes, *supra* note 12, at 535, 545, 545 n.278. The charitable trust device allowed the Ford family to maintain control over the stock in their role as trustees.

82. See The Bernard L. and Ruth Madoff Foundation, 2007 IRS Form 990-PF, Return of Private Foundation, available at <http://www.guidestar.org> (the 2007 tax return reports assets in excess of \$19 million).

83. See The T. Boone Pickens Foundation, 2007 IRS Form 990-PF, Return of Private Foundation, available at <http://www.guidestar.org> (the 2007 tax return reports assets in excess of \$188 million).

84. See Bill and Melinda Gates Foundation Trust, 2007 IRS Form 990-PF, Return of Private Founda-

IRS Publication 78<sup>85</sup> lists organizations eligible to receive tax-deductible contributions and specifically identifies private foundations.<sup>86</sup> Most of these private foundations are charitable trusts, and only a small portion are nonprofit corporations.<sup>87</sup> Publication 78 resembles three telephone books, containing over 3,700 pages, with approximately 180 organizations listed on each page.<sup>88</sup> An analysis of all organization names beginning with the letter “P” reveals that approximately eighty-five percent of individual founders surname their charitable trust. Over seventy-five percent include a surname and completely fail to indicate the charitable function or geographic territory of the charitable trust.<sup>89</sup>

The analysis excluded charitable trusts when a corporation or other commercial enterprise appeared to found the entity and entities that did not appear to fit within the “surnamed” category or the “functionally” named category. Appendix A of this Article summarizes the empirical analysis.

Although a donor may organize a private foundation as a nonprofit corporation, the great majority of private foundations are charitable trusts.<sup>90</sup> In fact, the IRS form presupposes that a private foundation is a charitable trust.<sup>91</sup> IRS statistics report that there were 72,800 private foundations with almost \$440 billion in accumulated assets in 2005 and that

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tion, *available at* <http://www.guidestar.org> (the 2007 tax return reports assets in excess of \$38 billion).

85. IRS Pub. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986 (revised Sept. 2007), *available at* <http://www.irs.gov/charities/article/0,,id=96136,00.html> [hereinafter IRS Pub. 78].

86. The numeral “4” follows the name of each private foundation listed in IRS Publication 78. *Id.* at 1.

87. *See infra* note 90 and accompanying text.

88. IRS Pub. 78, *supra* note 85. Volume 1 consists of pages 1 to 1300; Volume 2 consists of pages 1301 to 2521; and Volume 3 consists of pages 2523 to 3739. *Id.*

89. Approximately seven percent of the names include both a surname and a functional or geographic designation, *see infra* App. A, such as the Page Ann Hayden Foundation for Children with Special Needs. *See* IRS Pub. 78, *supra* note 85, at 2606. This survey considered a charitable trust identified as a “scholarship” entity, such as the George William Patton and Mary Burnham Patton Scholarship Fund, *see id.* at 2642, as having a functional name because the word “scholarship” provides grant seekers and others an indication of the entity’s charitable purpose. This survey, however, considers a charitable trust with a name such as The Patton Charitable Foundation, *see id.* at 2641, as a surnamed charitable trust failing to provide a functional designation because almost all private foundations must be “charitable” in some way, *see* I.R.C. § 509(a) (2002) (all private foundations must be described in I.R.C. § 501(c)(3)), and the mere use of the word “charitable” provides no meaningful clue to grant seekers or others regarding the entity’s function.

90. Schramm, *supra* note 12, at 370 (a private foundation is “generally organi[z]ed legally as a trust”). Founders likely avoid the corporate form because a corporation’s board of directors can amend the corporation’s articles of incorporation. *See, e.g.*, MO. REV. STAT. § 355.551 (1995). This would permit a future board to amend or destroy the terms and procedures created by the founder. A subsequent board of directors could change the entity’s name, purpose, or method of selecting the members of its governing body. In contrast, it is very difficult to change the terms of a charitable trust. *See infra* Part I.D.

91. IRS Publication 557, Tax-Exempt Status for Your Organization, at 70–72 (June 2008) (providing a sample charitable trust document for creating a private foundation).

donors contributed more than \$27 billion to private foundations in 2005.<sup>92</sup> Reducing the eighty-five percent figure discussed above<sup>93</sup> to eighty percent because some private foundations may be corporations, there are more than 58,000 surnamed charitable trusts holding approximately \$350 billion of accumulated assets, and donors contributed approximately \$21.5 billion to surnamed charitable trusts in 2005.<sup>94</sup>

Thus, surnamed charitable trusts are extremely important. As the tax subsidy for each donation to a surnamed charitable trust likely is from forty-five percent to sixty-seven percent of the donation,<sup>95</sup> the taxpaying public grants enormous tax subsidies to these entities. Whether the public receives a commensurate community benefit is an important issue.

### *C. Immortality, Self-Aggrandizement, and Other Motives*

#### *1. Possible Altruistic or Impersonal Motives*

The reason people give to charity is “hotly debated,”<sup>96</sup> and donor motives in publicizing their charitable giving could also spark a fiery discourse. “[H]uman motivations are terribly complex,”<sup>97</sup> and a single donor who broadcasts philanthropy may have multiple goals.

In some cases a founder may have no selfish motive, but instead may desire to follow or create a social norm. Some may believe the publicity will inspire generosity in others and make the world a better place. Matriarchs and patriarchs may desire to set a positive example for their descendants.<sup>98</sup>

Also, when giving reaches certain levels, there may be a societal expectation that the charity should thank the benefactor.<sup>99</sup> Some wealthy do-

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92. The IRS reported that 72,800 non-operating private foundations filed tax reports in 2005. IRS, SOI Tax Stats—Domestic Private Foundations and Charitable Trust Statistics, tbl. 1, Domestic Private Foundations, 2005, col. 1, available at <http://www.irs.gov/taxstats/charitablestats/article/0,,id=96996,00.html>. The IRS also reported that these entities had “[t]otal assets (book value)” of \$443,893,345,000 and received “[c]ontributions, gifts, and grants” of \$27,248,328,000. *Id.* cols. (5), (23).

93. See *supra* notes 88–89 and accompanying text.

94. Eighty percent of the 72,800 private foundations were 58,240 charitable trusts; eighty percent of the \$440 billion in assets were \$352 billion in assets; and eighty percent of total contributions of \$27.2 billion were \$21.76 billion.

95. See *supra* notes 151–65 and accompanying text.

96. “The psychology . . . of charitable giving by individuals is a difficult and hotly debated topic.” Ethan G. Stone, *Halos, Billboards, and the Taxation of Charitable Sponsorships*, 82 IND. L.J. 213, 231 (2007) (citing Colombo, *supra* note 57, at 667–79).

97. Colombo, *supra* note 57, at 669.

98. See Barbara R. Hauser, *Charitable Giving: Noblesse Oblige, “The Gospel of Wealth,” and Other Shibboleths*, 7 J. OF WEALTH MGMT. 23, 23 (2004), available at [http://www.cadwalader.com/assets/article/Hauser\\_100104.pdf](http://www.cadwalader.com/assets/article/Hauser_100104.pdf).

99. “[A] charity’s grateful acknowledgement of [a] gift is the socially expected response to a display of generosity. The donor would be insulted (and society would condemn the charity) if public thanks were not forthcoming.” Stone, *supra* note 96, at 231.

nors may believe that because they receive naming rights whenever they make a sizeable donation to an operating charity, the charitable trust should bear their name.

Some may believe that charitable giving is an obligation which accompanies great wealth, and the publicity is necessary to inform the rabble that the aristocrat has met the burden. One commentator asserts, however, that “noblesse oblige” is a mere “shibboleth.”<sup>100</sup>

Others may donate to cleanse a sullied family name. For example, “dead bodies of factory workers . . . soiled the legacy of Andrew Carnegie . . . whose suppression of the Homestead, Pennsylvania[] steel-mill strike of 1892 left nine workers dead.”<sup>101</sup>

Others may surname without serious reflection. When an individual establishes a charitable trust, the individual may learn from peers or advisors that including the family name in the entity name is a standard practice which the IRS has approved.<sup>102</sup>

## 2. *Immortality and Self-Aggrandizement*

In contrast to modest philanthropists,<sup>103</sup> many wealthy patrons consciously choose to employ their surname in search of immortality and self-aggrandizement. Charitable giving can instill a sense of pride and self-worth. “[I]ndividuals often give . . . because they value (as an end in itself) a self-image of generosity and responsibility . . . .”<sup>104</sup>

A charitable trust can be a vehicle for improving social status and reputation.<sup>105</sup> “[L]arge capital gifts can be a method for an individual to signal that [the individual] is both wealthy and generous, traits which are highly prized by our society.”<sup>106</sup> Individuals often seek status and prestige relative to their peers as an end in itself.<sup>107</sup> As described in Part II.C.2 of this Article, a founder family will enjoy adulation and ingratiating behavior from seekers of charitable grants.

Also, “[h]uman beings have always been fascinated with the concept of living forever. The search for the cure for mortality has embodied knightly quests (Search for the Holy Grail) . . . foreign conquests (Ponce

100. Hauser, *supra* note 98, at 23.

101. Weiss, *supra* note 59.

102. *See infra* Part I.E.

103. Some donors prefer anonymity. *See* Gross, *supra* note 39, at 49. A Bible passage encourages anonymity: “[W]hen thou doest *thine* alms, do not sound a trumpet before thee, as the hypocrites do . . . that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth . . . .” *Matthew* 6:2-3 (King James).

104. Stone, *supra* note 96, at 231.

105. “[C]haritable name association provides the donor with much by way of recognition, status, identity definition (or redefinition), and other personal pleasures.” Eason, *supra* note 62, at 453.

106. Colombo, *supra* note 57, at 671-72 n.66 (citing Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 575-76 (1997)).

107. *See id.* (citing Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992)).

de Leon's Floridian Fountain of Youth) and, most recently, scientific research (cloning)."<sup>108</sup> Philanthropists may desire to be admired by others after death, sometimes described as "financial immortality"<sup>109</sup> or "social immortality."<sup>110</sup> "[O]ne can expect that, especially with large . . . gifts . . . the desire to purchase some measure of immortality weighs heavily in the decision by the 'donor' . . . ."<sup>111</sup> One donor commented that having his name on the school building "validates my existence. It is a monument, a tombstone in a way. It says that I worked hard, I accumulated money, and I left something behind."<sup>112</sup>

#### *D. Charitable Trust Law Permits Surnames in Perpetuity*

Cardinal principles of charitable trust law permit a founder to exploit perpetual naming rights. First, the grantor of a trust is the master of its terms. The grantor is free to designate the name of the trust, the initial and subsequent trustee or trustees, and the conditions for amending any terms of the trust. A wealthy donor can surname a charitable trust, be designated as the trustee for life, and retain the exclusive power to amend the trust for life.<sup>113</sup> The grantor can also designate the future trustee or trustees after death, or a mechanism for choosing trustees, and may provide that only descendants can serve as trustees.<sup>114</sup>

Second, a charitable trust can last forever notwithstanding the rule against perpetuities.<sup>115</sup> "[M]ost charitable trusts are of indefinite duration."<sup>116</sup>

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108. Olen M. "Mac" Bailey, Jr., *Financial Immortality*, THE BEST TIMES (Memphis, Tenn.), Mar. 2003, available at [http://www.thebaileylawfirm.com/articles\\_release.cfm?Article\\_ID=7](http://www.thebaileylawfirm.com/articles_release.cfm?Article_ID=7).

109. *Id.* (contrasting "financial immortality" with political, athletic, artistic, scientific, business or literary immortality).

110. Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505, 506 (2008) ("As two noted psychologists wrote, 'That \$2,000,000 Chair in Psychosocial Gerontology which you have . . . endow[ed] at your local university . . . bestows social immortality; your name will be linked forevermore to the professor who holds that enviable title.'") (quoting ROBERT KASTENBAUM & RUTH AISENBERG, *THE PSYCHOLOGY OF DEATH* 101 (1972)).

111. Colombo, *supra* note 57, at 677. When a donor enjoys naming rights, he may be "purchasing a monument to himself," and may be seeking a "measure of immortality." *Id.*; see also Eason, *supra* note 62, at 394 n.58 (stating that tobacco baron James B. Duke "purchase[d] redefined immortality" in acquiring the naming rights to Duke University); Hauser, *supra* note 98, at 28 ("A major endowment results in name recognition if not literal immortality . . . .").

112. Jones, *supra* note 58, at 4 (quoting Gerald Ratner, a University of Chicago donor).

113. See 2 SCOTT ON TRUSTS, *supra* note 25, § 100, at 73 (settlor can serve as trustee). The grantor can only claim a charitable tax deduction for the contribution if the trust must use the funds for charitable or other exempt purposes. See I.R.C. § 170(c)(2) (2000).

114. See RESTATEMENT (THIRD) OF TRUSTS § 34(1) (2003). The trust can provide a mechanism for choosing trustees if in the future the founder has no descendants. See *id.*

115. 4A SCOTT ON TRUSTS, *supra* note 25, § 365, at 109 ("A charitable trust is valid although it is to continue beyond the period of the rule against perpetuities. It is valid even though it is to continue indefinitely.").

116. *Id.* § 365, at 109 n.1.

Third, the opportunities to amend or modify a charitable trust are severely limited, except as permitted by the terms of the trust. Although a grantor serving as trustee could amend a *noncharitable* trust with the agreement of all the beneficiaries,<sup>117</sup> the beneficiaries of a charitable trust are indefinite.<sup>118</sup> Judicial amendment is possible under the *cy pres* doctrine<sup>119</sup> and the doctrine of equitable deviation, but neither doctrine likely would remove a surname from the name of a charitable trust, even hundreds of years after the founder's death.

Courts employ the *cy pres* doctrine to change the purpose of a charitable trust, but only when the stated purpose becomes impossible or impractical to pursue.<sup>120</sup> The use of a surname would not be a purpose of a charitable trust, and the surname's presence likely would not make it "impossible" or "impractical" for the charitable trust to pursue its charitable purpose.<sup>121</sup>

The doctrine of equitable deviation allows a court to deviate from the administrative terms of a trust, but only if justified by a change in circumstances<sup>122</sup> which was not anticipated by the donor<sup>123</sup> and which would

117. *Id.* § 367, at 113.

118. *Id.*

119. See RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). See generally Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 *FORDHAM L. REV.* 1827 (2003).

120. A leading commentator states:

If . . . it becomes impossible or impracticable or illegal to carry out the particular purpose for which the property was given, the court may direct the application of the property to some other charitable purpose that falls within the general charitable intention of the settlor. . . . The power to permit such a deviation from the terms of the trust is in the court . . . and not in the settlor.

4A *SCOTT ON TRUSTS*, *supra* note 25, § 367.2, at 118. An American Law Institute Restatement would allow *cy pres* to also apply if implementation of the purpose becomes "wasteful." RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

121. Presumably, regardless of a charitable trust's name, it could operate in a praiseworthy fashion. Nevertheless, as discussed in Part II.C of this Article, the surname will encourage nepotism, uninformed decision making, and a lack of transparency which will make it less likely that the charitable trust will fulfill its maximum potential.

In discussing *cy pres* and charitable naming rights, Professor Eason identifies two ways in which the donor's retained naming rights might influence a court's application of *cy pres*. First, if a court determines that a trust should use its assets for a different charitable purpose under *cy pres*, the court may allow the naming right to apply "in a manner that differs from that stated by the donor." Eason, *supra* note 62, at 425. Second, a court may consider the donor's retention of a naming right when deciding whether the donor had a general charitable intent supporting the application of *cy pres*. See *id.* If the donor had a specific intent, rather than a general intent, and the original charitable purpose becomes impractical or impossible, *cy pres* may not apply, and the donated assets would pass to the donor's heirs. See *id.* at 427. For example, in *Nelson v. Kring*, 592 P.2d 438 (Kan. 1979), the court refused to apply *cy pres* after specifically noting that the donor intended to fund a hospital that bore his name. *Id.* at 443-44. In *Hardy v. Davis*, 148 N.E.2d 805 (Ill. App. Ct. 1958), however, the donor contributed funds for a surnamed orphanage. When it was no longer possible to operate the orphanage, the court concluded that the naming rights did not preclude a finding of general intent, and the court found the doctrine of *cy pres* to be applicable. *Id.* at 813-14.

122. See RESTATEMENT (THIRD) OF TRUSTS § 66 (2003); RESTATEMENT (SECOND) OF TRUSTS § 381

“defeat or substantially impair the accomplishment of the [donor’s] purposes.”<sup>124</sup> With regard to the name of a charitable trust, it seems unlikely that a change in circumstances which could defeat or substantially impair the accomplishment of the donor’s purpose could be addressed by changing the charitable trust’s name. A charitable trust likely *could* fulfill its charitable objectives regardless of its name, although this Article explores many problems with a perpetual surname.<sup>125</sup>

### *E. Tax Law Considers Surnames Harmless*

In the 1960s and 1970s, the IRS issued a regulation and a series of rulings which bless charitable naming rights in varied circumstances. Specifically on entity naming rights, in Revenue Ruling 73-407,<sup>126</sup> a charitable trust<sup>127</sup> entered into a contract to make a large donation to an operating charity if the operating charity changed its name to include the surname of the trust’s founder “and agreed to refrain from changing its name again for one hundred years.”<sup>128</sup> Despite the rather narrow fact pattern involved, the IRS proclaimed a broad immunity for those who broadcast their philanthropy. The IRS stated, “the public recognition a person may receive, arising from the charitable activities of a [charitable trust] to which such

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(1959). “The changed circumstances may, but need not, result in cy pres equivalent ‘impossibility, impracticability, or illegality.’” Eason, *supra* note 62, at 436 n.262.

123. See RESTATEMENT (SECOND) OF TRUSTS § 381 cmt. d (1959).

124. *Id.* § 381.

125. Equitable deviation may assist a charity when it makes a peculiar type of naming agreement regarding a physical facility. For example, Avery Fisher donated \$10.5 million in 1973 to support the Lincoln Center philharmonic concert hall, and the charity not only agreed to name the hall that was built with the donation after Mr. Fisher, but allegedly agreed to name all future halls after Mr. Fisher. See Eason, *supra* note 62, at 449 (citing Elaine Dutka, *Avery Fisher Hall Now, But Will It Stick*, L.A. TIMES, June 5, 2002, at F2; Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002, at E1). As could have been predicted, the original hall subsequently deteriorated and in 2002 the charity was ready to tear it down and raise funds necessary for a \$250 million to \$300 million new facility. Lincoln Center wanted to offer a new primary donor (who would be asked to donate \$75 to \$100 million) naming rights in the new hall, and the Fisher family objected. Eason, *supra* note 62, at 451. Eventually the parties settled, with the interior of a Lincoln Center building named after Mr. Fisher. See Gross, *supra* note 39, at 48. Professor Eason admits that it is foolish for a charity to enter into such a perpetual naming agreement regarding physical structures. Eason, *supra* note 62, at 452 (“To allow a current donor to dictate that all future facilities will bear [the donor’s] name . . . to appease that [donor’s] vanity, seems both unnecessary and short-sighted.”). Even in the rare circumstance in which a charity might agree to such a naming right, Professor Eason notes that the doctrine of equitable deviation might allow a court to release the charity from the naming condition if the donor did not anticipate that the retained naming right would prevent the creation of a new building necessary for the entity to conduct its charitable purposes. See *id.* at 439 (“Characterizing naming provisions as administrative [under the doctrine of equitable deviation] . . . clearly opens a pervasive route to escaping or circumventing a donor’s seemingly restrictive name association demands.”).

126. Rev. Rul. 73-407, 1973-2 C.B. 383.

127. The entity likely is a charitable trust because Rev. Rul. 73-407 refers to a “private foundation.” See *supra* note 90 and accompanying text.

128. Rev. Rul. 73-407, 1973-2 C.B. 383.

person is a substantial contributor, . . . is [merely an] incidental and tenuous [benefit],”<sup>129</sup> and will not violate the applicable tax rule.<sup>130</sup>

In Revenue Ruling 68-432,<sup>131</sup> the IRS considered the amount an individual can deduct when receiving certain benefits in return for making a charitable contribution.<sup>132</sup> The IRS signaled that it would ignore naming rights when it stated that “[s]uch privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value [under the charitable tax deduction rules].”<sup>133</sup>

In 1977, the IRS ruled favorably on an arrangement that involved naming rights of a public charity’s real estate coupled with an interesting advertising scheme.<sup>134</sup> A for-profit corporation donated land and substantial cash each year to a charity operating a replica of an early nineteenth century American village open to the general public, similar to a history museum. “[T]he [for-profit] corporation benefits by having the village named after it, by having its name associated with the village in conjunction with its own advertising program, and by having its name mentioned in each [pamphlet or other] publication [which the charity provides to the general public].”<sup>135</sup> Nevertheless, the IRS ruled that “such [private] benefits are merely incidental to the benefits flowing to the general public”<sup>136</sup> and do not violate the applicable rules. In 1973, the Treasury Department issued regulations that naming rights over a charity’s buildings were mere “incidental and tenuous” benefits.<sup>137</sup>

Although the charitable name game has exploded since the 1960s and 1970s,<sup>138</sup> the IRS has not reexamined its view.<sup>139</sup>

129. *Id.*

130. Rev. Rul. 73-407 considered whether the transaction triggered the excise tax on self-dealing under I.R.C. § 4941(d)(1)(E) (2000). Generally “self-dealing” includes any direct or indirect transfer by the charitable trust for the benefit of the founder, unless the benefit is “incidental or tenuous.” Treas. Reg. § 53.4941(d)-2(f)(2) (1973); Rev. Rul. 82-136, 1982-2 C.B. 300.

131. Rev. Rul. 68-432, 1968-2 C.B. 104.

132. In general, a taxpayer cannot deduct a contribution to the extent the taxpayer receives a monetary benefit. Rev. Rul. 67-246, 1967-2 C.B. 104. If the taxpayer’s donation exceeds the return benefit, the taxpayer may deduct the excess. *Id.*; see also *United States v. Am. Bar Endowment*, 477 U.S. 105, 118 (1986).

133. Rev. Rul. 68-432, 1968-2 C.B. 104. Also, in the 1960s the IRS ruled that a charity providing educational broadcasting qualifies for tax-exempt status even if the programs acknowledge contributors by name, Rev. Rul. 67-342, 1967-2 C.B. 187, and that a charity could grant its commercial contributors the right to use the charity’s “identifying symbol” in advertising. Rev. Rul. 66-358, 1966-2 C.B. 218.

134. Rev. Rul. 77-367, 1977-2 C.B. 193.

135. *Id.*

136. *Id.* As a result, the charity qualifies for tax-exempt status because it is organized and operated exclusively for educational and charitable purposes. See *id.*

137. The IRS concluded that the naming rights will not trigger an excise tax on self-dealing transactions. Treas. Reg. § 53.4941(d)-2(f)(9) (Ex. 4) (1973).

138. See *supra* Part I.A.

139. In 2003, the IRS issued a warning in an unrelated field. In I.R.S. Priv. Ltr. Rul. 200323006

## II. WHAT'S IN A NAME? THE POWER OF APPELLATION

### *A. Naming Rights in the Great Debate on Charitable Tax Subsidies*

Tax benefits for charity antedate Moses<sup>140</sup> and have a rich and colorful history.<sup>141</sup> Ancient Egypt, Greece, and Rome did not tax temples and other religious institutions on the theory that “they were owned by the gods themselves and were thus beyond the reach of mortal taxing authorities.”<sup>142</sup> In the United States, every federal income tax<sup>143</sup> has exempted charities,<sup>144</sup> and since 1917 Congress has allowed taxpayers to claim income tax deductions for donations to charity.<sup>145</sup> Congress enacted the estate tax charitable deduction in 1918<sup>146</sup> and the gift tax charitable deduction in 1924.<sup>147</sup>

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(June 6, 2003), available at 2003 WL 21300880, the IRS ruled that a commercial entity’s payment for naming rights constituted “private use” under municipal bond rules. The ruling, however, did not trigger an adverse consequence in the fact pattern considered, and a commentator asserts that practitioners can easily avoid the ruling by redirecting the payments. See Elizabeth M. Mills, *IRS Calls Foul in Naming Rights Agreement for Bond-Financed Facility*, 15 TAX’N OF EXEMPTS 180, 182–83 (Jan./Feb. 2004).

140. See *Genesis* 47:26 (King James) (“Joseph made it a law over the land of Egypt unto this day, that Pharaoh should have the fifth part; except the land of the priests only, which became not Pharaoh’s.”) (emphasis omitted), quoted in JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 3 (1995).

141. “Exempting charities from various forms of taxation is a practice that appears as old as western civilization itself.” COLOMBO & HALL, *supra* note 140, at 3; Colombo, *supra* note 57, at 660–61 n.15. In approximately 1200 B.C., tax exemptions “endangered” the “economic equilibrium” of Egypt because tax-exempt temples owned fifteen percent of the cultivatable land, vast amounts of slaves, and other personal property. COLOMBO & HALL, *supra* note 140, at 3. Queen Elizabeth I’s Statute of Charitable Uses in 1601 ushered in post-Renaissance government support of charities, including “private perpetual funds [that] support . . . charitable institutions.” Tanya D. Marsh, *A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities*, 22 VA. TAX REV. 137, 138 (2002). The Statute of Uses in 1601 permitted transfers of real property to perpetual trusts that supported specified charitable activities, notwithstanding the rule against perpetuities enacted in King Henry VIII’s Statute of Uses in 1536. See Byrnes, *supra* note 12, at 501–02.

142. COLOMBO & HALL, *supra* note 140, at 4.

143. In Colonial times, before the imposition of the federal income tax, “[t]he primary example of a uniform [property tax] exemption . . . was for orthodox churches, which were not taxed because the colonies were established as theocracies and no government taxes itself.” *Id.* at 5.

144. When Congress enacted a federal income tax in 1894, it “included the first federal tax statute exempting charitable [religious or educational] associations from taxation,” and the exemption included “endowment income.” Byrnes, *supra* note 12, at 525. “[E]very subsequent federal income tax law has contained a similar exemption.” John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 845 (1993).

145. In 1917, Congress enacted the charitable deduction, which allowed donors to claim an income tax deduction for contributions to entities organized and operated exclusively for charitable, educational, scientific, religious, and other specified purposes, within limits. See Byrnes, *supra* note 12, at 539. The current charitable deduction allows an individual to deduct cash contributions to public charities up to 50% of adjusted gross income. See I.R.C. § 170(b)(1)(A) (2000).

146. See Byrnes, *supra* note 12, at 540–41.

147. See *id.* at 541.

### 1. Charitable Tax Benefits Are a Government Subsidy

Charitable tax benefits are an indirect government subsidy for charitable giving.<sup>148</sup> “It is as if the taxpayer incurred and paid a tax liability, and the government gave the taxpayer a direct subsidy for the same amount.”<sup>149</sup> When the individual is wealthy, the government subsidy is substantial.<sup>150</sup> If the individual makes a charitable gift, the estate tax charitable contribution deduction alone can subsidize forty-five cents of every dollar donated.

For example, presume that wealthy hypothetical taxpayer Ned Narcissus contributes to a family charitable trust upon his *death*. The federal estate tax applies at a forty-five percent rate to a decedent dying in 2009 to the extent his taxable estate exceeds \$3.5 million.<sup>151</sup> Ned Narcissus dies with a net estate of \$20 million before the charitable deduction, and his will donates \$10 million to the Narcissus Charitable Trust for Groundhogs. The \$10 million bequest is tax deductible.<sup>152</sup> Ned Narcissus leaves the balance of his estate to his daughter.

In the absence of the gift to the surnamed charitable trust, Ned Narcissus’s estate would have paid estate taxes of approximately \$7,425,000,<sup>153</sup> and his daughter would have received approximately \$12,575,000.<sup>154</sup> In contrast, because of the \$10 million charitable bequest, Ned Narcissus’s estate will only pay estate taxes of \$2,925,000,<sup>155</sup> and Ned’s daughter will

148. “It is certainly true that the operation of tax exemption is equivalent, in effect, to a direct subsidy; monetarily, there is no difference.” Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 403–04 (1997) (“[T]he charitable exemption is an indirect subsidy by which the government encourages [charitable] organizations . . . . This view . . . is pretty much the foundation of present law . . . .”); see also Schramm, *supra* note 12, at 388.

149. Schramm, *supra* note 12, at 388 (quoting Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 858 (1993)). “By foregoing taxes that otherwise would have been due on the contribution, the government makes contributions cheaper and supplies an implicit subsidy to the recipient organization equal to the donor’s marginal tax bracket.” Colombo, *supra* note 57, at 683.

150. In contrast, when a very poor person makes a charitable donation, there is no government subsidy because a tax deduction does not benefit the poor donor who otherwise owes no income tax. See Colombo, *supra* note 57, at 702.

151. See I.R.C. § 2001(c)(2)(B) (2000) (the tax rate in 2009 is 45%); I.R.C. § 2010(c) (2000) (the “applicable exclusion amount” for decedents dying in 2009 is \$3.5 million).

152. An estate may claim an estate tax deduction for all transfers to or for the use of an organization organized and operated exclusively for the “prevention of cruelty to . . . animals.” I.R.C. § 2055(a)(2) (2000); see Madoff, *supra* note 9 (taxpayer could deduct a contribution for the exclusive benefit of the Maltese dog breed).

153. The taxable estate is the gross estate after deductions, minus the applicable exclusion amount [in this case, \$20 million – \$3.5 million = \$16.5 million]. The product of the taxable estate and the 45% tax rate would equal the estate tax payable [\$16.5 million x 45% = \$7,425,000].

154. Ned Narcissus’s daughter receives the balance of the estate after the payment of federal estate taxes [\$20 million – \$7,425,000 = \$12,575,000].

155. The taxable estate is the gross estate less the \$10 million charitable deduction, minus the applicable exclusion amount [\$20 million – \$10 million – \$3.5 million = \$6.5 million]. The product of the taxable estate and the 45% tax rate would equal the tax payable [\$6.5 million x 45% = \$2,925,000].

receive \$7,075,000.<sup>156</sup> Thus, although Ned Narcissus gave \$10 million to charity, his daughter's inheritance only dropped by \$5,500,000<sup>157</sup> because the government subsidized \$4,500,000 of the donation.<sup>158</sup> The end result is the same as if Narcissus's estate paid the IRS \$7,425,000 and the IRS then paid \$4,500,000 to the Narcissus Charitable Trust for Groundhogs,<sup>159</sup> and the estate paid the charitable trust \$5,500,000.<sup>160</sup> Thus, the government pays forty-five percent of the charitable donation, and the estate pays fifty-five percent.

The government subsidy is even bigger if the wealthy donor makes the charitable donation during life. In that case the charitable income tax deduction and the estate tax deduction combined can subsidize up to sixty-seven percent of every dollar donated. In effect, a wealthy family may bear only one-third of the cost, because the government indirectly subsidizes two-thirds.

For example, presume that wealthy hypothetical taxpayer Sally Self-Aggrandizement pays federal and state income taxes at a combined forty percent rate.<sup>161</sup> Shortly before her death, Sally Self-Aggrandizement donated \$100,000 to the Self-Aggrandizement Trust for Tiddlywinks Training. The gift is tax deductible<sup>162</sup> and reduces her income tax liability for her final year by \$40,000.<sup>163</sup> The gift also reduces her taxable estate by

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156. Ned Narcissus's daughter receives the balance of the estate after the payment of the charitable donation and the federal estate taxes [\$20 million - \$10 million - \$2,925,000 = \$7,075,000].

157. In the absence of the charitable donation, the daughter would receive \$12,575,000. *See supra* note 154 and accompanying text. If Ned Narcissus's will bequeaths \$10 million to charity, his daughter receives \$7,075,000. *See supra* note 156 and accompanying text.

158. Without the charitable deduction, the government receives \$7,425,000 in federal estate taxes. *See supra* note 153 and accompanying text. If the will makes the charitable donation, the government receives only \$2,925,000 in federal estate taxes. *See supra* note 155 and accompanying text.

159. The IRS would have \$2,925,000 in taxes after the transactions [\$7,425,000 - \$4,500,000 = \$2,925,000]. *See supra* note 155 and accompanying text.

160. If the estate paid \$7,425,000 to the IRS and \$5,500,000 to the family charitable trust, the daughter would receive \$7,075,000 [\$20 million - \$7,425,000 - \$5,500,000 = \$7,075,000]. *See supra* note 156 and accompanying text.

161. In 2009, the maximum federal income tax rate is 35%. I.R.C. § 1(i)(2) (Supp. V 2005). State income tax rates vary by state. Florida, Nevada, South Dakota, Texas, Washington, and Wyoming impose no income tax. 1 STATE TAX GUIDE: ALL STATES 3503 (2d ed. 2006). Some states impose an income tax at comparatively high rates. *See id.* ¶ 15-681, at 3959 (New York imposes a maximum marginal rate of 7.7%); *id.* ¶ 15-365, at 3732 (Hawaii imposes a maximum marginal rate of 8.25%). In the interest of simplicity, this example employs a 5% state tax rate and ignores the taxpayer's ability both to deduct federal income taxes paid on a state income tax return and to deduct state income taxes on a federal income tax return. *See* I.R.C. § 164(a)(3) (2000).

162. A contribution to an "educational" organization can be tax deductible, and the definition of "educational" is extremely broad. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959) ("The term 'educational' . . . relates to . . . [t]he instruction or training of the individual for the purpose of improving or developing his capabilities[,] or . . . [t]he instruction of the public on subjects useful to the individual and beneficial to the community.").

163. This presumes that Sally Self-Aggrandizement's successor properly claims the full \$100,000 as an income tax charitable deduction. A taxpayer can only deduct cash contributions to a private foundation to the extent of 30% of adjusted gross income. I.R.C. § 170(b)(1)(B)(i) (2000).

\$60,000,<sup>164</sup> which reduces her estate tax liability by \$27,000.<sup>165</sup> Sally Self-Aggrandizement leaves the balance of her estate to her son. In the absence of the donation, Sally's son would have received an extra \$33,000, and the government would have received an extra \$67,000 in taxes. When Sally gave \$100,000 to the Self-Aggrandizement Charitable Trust for Tiddly-winks Training, the government lost \$67,000 in tax revenue, while the son lost only \$33,000 of his inheritance.

The United States Supreme Court agrees that the tax benefits granted for charitable giving are an "indirect economic benefit."<sup>166</sup> The charitable contribution deduction is an unusual tax subsidy because it is "upside-down."<sup>167</sup> Wealthier individuals in a higher marginal tax bracket benefit more from the charitable deduction than less wealthy taxpayers in a lower tax bracket.<sup>168</sup> As the wealthy tend to contribute to arts organizations such as operas and symphonies, and the poor tend to contribute to churches and social welfare organizations, the upside-down subsidy favors some charities over others.<sup>169</sup>

## 2. Tax Subsidies Should Be in Exchange for Public Benefits

Congress apparently wished to extend tax subsidies only to organizations that provide significant public benefits when it granted tax-exempt status to charities,<sup>170</sup> and again when it allowed donors to claim income,

164. In the absence of the gift, Sally would have died with additional assets of \$100,000, but her income tax liability would have been \$40,000 higher, for a net increase of \$60,000.

165. At a 45% rate, a \$60,000 increase in the taxable estate triggers an extra \$27,000 estate tax liability [ $\$60,000 \times 45\% = \$27,000$ ].

166. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). The Court even concluded that no Constitutional impediment prevents the extension of the exemption to religious organizations. *Id.* at 675 ("The grant of a tax exemption is not sponsorship [of a religion] since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."); see also NEWMAN, *supra* note 50, at 563 (stating that *Walz* "put to rest" constitutional arguments about a subsidy to religion). Justice Douglas strenuously objected. *Walz*, 397 U.S. at 709 (Douglas, J., dissenting) ("Tax exemption, no matter what its form, is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds . . .") (quoting THE BROOKINGS INSTITUTION, REPORT ON A SURVEY OF ADMINISTRATION IN IOWA: THE REVENUE SYSTEM 33 (1933)).

167. Colombo, *supra* note 57, at 702 (referring to the charitable income tax deduction as "upside-down"); see also NEWMAN, *supra* note 50, at 564.

168. See *infra* notes 148-165 and accompanying text.

169. See Colombo, *supra* note 57, at 685 ("Empirical studies confirm that some organizations, particularly churches, are largely funded by relatively small donations from middle and lower-income groups, whereas arts and education organizations rely more heavily on large gifts from wealthy contributors."); see also NEWMAN, *supra* note 50, at 564.

170. In 1894, Congress granted federal tax exemption to entities organized and operated exclusively for charitable or other specified purposes. "Congress rationalized that charitable institutions provided desirable public [benefits], thus justifying the exemption." Byrnes, *supra* note 12, at 525. In a similar vein, in 1909 Congress denied tax-exempt status if "[any] part of the [entity's] net income . . . inures to the benefit of any . . . individual." *Id.* at 529. In 1924, the United States Supreme Court stated that "[e]vidently the exemption is made in recognition of the benefit which the public derives from . . .

gift, and estate tax deductions for contributions to charities.<sup>171</sup> Scholars describe this subsidy-in-exchange-for-economic-public-benefits approach as the “most defensible rationale.”<sup>172</sup> Today, an entity is entitled to these tax subsidies only if it “engages primarily in activities which accomplish one or more . . . exempt purposes,” and will not qualify “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”<sup>173</sup> Many scholars endorse the subsidy-in-exchange-for-economic-public-benefits rationale,<sup>174</sup> although they find disagreement among the details.<sup>175</sup>

Society appropriately praises charities that significantly reduce the burdens of the government. Without charitable hospitals, schools, and

activities of the class named, and is intended to aid them when not conducted for private gain.” *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) *quoted in* Byrnes, *supra* note 12, at 529.

171. In 1917, Congress basically legislated that only tax-exempt charities can receive tax-deductible contributions. *See* 65 CONG. REC. 6728 (1917) (statement of Sen. Hollis, *cited in* Colombo, *supra* note 57, at 682 n.124. *See also* Colombo, *supra* note 57, at 682 (“Legislative history indicates that the original deduction was primarily intended to insure that the ‘new’ income tax did not seriously impair the flow of private funds to exempt charities . . .”).

172. Colombo, *supra* note 57, at 702; *see also* Atkinson, *supra* note 148, at 402 (“The traditional subsidy theory of the tax exemption for charities . . . [points] to . . . two kinds of public benefits. . . . In summary, charities provide primary public benefits [in the form of] especially good goods to ordinary people, and ordinary goods to the especially deserving.”). Similarly, “[t]he [state tax] exemptions flourished based on the economic policy justification of the trade off of *public service* for tax subsidy.” Byrnes, *supra* note 12, at 524 (emphasis added).

173. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959); *see also* *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1065 (1989). Nevertheless, the courts and the IRS sporadically issue favorable rulings that allow entities to enjoy these tax subsidies although the public benefit is dubious. *See supra* notes 26–29 and accompanying text.

174. Colombo, *supra* note 57, at 682 (stating that the public benefit theory is the “most widely accepted rationale”); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397–98 (1988); *see also* Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 409 (1998).

175. For example, Professor Gergen posits that government should only subsidize charities that provide public goods or services which otherwise would lack funding due to a tendency of persons to “free ride” on the philanthropy of others. As a result, he concludes that Congress should prohibit donors from deducting contributions to public television stations because “modern technology can provide a way to charge for this benefit so as to exclude free-riders.” Colombo, *supra* note 57, at 687 (citing Gergen, *supra* note 174, at 1443–47). Similarly, Professor Gergen would deny tax benefits to most churches because congregations can charge themselves for the religious services. *See* Gergen, *supra* note 174, at 1434–43.

Professor Hansmann argues that, when for-profit entities cannot raise equity capital, charitable entities, rather than government or for-profit entities, are appropriate to provide community benefits, or some other market failure would arise. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 843–45 (1980). Professors Colombo and Hall assert a “donative theory” based on the idea that Hansmann’s market failure exists, and government should subsidize when an entity must rely on donations for at least one-third of its financial support. Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1454 (1991) (“[H]istorical experience suggests a threshold in the vicinity of one-third of gross revenues.”); *see also* Atkinson, *supra* note 148, at 422; Colombo, *supra* note 57, at 697–98. In commentating on the donative theory, Professor Atkinson states that “[t]his [approach] would bar the exemption of most *private foundations* . . . and perhaps many heavily endowed and fee-supported public charities like museums and schools.” Atkinson, *supra* note 148, at 422 (emphasis added).

relief agencies for the poor, the government would need to spend more tax dollars to provide those essential services. If a partial tax subsidy induces donations that reduce the burdens of the government, a burden has shifted from poorer citizens, who are less able to contribute, to wealthy citizens, who are more able to contribute. For example, if Ned Narcissus contributes one dollar to State University, presumably that is one dollar less the government must spend on education. Even if Narcissus enjoyed a sixty-seven percent tax subsidy in income and estate tax savings from the tax deductions, the government (and other taxpayers) save thirty-three cents on the dollar.

Also, charities may provide an economic benefit through plurality.<sup>176</sup> Charities can bring new and revolutionary ideas and be willing to experiment with different approaches.<sup>177</sup> In contrast, government programs may be influenced by corruption, lobbying, political pressures, and inertia.<sup>178</sup> Moreover, the charitable tax deduction may economically benefit society by granting an outlet for frustrated taxpayers who desperately desire to reduce their tax payments to the government. These taxpayers may not want to help finance military operations or other government activities.<sup>179</sup> Without charitable giving as an alternative, more taxpayers might turn to aggressive tax schemes or tax fraud.

The alternative theories to the tax-subsidies-in-exchange-for-economic-public-benefits approach have fundamental weaknesses.<sup>180</sup> One alternative is that government provides tax subsidies because charities and their donors act with “altruism,” and the government should promote the virtue of altruism.<sup>181</sup> Social science research indicates, however, that people seldom

176. See Colombo, *supra* note 57, at 692.

177. See Atkinson, *supra* note 148, at 403 (“[C]harities’ very existence is said to promote pluralism and diversity, which are taken to be either inherently desirable or intimately related to our liberal democratic values.”).

178. Charitable organizations are typically free from the “vagaries of majoritarian politics.” Colombo, *supra* note 57, at 698 (citing HALL & COLOMBO, *supra* note 140, at 100–08).

179. See NEWMAN, *supra* note 50, at 536 (discussing the charitable deduction as a “sort of escape valve”). “A classic example of [the objecting taxpayer] is Henry David Thoreau’s refusal to pay his taxes in protest of the federal government’s unwillingness to abolish slavery. Thoreau spent one night in jail.” James Andreoni, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 J. ECON. LITERATURE 818, 851 n.88 (1998).

180. See Colombo, *supra* note 57, at 702 (“Attempts to justify the [charitable] deduction as an incentive for individual altruism or as consistent with the normative tax base, on the other hand, are either overbroad, impossible to define, or both.”). This is not meant to imply that the tax-subsidies-in-exchange-for-economic-public-benefits approach is a talisman. First, this approach substitutes one question for another. Rather than asking why government grants tax subsidies, we now ask which entities provide sufficient economic public benefits to justify receipt of the tax subsidies. “To cloak the exemption in the garb of ‘public benefit’ without saying more about the cloth from which it is cut invites the suggestion that exemption is a matter of naked and unprincipled political preference.” Atkinson, *supra* note 148, at 405. Second, even if a charity provides a sufficient public benefit, one still can question why it is more efficient for the charity, instead of the government, to provide a particular service.

181. Under this approach, “[w]henver an organization with the potential to return profit to its found-

act without regard to their own self-interest.<sup>182</sup> An altruism standard would not be administrable because it is extremely difficult to accurately determine whether a person acts exclusively for altruistic reasons and the degree to which altruism inspires a particular action.<sup>183</sup>

This Article proceeds with the fundamental principles that the charitable tax subsidies should only be available to entities which will provide significant public benefits and that government should regulate to ensure those entities provide public benefits. Statutes and regulations should strive to provide a fair bargain for taxpayers. Practices that reduce public benefits merit close scrutiny. This Article posits that in the case of charitable trusts, *perpetual* naming rights tend to reduce public benefits, and Congress should regulate.

One commentator challenges these fundamental principles and indicates that government tax subsidies do not entitle the government to regulate. He relies on an analogy to an individual's 401(k) retirement account, stating that "[f]ew would contend, for example, that individual 401(k) plans, because they involve tax-exempt contributions, . . . can be directly controlled by the government."<sup>184</sup> This analogy misses the mark for several reasons. First, "direct[] control[]" is a misplaced, value-laden phrase. The relevant inquiry is the proper extent of government regulation. Second, government imposes numerous restrictions on 401(k) arrange-

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ers is set up on a nonprofit basis, the founders have necessarily forgone that potential profit. . . . [T]he organization embodies their altruism." Atkinson, *supra* note 148, at 423 (footnote omitted). Professor Atkinson suggests that altruism alone may justify tax subsidies. *Id.* at 424 ("[The] rationale is that [the] altruistic supply of a good or service—any good or service—is a metabenefit worthy of consideration for tax preference."). The government often uses the tax laws as a means of behavior modification. See Colombo, *supra* note 57, at 668.

182. Based on his analysis of the literature in psychology, social psychology, and economics, Professor Colombo concludes that if "altruism" means acting with "unselfish concern for the welfare of others," it is extremely rare that people act out of altruism. Colombo, *supra* note 57, at 668–69. An individual may contribute to charity to receive a personal sense of righteousness, to enhance his or her reputation or social standing, to improve his or her self-image, or to feel a "warm glow" sensation. *Id.* at 671–73.

183. See *id.* at 669 ("[H]uman motivations are terribly complex . . . ."); see also *supra* Part I.C.

Other scholars argue that an accurate measurement of "income" compels the charitable tax benefits. First, this approach asserts that the revenues of charities are not truly "income" because contributions are gifts or capital contributions. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344–45 (1972); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 308–09 (1976). Second, this approach argues that a donor's charitable contributions are not personal expenses and therefore should be deductible in computing the individual's income tax liability. See Colombo, *supra* note 57, at 680 ("According to [Professor] Andrews, a charitable contribution does not constitute personal consumption; rather it is in the nature of a redistribution of income to the objects of charity.").

This explanation ignores that many charities, particularly schools and hospitals, regularly prepare and issue financial statements which report their annual income. Also, it fails to appreciate that charitable donations are a personal choice, and many personal expenses are not tax deductible. See I.R.C. § 262 (2000).

184. Schramm, *supra* note 12, at 388.

ments.<sup>185</sup> For example, government regulations prohibit an individual from assigning a 401(k) account to any other person, including family members or creditors.<sup>186</sup> Indeed, if *direct control* is merely synonymous with *regulation*, then one could fairly conclude that the government directly controls 401(k) arrangements. Third, the tax deduction for contributions to a 401(k) plan results in a mere deferral of tax because the individual will pay tax at ordinary income tax rates on the amounts distributed from the 401(k), usually at retirement.<sup>187</sup> Even if the individual dies and the individual's beneficiary receives the 401(k) balance, the beneficiary must pay income tax on that inheritance.<sup>188</sup> In contrast, the donor who deducts amounts contributed to a charitable trust never pays tax on those amounts.<sup>189</sup>

### B. Giving Narcissus His Due: Possible Benefits

This Part describes the potential public benefits from charitable trusts and how a surnamed moniker for a limited period of time may promote those benefits.

First, charitable trusts receive elephantine donations<sup>190</sup> and annually distribute a portion of their assets to operating charities, which may provide important public benefits. While the Helmsley situation vividly demonstrates that charitable trusts can allow big money—including big taxpayer money—to go to the dogs,<sup>191</sup> charitable trusts can also transfer significant amounts to meritorious projects.

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185. Congress restricts the amount an employee can annually contribute to a 401(k) plan. I.R.C. §§ 402(g); 415(c)(1) (2000). The limit generally is \$16,500 for 2009. I.R.S. Notice 2008-102, 2008-45 I.R.B. 1106, available at 2008 WL 4635900. An employee must elect to defer amounts to the 401(k) account before those amounts become “available” to the employee. I.R.C. § 401(k)(2)(A) (2000); Treas. Reg. § 1.401(k)-1(a)(3)(iv) (1988). An employee may only receive distributions in compliance with a detailed statutory and regulatory scheme. For example, the plan may not distribute amounts attributable to elective contributions before “severance from employment, death, or disability,” termination of the plan, or “attainment of age 59 1/2.” I.R.C. § 401(k)(2)(B)(i) (2000).

186. 29 U.S.C. § 1056(d)(1) (2000); see also *Patterson v. Shumate*, 504 U.S. 753, 759–60 (1992). “401(k) accounts are entirely excluded from the bankruptcy estate . . . [and] are protected against judgment creditors. Generally 401(k) accounts are vulnerable to only two things: the federal government and an ex-spouse.” Sean W. Mullaney, Comment, *More Than Just a Diploma: Roth IRA Conversions Sheltered by the Lifetime Learning Credit*, 14 GEO. MASON L. REV. 413, 417–18 (2007) (footnote omitted).

187. See I.R.C. § 61(a)(11) (2000).

188. Although a beneficiary normally receives an inheritance free of income taxes, see I.R.C. § 102(a) (2000), a beneficiary pays tax on the receipt of “income in respect of a decedent.” I.R.C. § 691(a)(1) (2000).

189. If a donor makes a contribution and claims a charitable tax deduction in one year, and in a later year the charity returns the property to the donor, the taxpayer must include the recovery in taxable income. See, e.g., *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 403 (Ct. Cl. 1967) (applying the tax benefit doctrine).

190. In 2005, charitable trusts received approximately \$22 billion in donations. See *supra* note 94 and accompanying text.

191. See *supra* notes 1–11 and accompanying text.

Second, a charitable trust can allow a founder to pursue an independent agenda and boldly underwrite novel or nascent initiatives.<sup>192</sup> Commentators have compared charitable trusts to venture capital funds seeking to “advanc[e] the frontiers of knowledge.”<sup>193</sup> Wealthy aristocrats who follow their entrepreneurial spirit to fame and fortune in the business world may have new and exciting ideas about improving society for common people. These magnates can use the charitable trust as a catalyst for change. Charitable trusts helped fund the vaccine for yellow fever,<sup>194</sup> Robert Goddard’s early research on the rocket,<sup>195</sup> and other breakthroughs.<sup>196</sup> Charitable trusts can fund pilot programs in one geographic location. In contrast, the federal government could have problems attempting to extend a benefit to only one locality for political reasons.<sup>197</sup>

Third, a benefit related to independence is pluralism. Charitable trusts allow the wealthy to “express their own bents, concerns, and experience[s].”<sup>198</sup> With our democratic government generally, the majority directs government responses to problems, and that majority may lean toward the status quo. It may be difficult for individuals to implement minority views. A charitable trust may allow a talented maverick to pursue a bold initiative that solves a vexing problem.<sup>199</sup>

Fourth, charitable trusts can study both government and the charitable sector to assess their performance, and can criticize, make recommendations, and fill gaps that are not met with existing programs.<sup>200</sup> A charitable trust can “play[] the role of institutional entrepreneur, challenging other social institutions.”<sup>201</sup>

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192. “Many foundations have translated their exceptional freedom into substantial achievements. Three areas—education, science, and social policy—illustrate the manner in which foundations can act as catalysts, often producing results that government and business are either unwilling or incapable of producing.” Schramm, *supra* note 12, at 373.

193. Byrnes, *supra* note 12, at 554; *see also id.* at 577.

194. Schramm, *supra* note 12, at 375 (funded by the Rockefeller Foundation).

195. *Id.* at 376 (“In the 1920s, the Guggenheim Foundation supported Robert Goddard’s seminal experiments with rocketry.”).

196. *See supra* notes 15–19 and accompanying text.

197. Byrnes, *supra* note 12, at 577–78.

198. *Id.* at 569–70 (quoting STAFF OF S. COMM. ON FIN., 89TH CONG., TREASURY DEP’T ON PRIVATE FOUND., 12 (Comm. Print 1965) [hereinafter 1965 TREASURY REPORT]).

199. “Private philanthropic organizations can possess important characteristics which modern government necessarily lacks. . . . [The private organization can] dissent from prevailing attitudes . . . and . . . act quickly and flexibly.” 1965 TREASURY REPORT, *supra* note 198, at 12, *quoted in* Byrnes, *supra* note 12, at 569. The Treasury Department Report asserts that the independence of a charitable trust permits it to be more innovative than operating charitable organizations. “[Their] freedom permits foundations relative ease in the shift of their focus of interest and their financial support from one charitable area to another.” 1965 TREASURY REPORT, *supra* note 198, at 12, *quoted in* Byrnes, *supra* note 12, at 570.

200. *See* Byrnes, *supra* note 12, at 577–78.

201. Schramm, *supra* note 12, at 358.

Fifth, charitable trusts can rescue operating charities in difficult times.<sup>202</sup> If an operating charity fails to save sufficient resources and an economic downturn or other outside force reduces contributions or operating revenues, a charity may need to drastically curtail programs or dissolve.<sup>203</sup> Charitable trusts, with their enormous uncommitted resources, may assist important operating charities in times of crisis.

Sixth, a business tycoon in charge of a charitable trust may demand improved administrative and other procedures from grant recipients.<sup>204</sup>

Naming rights may enhance three of these benefits. First, a prideful philanthropist may donate more if the charitable trust bears the family name.<sup>205</sup> A maverick founder<sup>206</sup> may have more passion and zeal because the family name accompanies all the activities. Second, the surname may promote the charitable trust's independence. As discussed in Part II.C.3 of this Article, the surname in the entity name will tend to discourage outsiders from participating. Third, naming rights can further pluralism by encouraging wealthy philanthropists to establish their own charitable trust rather than contributing to an operating charity or another charitable trust.<sup>207</sup>

### *C. Reflections on Narcissism as a Tragedy for Charitable Trusts*

#### *1. Structural Features that Reduce Public Benefits*

As discussed in Part II.A of this Article, Congress should grant charitable tax subsidies only when the entity provides sufficient public benefits. A donation to a charitable trust, even if not surnamed, will tend to provide less public benefit than a donation to an operating charity because the principal of the trust fund may never be distributed for charitable activities, and the trust may distribute less than four percent of its net assets each year for charitable activities.<sup>208</sup>

202. See Byrnes, *supra* note 12, at 560.

203. As a result of adverse financial conditions, many charities filed for bankruptcy in early 2009. See Stephanie Strom, *Charities Now Seek Bankruptcy Protection*, N.Y. TIMES, Feb. 20, 2009, at A17.

204. See Byrnes, *supra* note 12, at 533–34; Schramm, *supra* note 12, at 368–69.

205. See Eason, *supra* note 62, at 460 (“Perpetual naming conditions are, thus, only defensible as a facilitator of charitable contributions.”) (emphasis omitted).

206. “Most large foundations were established by entrepreneurs who changed the world with bold risk-taking in their business practices and expected no less from their foundations. The courage to take risks and inspire progress remains at the core of foundations today . . . .” Schramm, *supra* note 12, at 361–62 (footnote omitted).

207. A rare exception is Warren Buffett’s multibillion dollar donation to the Bill and Melinda Gates Foundation. See Timothy L. O’Brien & Stephanie Saul, *Buffett to Give Bulk of His Fortune to Gates Charity*, N.Y. TIMES, June 26, 2006, at A1.

208. Tax law requires that a charitable trust distribute only five percent of its net assets each year. I.R.C. § 4942(e)(1) (2006). On average, over 1.2% of that amount goes for expenses. As a result, a charitable trust may only grant 3.8% to operating charities. See *supra* notes 22–24 and accompanying text.

Professor Byrnes's analysis of the historical debates concerning charitable trusts since the days of King Henry VIII identifies four recurring arguments against charitable trusts, whether or not surnamed. First, charitable trusts violate basic principles of democracy because the wealthy elite, scheming in isolation, allocate the tax subsidies among the projects they choose.<sup>209</sup> A clever commentator described the situation as "subsidy without representation."<sup>210</sup>

Second, charitable trusts allow the wealthy elite excessive power in shaping society.<sup>211</sup> Early industrialists, like Rockefeller and Carnegie, arguably used their power as trustees of multimillion dollar charitable trusts to sharpen the skills of the workforce rather than to help the poor.<sup>212</sup>

Third, tax subsidies to these charitable trusts shift the nation's tax burden from the wealthy to the middle class, "creating the injustice of [an] inequitable burden against the non-favored class."<sup>213</sup> An early commentator remarked that "the government has an interest in the Rockefeller Foundation because the government's contribution represents two million dollars a year in relinquished taxes, for which the public must make up the difference."<sup>214</sup>

Fourth, commentators often accuse the founders of these charitable trusts of amassing their millions by exploiting the American worker: these "wealthy financiers established charitable institutions only to morally legitimize their 'ill-gotten property'"<sup>215</sup> and to "conjure adulation and fill the void during [their] retirement."<sup>216</sup> One religious leader combined several arguments, stating that "foundations were established from wealth earned from the common man's labor, and thus government should democratically decide where the foundation's resources should be spent."<sup>217</sup>

In addition to these general criticisms, unique problems can arise with surnamed charitable trusts.

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209. The trust must use its funds for charitable purposes, *see* I.R.C. § 170(c)(2) (2006), but the trustee can have absolute discretion in choosing among charitable projects.

210. Byrnes, *supra* note 12, at 564.

211. "The funds of these [charitable trusts] are exempt from taxation, yet during the lives of the founders are subject to their dictation for any purpose other than commercial profit . . ." Byrnes, *supra* note 12, at 536-37 (quoting WALSH COMM'N, *supra* note 81, at 81-82).

212. *See id.* at 534-35.

213. *Id.* at 512.

214. *Id.* at 535 (discussing WALSH COMM'N, *supra* note 81).

215. Byrnes, *supra* note 12, at 511 (quoting JAMES PARTON, TAXATION OF CHURCH PROPERTY 12 (Boston, Cochrane & Sampson 1873)).

216. *Id.* at 512.

217. *Id.* at 535 (describing the comments of Pastor John Haynes Holmes).

## 2. *The Inefficiencies of Adulation*

The founding donor and the founder's descendants can act as the trustees of the charitable trust in perpetuity.<sup>218</sup> This is a prized position of power and prestige because the trustee controls the spigot over the trust's wealth. Operating charities are keenly aware that charitable trusts must distribute five percent of their net assets, minus expenses, each year to operating charities.<sup>219</sup> Operating charities in search of grants can locate charitable trusts through multiple sources,<sup>220</sup> and in the case of surnamed charitable trusts, the identity of the founder family is clear.<sup>221</sup>

Not surprisingly, operating charities beg, cajole, grovel,<sup>222</sup> and engage in a variety of inefficient behaviors to curry the favor of the financial tycoons and their descendants who act as trustees. For example, the Papal Foundation, a public charity, offered donors a ““medallion, a gold pin, . . . a certificate, . . . [and] a ceremony in Rome recognizing [the] contribution and a visit with [the] Pope . . . in his private library.””<sup>223</sup> Commentators allege that certain universities have abandoned their religious affilia-

218. *See supra* Part I.D.

219. One presentation to grant seekers states, “Why Foundations Are Relevant to You . . . All grantmaking foundations must pay out at least five percent of their assets in the form of grants each year.” Terry Pearl, Director, Mount Sinai Corporate and Foundation Relations, How to Succeed in Obtaining Foundation Support for Your Research 3, <http://www.mssm.edu/forfaculty/development/research/pdf/PrivateFoundationGrants.pdf> (last visited Dec. 29, 2009).

220. *See, e.g.*, FOUNDATION CENTER, THE FOUNDATION DIRECTORY (David G. Jacobs ed., 30th ed. 2008) (providing information on foundations with at least \$2 million in assets or which grant at least \$200,000 annually); FOUNDATION CENTER, THE FOUNDATION DIRECTORY PART 2 (David G. Jacobs ed., 17th ed. 2008) (providing information on foundations with less than \$2 million in assets, which make annual grants of at least \$50,000 but less than \$200,000); *see generally* FOUNDATION CENTER, FOUNDATION GRANTS INDEX (listing grants of \$10,000 or more in twenty-eight categories); R. R. BOWKER, ANNUAL REGISTER OF GRANT SUPPORT (providing information on grants from private foundations, government agencies, corporations, community trusts, unions, and other organizations); THE FOUNDATION CENTER, <http://foundationcenter.org>; THE GRANTMANSHIP CENTER, <http://www.tgci.com>; GRANTWRITERS.COM, <http://www.grantwriters.com>; GUIDESTAR, <http://www.guidestar.org>.

221. Charities can consult the charitable trust's annual IRS Form 990-PF for the names and addresses of the current trustees. *See* Instructions for IRS Form 990-PF, Part VIII—Information About Officers, Directors, Trustees, Foundation Managers, Highly Paid Employees, and Contractors, at 22–23, *available at* <http://www.irs.gov/pub/irs-pdf/i990pf.pdf>. The IRS Form 990-PF for most charitable trusts is available through [guidestar.org](http://www.guidestar.org). *See* GuideStar, *supra* note 220. Also, any member of the public may obtain a copy of a charitable trust's IRS Form 990-PF by filing IRS Form 4506-A with the IRS. *See* I.R.C. § 6104(d) (2006); IRS Form 4506-A, Request for Public Inspection or Copy of Exempt or Political Organization, *available at* <http://www.irs.gov/pub/irs-pdf/f4506a.pdf>. Also, any person can request IRS Form 990-PF from the charitable trust. *See* Instructions for IRS Form 990-PF, *supra*, at 7.

222. Others prefer to describe this process as “Building Relationships With Foundations,” cultivating the relationship, or “provid[ing] ongoing donor recognition.” Pearl, *supra* note 219, at 16–17.

223. Colombo, *supra* note 57, at 659 n.9 (quoting Lisa Miller, *Worldly Rewards: Religious Institutions Are Invoking Premiums to Inspire the Wealthy*, WALL ST. J., Mar. 10, 1999, at A1); *see also* The Papal Foundation, Stewards & Financials, <http://www.thepapalfoundation.com/stewards.html> (last visited Dec. 29, 2009) (“For Stewards of Saint Peter, the highlight of the year has been the annual pilgrimage to Rome. . . . [A] visit with the Holy Father has been customary.”).

tions to curry the favor of charitable trusts.<sup>224</sup> Operating charities provide a variety of tangible “donor recognition” perquisites for a big enough contribution, ranging from recognition plaques and donor bricks to gift trees.<sup>225</sup> Marketers clearly describe these donor appreciation opportunities as benefits sold in exchange for a “donation.”<sup>226</sup> An especially popular inducement is the “donor wall,” which one organization brazenly compares to the Vietnam War Memorial in Washington, D.C.<sup>227</sup> One supplier offers sixty-seven different designs for “donor walls,” including one which boldly proclaims above the names of the big money donors: “We Have Spoken Your Name To God.”<sup>228</sup> In attempting to sell donor recognition, one organization bluntly states, “Let’s face it. People like to see their good deeds recognized. They also like to see themselves recognized where their friends and neighbors can see.”<sup>229</sup>

Grant seekers recognize that the competition is different when one individual or family exclusively wields the grant-making power. One presentation bluntly states, “Differences Between Government and Foundation Grant Review Processes . . . Foundations’ own preferences are considered . . . Personal connections may have an impact.”<sup>230</sup> In contrast, governments and publicly supported charities that allocate grant funds generally do not allow one person or family to allocate the funds.<sup>231</sup>

While the powerful families that control charitable trusts may enjoy all the ingratiating behavior, society would benefit more if the operating charities spent that time fulfilling their charitable missions.

### 3. *Discouraging Diversity and Community Involvement*

Government agencies and commentators encourage charities to seek diversity and community involvement when selecting the members of the

224. See Byrnes, *supra* note 12, at 536 (“[T]he [Walsh] Commission found that the foundations were manipulating educational and thus social policy. Presented in support of this finding, some universities had severed their religious affiliation in order to receive grants from [Andrew] Carnegie’s foundations.”) (citations omitted).

225. Fundraiser Help, Donor Recognition, <http://www.fundraiserhelp.com/donor-recognition.htm> (last visited Dec. 29, 2009). The charity may incorporate the bricks into a new “reflection garden or water fountain area.” *Id.* “A gift tree is a three dimensional sculpture of a tree with burnished metal leaves[, and e]ach leaf is engraved with the donor’s message. The end result is high-quality artwork . . . displayed in the organization’s foyer or lobby.” *Id.*

226. “In this type of capital campaign, a nonprofit group seeks a pledge of a certain contribution amount and in return, offers to provide a specific type of recognition. Donations of a certain amount are rewarded with graduated levels of recognition.” *Id.*

227. *Id.*

228. United States Bronze, Donor Walls illus. 13, <http://www.usbronze.com/displayPop1.php?sday=Donor+Walls&offset=13>.

229. Fundraiser Help, *supra* note 225.

230. Pearl, *supra* note 219, at 14.

231. For example, community foundations receive and hold contributions from multiple donors in separate funds and typically serve a specific geographic territory. See Marsh, *supra* note 141, at 141–42; see also Pearl, *supra* note 219, at 3.

entity's governing body.<sup>232</sup> If people with different experiences and talents are brought to bear on a project, the governing body may find new and effective approaches. Many commercial enterprises recognize the benefits of an independent governing body.<sup>233</sup>

A founder's surname in a charitable trust's moniker can act as a "keep out" sign for nonfamily members. Even the IRS's description of charitable trusts as "private foundations" suggests these entities belong exclusively to the founder family and are not open to the public.<sup>234</sup> This is singularly inappropriate as government provides forty-five percent to sixty-seven percent of the donations through tax subsidies.<sup>235</sup>

The presence of the surname will tend to repulse civic-minded individuals who desire to serve on a nonprofit governing body. These charitably inclined volunteers may desire to provide a public benefit and seek an improved self-image, a "warm glow" feeling,<sup>236</sup> satisfaction in complying with a social norm, and an improved public reputation as a generous and engaged member of the community. When a person is on the governing board of a surnamed charitable trust, it may signal to friends, an employer, a prospective employer, and others that the individual has an "in" with the family, rather than a desire to make a positive difference in the world.

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232. The Massachusetts Attorney General's Office advises charities that:

You should make sure that your board's process of selecting new members assures diversity of viewpoints and rotation of board members and officers. . . . [Y]ou have responsibility for ensuring that the public and charitable role of the organization will be carried out in a way that is effective in furthering the mission of the charity. *A nominating process which invites openness, variety, and change is important* to achieving this goal. . . . Your nominating process should reach out for candidates, and actively recruit individuals whose commitment, skills, life experience, background, perspective, or other characteristics will serve the organization and its needs. . . . Term limits for board members are an effective way to ensure board vitality. . . . *To avoid becoming labeled as a closed club for "insiders only," choose board members who have an interest in the organization's mission, represent diverse viewpoints, and have a willingness to learn, and then be sure there are opportunities for board renewals.*

COMMONWEALTH OF MASSACHUSETTS, OFFICE OF ATTORNEY GENERAL MARTHA COAKLEY, THE ATTORNEY GENERAL'S GUIDE FOR BOARD MEMBERS OF CHARITABLE ORGANIZATIONS, 4-5 (2007), available at [http://www.mass.gov/Cago/docs/nonprofit/guide\\_for\\_board\\_members.pdf](http://www.mass.gov/Cago/docs/nonprofit/guide_for_board_members.pdf) (emphasis added); see also Atkinson, *supra* note 148, at 403 ("[D]iversity [is] taken to be either inherently desirable or intimately related to our liberal democratic values."); David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336, 349 (2004). The Treasury Regulations encourage certain charities to "consider the nature and diversity . . . that . . . trustees bring to the organization" in composing the board of trustees. See Treas. Reg. § 1.170A-9(e)(3)(i) (1972). State nonprofit corporation laws often require that the entity have at least three persons on the board of directors. See, e.g., MO. REV. STAT. § 355.321.2 (1994).

233. See HEIDRICK & STRUGGLES, BUILDING HIGH-PERFORMANCE BOARDS (2006), [www.heidrick.com/NR/rdonlyres/FD74D2C1-7F07-4B88-BB40-9D60E0DB1298/0/HS\\_PerformanceBoards.pdf](http://www.heidrick.com/NR/rdonlyres/FD74D2C1-7F07-4B88-BB40-9D60E0DB1298/0/HS_PerformanceBoards.pdf) (last visited Dec. 29, 2009).

234. I.R.C. § 509(a) (2006).

235. See *supra* notes 151-165 and accompanying text.

236. Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875, 1908 (2006).

In the Helmsley situation, it may even signal that the volunteer is a tax cheater and mistreats the less fortunate.<sup>237</sup>

#### *4. Inhibiting the Flow of Information and Promoting Isolationism*

Operating charities desiring grants can search for charitable trusts in multiple ways.<sup>238</sup> A charitable trust that is surnamed and fails to include any geographic or functional description in its name will be more difficult to find.

If a shelter for abused or abandoned dogs needs additional funding, its representatives may search internet databases, such as [guidestar.org](http://guidestar.org), with search terms including *dogs*, *pets*, *animals*, *protection*, and *prevention of cruelty*.<sup>239</sup> The researcher would find Puppies Under Protection (Royal Palm Beach, FL); Gone to the Dogs Inc. (Charles City, VA); Teachers Pet – Dogs & Kids Learning (Rochester Hills, MI); All Dogs Heaven Cleveland (Lakewood, OH); Dogs Deserve Better, Inc. (Tipton, PA); Dogs with a Mission (Washington, D.C.); and many others. However, this search would *not* find the Leona M. and Harry B. Helmsley Trust, which has \$8 billion which may benefit dogs.<sup>240</sup> The surname imposes an extra barrier for operating charities that are not connected with the wealthy family. It tends to restrict the flow of information to the charitable trust, which may encourage the charitable trust to continue in its historical pattern of giving. If the charitable trust never even receives a grant application from a dynamic operating charity, how could the trustees make an informed decision regarding that entity's need for funds? As a result, surnamed charitable trusts may tend to distribute to the same charities each year that successfully flatter the wealthy founder family.

#### *5. Nepotism in Employment*

Tax law recognizes some potential abuses when a charitable trust engages in transactions with the founder family. It imposes an excise tax if a charitable trust purchases or rents property from the founder family,<sup>241</sup> even if the charity pays fair market value. In addition to an initial ten percent excise tax,<sup>242</sup> if the parties do not reverse the purchase or rental trans-

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237. See *supra* notes 1–6 and accompanying text.

238. A grant seeker can search [guidestar.org](http://guidestar.org), consult the Foundation Directory, or find other resources. See *supra* note 220.

239. A researcher could also choose to narrow the search with geographic terms.

240. See *supra* notes 3–7 and accompanying text.

241. I.R.C. §§ 4941(d)(1)(A); 4941(d)(1)(C) (2006).

242. The statute imposes the tax on the party dealing with the charitable trust. I.R.C. § 4941(a)(1) (2006). In addition, a foundation manager who willfully participates knowing it is an act of self-dealing is subject to an excise tax of five percent of the amount involved, up to a maximum of \$20,000. I.R.C. §§ 4941(a)(2); 4941(c)(2) (2006).

action within a certain period of time, the involved family member must pay an excise tax of two hundred percent of the amount involved.<sup>243</sup>

Nevertheless, Congress left an enormous loophole. A charitable trust can compensate the founder family for performing personal services for the charitable trust.<sup>244</sup> The tax law imposes no excise tax as long as the charitable trust does not pay amounts in excess of reasonable compensation.<sup>245</sup> The amount which is reasonable will be uncertain. Neither the statutes nor regulations provide clear guidance. Instead, reasonableness depends on the facts and circumstances of the particular situation.<sup>246</sup> Other rules that could provide more objective standards for evaluating compensation paid do not apply to charitable trusts.<sup>247</sup>

The Treasury Regulations specifically list many different types of services the founder family can provide for compensation, including investment counseling, brokerage services, and legal advice.<sup>248</sup> As the charitable trust will hold substantial wealth, the trust may need substantial services.

The presence of a surname may discourage outsiders who otherwise might seek employment opportunities. If a majority of the trustees are members of the founder family, outsiders may conclude that family members will have the “inside track” for hiring and subsequent advancement.

Some operating charities, government units,<sup>249</sup> and commercial firms take steps to discourage or prohibit nepotism<sup>250</sup> in hiring because it may

243. I.R.C. § 4941(b)(1) (2006). A foundation manager who “refused to agree to part or all of the correction [can be subject to an additional tax of fifty] percent of the amount involved,” up to a maximum of \$20,000. I.R.C. §§ 4941(b)(2); 4941(c)(2) (2006).

244. The statute includes the “payment of compensation” among the list of “self-dealing” transactions, but excludes the payment of reasonable compensation. I.R.C. §§ 4941(d)(1)(D); 4941(d)(2)(E) (2006).

245. I.R.C. § 4941(d)(2)(E) (2006).

246. *See* Treas. Reg. § 53.4941(d)-3(c) (1973) (requiring that the amount is “not excessive”); I.R.S. Gen. Couns. Mem. 39,547 (Mar. 26, 1986), *available at* 1986 WL 373004; *see also* COUNCIL ON FOUNDATIONS, DETERMINING REASONABLE COMPENSATION FOR FOUNDATION DIRECTORS AND TRUSTEES 2 (2002), *available at* [http://www.cof.org/files/Documents/Governing\\_Boards/trusteecomp2003.pdf](http://www.cof.org/files/Documents/Governing_Boards/trusteecomp2003.pdf) (“[N]o single formula defining reasonable compensation exists. What is reasonable will depend on the facts and circumstances of each case.”).

247. *See* I.R.C. § 4958(e) (2006) (excluding private foundations from the definition of an “applicable tax-exempt organization” under the excess benefit transaction rules).

248. Treas. Reg. § 53.4941(d)-3(c), Exs. 1 to 3 (1973). Presumably a trustee could also provide accounting and auditing services. *See* COUNCIL ON FOUNDATIONS, *supra* note 246, at 3 (including “accounting/auditing fees”).

249. For example, the Massachusetts Attorney General’s Office warns against conflicts of interest:

[A] board member or related entity should be cautious about entering into a business relationship with the organization the board member is overseeing, and the board should be very cautious about allowing the organization to enter into such a relationship. *Such a transaction should not occur unless the board determines it is clearly in the best interest of the charity.* Prior to the board vote, the board member should fully disclose his or her financial interest to the entire board, and the board member should not vote on any aspect of the arrangement or be present when it is being discussed or voted upon.

THE ATTORNEY GENERAL’S GUIDE FOR BOARD MEMBERS OF CHARITABLE ORGANIZATIONS, *supra* note 232, at 7 (emphasis added).

250. “Nepotism is prohibited by [nineteen] state legislatures either through statute or by constitution”

“conflict[] . . . fundamentally with the basic American values of egalitarianism and merit”<sup>251</sup> and can have undesirable consequences.<sup>252</sup>

### 6. *Uninformed and Biased Grant Making*

Advocates defend charitable trusts by pointing to their annual distributions to operating charities. Perhaps the most crucial function<sup>253</sup> of a charitable trust is to wisely allocate its annual grant funds among effective operating charities. Charitable trusts can fund important medical research, innovative educational programs, food pantries, and homeless shelters. Nevertheless, they can also fund quilting schools,<sup>254</sup> schools for bank employees, and part-time yachtsmen wishing to compete in exotic foreign locations.<sup>255</sup> Because of this enormous discretion,<sup>256</sup> the qualifications of the grant makers and the procedures they follow are crucial.

In the case of a surnamed charitable trust, the founder family may dominate the board of trustees and all paid positions. This may not only lead to a lack of diversity, but a lack of expertise and experience. While

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for specified government positions, and the remaining states apply “general ethical considerations” and conflict of interest rules. Ginger Sampson, *To Hire (Or Not to Hire) A Relative*, NAT’L CONFERENCE OF STATE LEGISLATURES, Nov./Dec. 2001, <http://www.ncsl.org/programs/ethics/legisbrief-nepotism.htm>; see also Posting by Jack Siegel to CharityGovernance.com, *This Bud’s Not For You: Why Nepotism Is a Problem*, [http://www.charitygovernance.com/charity\\_governance/2008/05/this-buds-not-f.html](http://www.charitygovernance.com/charity_governance/2008/05/this-buds-not-f.html) (May 27, 2008, 11:42 CST) (Nepotism and its “baggage and psycho drama . . . isn’t good for any organization, be it for-profit or nonprofit.”). “Employers may create anti-nepotism policies to avoid employee discrimination charges,” *Nepotism*, EMPLOYEEISSUES.COM, <http://employeeissues.com/nepotism.htm> (last visited Dec. 29, 2009), but “[t]here are no uniform national business laws regarding nepotism and the practice may be openly embraced by some businesses.” *Terms: Nepotism*, CRIMINAL LAW LAWYER SOURCE, <http://www.criminal-law-lawyer-source.com/terms/nepotism.html> (last visited Dec. 29, 2009).

251. NPR, NEPOTISM: WRONG FOR THE WORKPLACE?, (NPR Radio, Oct. 17, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15353609>.

252. “Nepotism and [c]ronyism deny . . . qualified people access to income and power.” *Stand Up Against: Nepotism*, STAND UP AFRICA MOVEMENT, <http://www.standupafrica.info/component/content/article/74> (last visited Dec. 29, 2009). “[N]epotism . . . may cause problems with favoritism, discipline, fraud, confidentiality and liability.” Sampson, *supra* note 250. “[T]he consequences of nepotism might constitute illegal employment discrimination under Federal discrimination laws or state equivalents” or wrongful termination. EMPLOYEEISSUES.COM, *supra* note 250. Nevertheless, “[i]f . . . nepotism or its consequences were not illegal . . . then there’s little that an adversely-affected employee can do, but try to win the favor of the ‘family clique’ or quit for a better job.” *Id.*

253. A related key function is to wisely *invest* its wealth. If a charitable trust invests wisely, the trust fund will grow and the trust can distribute more each year to operating charities. If the charitable trust invests poorly, the trust principal may decline or even disappear, and it will distribute less (or none) to operating charities.

254. See I.R.S. Priv. Ltr. Rul. 89-30-052 (May 5, 1989), available at 1989 WL 594194.

255. See *supra* notes 26–29 and accompanying text.

256. For example, if an appellate court fails to reverse the ruling of Judge Troy Webber of the Surrogate Court in Manhattan, the trustees of the Helmsley trust will have absolute discretion to choose among charitable causes. See Strom, *supra* note 7 (“[T]he trustees may apply trust funds for such charitable purposes and in such amounts as they may, in their sole discretion, determine . . .”). A founder could narrow the trustee’s discretion with the terms of the trust, but a founder is also free to allow the trust funds to be used for any charitable purpose.

the founder may be an entrepreneurial wizard who might bring innovative ideas from the business world to the charitable sector, the skill level of the founder's descendants is mere speculation. Can the founder's offspring accurately evaluate grant applications and proposals from sophisticated medical researchers, health care innovators, educational experts, and advocates for the poor?

Charitable trust proponents can point to several success stories, such as funding the polio vaccine, the community college system, and Sesame Street.<sup>257</sup> Such isolated and anecdotal evidence, however, leaves many questions. For example, would researchers and educators have made the same breakthroughs even faster if government had the additional tax revenues to fund those projects?<sup>258</sup> Would a panel of experts be better qualified to choose worthwhile charitable projects to pursue than robber barons and tycoons who have no expertise in the fields of health, science, technology, or education?<sup>259</sup>

In contrast to surnamed charitable trusts that use bloodline as the criteria for competence in evaluating grant applications, many government units and operating charities assemble diverse, experienced, and talented boards or committees to conduct grant making.<sup>260</sup>

### III. VIABLE RESPONSE—A TEMPORAL RESTRICTION

Bold proposals attacking charitable trusts have foundered.<sup>261</sup> Failed recommendations include restricting a charitable trust's duration to ten or

257. See *supra* notes 15–19 and accompanying text.

258. Warren Weaver, vice-president of the Rockefeller Foundation in the 1930s, once boldly stated that the Foundation “prodded scientists onto paths they might never have taken if left to their own devices.” Schramm, *supra* note 12, at 376.

259. The President of the Kaufman Foundation includes the philanthropist's lack of expertise as a benefit for charitable trusts. “History has proven that diffusion of the benefits of progress occurs through neither the ministrations of ‘professionals’ and ‘experts’ . . . but through the . . . deliberate acts of individuals.” Schramm, *supra* note 12, at 360.

260. See, e.g., *Grantmaking*, PLACER COMMUNITY FOUNDATION, <http://www.placercf.org/Grantmaking.php> (last visited Dec. 29, 2009) (“We continuously monitor our community to understand the nature of local needs, forces of change, availability of resources and capacity for growth.”); *Grant Programs*, SCIENCE FOUNDATION ARIZONA, <http://www.sfaz.org/our-investments/investments.aspx> (last visited Dec. 29, 2009) (“Proposals undergo three separate reviews by experts in science, engineering, innovation and business. Technical reviews are provided by external peer review experts to avoid any conflicts of interest.”); *Apply for a Grant*, SILICON VALLEY COMMUNITY FOUNDATION, <http://www.siliconvalleycf.org/grants.html> (last visited Dec. 29, 2009) (“Silicon Valley Community Foundation . . . [has] examined the diverse needs across our region, evaluated the best practices of our parent foundations and incorporated community input before launching a new set of grant making strategies.”); *Grantmaking Strategies*, Silicon Valley Community Foundation, <http://www.siliconvalleycf.org/grantmaking-strategies%5Cindex.html> (last visited Dec. 29, 2009) (“By using an RFP approach, the community foundation aims to solicit the best thinking of nonprofit service providers, public sector agencies, research institutions and other entities serving San Mateo and Santa Clara counties.”).

261. Professor Byrnes's comprehensive history of charitable trusts from King Henry VIII through the Tax Reform Act of 1969 demonstrates the sporadic appeals by reformers and the political power of the

twenty-five years;<sup>262</sup> delaying the donor's tax deduction for a contribution until the charitable trust actually distributes the funds;<sup>263</sup> prohibiting the founding family from holding more than twenty-five percent of the positions on the charitable trust's board of trustees after twenty-five years;<sup>264</sup> limiting the charitable trust's tax exemption to forty years;<sup>265</sup> and requiring that a charitable trust distribute five percent of its net assets each year to operating charities regardless of its expenses.<sup>266</sup>

As a result, proposing an absolute ban on surnames likely is a waste of time. In addition, endorsing an absolute ban would ignore the collateral issues that emanate from a more viable proposal.

Congress may be more receptive to nuanced proposals targeted at specific abuses. In the Tax Reform Act of 1969,<sup>267</sup> Congress regulated specified egregious practices, including a charitable trust's ability to engage in certain self-dealing transactions with the founder family<sup>268</sup> or make certain types of investments.<sup>269</sup>

Accordingly, rather than an absolute ban, this Article proposes a temporal restriction that can preserve two arguable benefits from surnames. First, the right to surname helps inspire the initial contribution to a charitable trust. If a charitable trust provides public benefits in excess of the tax subsidy, it is worthwhile to encourage those gifts.<sup>270</sup> Second, the initial founder may be a maverick philanthropic wizard, and the right to surname may inspire the founder to expend more time and energy for a worthwhile charitable cause.

Lawmakers may be receptive to a temporal restriction because it highlights an especially outrageous feature of charitable trusts—their perpetual life. With the passage of time, the government and the American public may begin to appreciate the consequences of perpetual life. Before 1900, there were only five charitable trusts in the United States.<sup>271</sup> As a result,

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charitable trust lobby. Byrnes, *supra* note 12, at 542–80.

262. *See id.* at 559, 563, 566.

263. *See id.* at 566.

264. *See id.* at 574.

265. *See id.* at 580.

266. The Bill, introduced in 2003, also would have disregarded travel expenses for travel outside the U.S., first class travel within the U.S., and travel on a private aircraft. Philanthropy Expansion and Responsibility Act of 2003, S. 1514, 108th Cong. § 2 (2003) (introduced by Sen. Hutchison); *see also* Charitable Giving Act of 2003, H.R. 7, 108th Cong. § 105 (2003). The charitable trusts complained that the changes would jeopardize their perpetual existence, and the Bill died. *See* Madoff, *supra* note 9; Hodding Carter III, Op-Ed, *Proposed Legislation Could Hurt Private Philanthropy*, MIAMI HERALD, July 11, 2003, available at <http://www.independentsector.org/members/carteroped.html>.

267. Tax Reform Act of 1969, Pub. L. No. 91-172, § 101, 83 Stat. 487.

268. I.R.C. § 4941 (2006).

269. *Id.* §§ 4942; 4944.

270. *See supra* notes 172–175. Charitable trusts may distribute all of their funds to public high schools, hospitals, or other charities that clearly reduce the burdens of government.

271. *See* Byrnes, *supra* note 12, at 530.

almost all of the 60,000 charitable trusts<sup>272</sup> in the United States are less than one hundred years old. Nevertheless, the legal mechanisms are in place for these trusts to control enormous amounts of U.S. wealth for hundreds or thousands of years.<sup>273</sup>

The current paradigm presents a formidable triumph of dead-hand control and family control over the changing needs of society. Society's image of charitable trusts today might be different if documents drafted and families designated in the year 1215 (at the time of the Magna Carta) controlled enormous wealth today and had the concomitant power to shape social institutions. "The perpetual [charitable trust] is based on the assumption that people can make intelligent decisions about the use of resources far into the future. But . . . [w]ould it really make sense for current policy to be dictated by the vision of someone living in 1930? 1630? 1230?"<sup>274</sup> As demonstrated in Part II.C, naming rights exacerbate the worst aspects of family control. In searching for additional means to regulate charitable trusts for the common good, a temporal restriction on naming rights can be a viable proposal.

#### *A. Naming for Half a Century, Not Forever*

Because a proposal to ban surnames would trigger a maelstrom of powerful protests, and if enacted would preclude potential benefits of a short-term naming right, this Article proposes that charitable trusts could use a surname for a limited time. The appropriate duration is debatable.<sup>275</sup> At various times, reformers recommended that unrelated changes to charitable trust operations occur after twenty-five years,<sup>276</sup> and they failed.

A viable approach could allow a founder to surname for fifty years, and extant charitable trusts could remain surnamed for fifty years after enactment of the new law. This may encourage the wealthy to continue to contribute. A lifetime donation will provide self-aggrandizement and will allow an entrepreneurial wizard fifty years to implement charitable dreams with a surname. Bill Gates established the predecessor of the Bill and Me-

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272. See *supra* note 94 and accompanying text.

273. See *supra* Parts I.D.–I.E.

274. Madoff, *supra* note 9.

275. The battles over copyright protection demonstrate durational debates. Copyright law grants protection to an author or performer for a limited period of time and then releases the work for use in the public domain. See 17 U.S.C. §§ 301–05 (2006). The duration of copyright protection has gone from fourteen years plus an optional renewal term of fourteen years (Copyright Act of 1790), to a fixed term of twenty-eight years plus one optional renewal term of twenty-eight years (Copyright Act of 1909), to the life of the author plus fifty years (the 1976 Copyright Act), to the life of the author plus seventy years (1998 Copyright Term Extension Act). See Lindsay Warren Bowen, Jr., *Givings and the Next Copyright Deferment*, 77 *FORDHAM L. REV.* 809, 815–19 (2008). The 1976 Copyright Act provided a 75 year term for a work-for-hire, and the 1998 Act increased that protection to 120 years. *Id.* at 818–19.

276. See *supra* notes 261–266 and accompanying text.

linda Gates Foundation in 1994, when Bill Gates was 39 years old.<sup>277</sup> If enacted in 2010, this proposal would allow the charitable trust to maintain the Gates surname until Bill Gates is 105 years old in 2060. In the case of lifetime gifts, a fifty-year term allows the founder to use the surname for at least half of the founder's life, except in the case of centenarians.

In the case of a surnamed charitable trust established upon a founder's death, survivors will tend to favorably remember the founder for at least fifty years, and the descendants can enjoy the attendant perquisites for fifty years. In effect, a founder would bequeath scions fifty years of flattery and adulation. Thereafter, the removal of the surname could curb several problems.

### *B. Tax Benefits Justify Regulation and Tax Regime Facilitates Enforcement*

In reflecting on Leona Helmsley's \$8 billion bequest that could exclusively benefit dogs, a veteran of the New York philanthropic scene observed a dynamic tension. On the one hand, a fundamental part of the American psyche is that people are free to use their money as they wish.<sup>278</sup> On the other hand, once a robber baron or other donor forces the government to pay a large part of the tab by claiming a tax deduction, the government should regulate to protect the public interest.<sup>279</sup>

In 1969, Congress enacted rules that prohibit charitable trusts from engaging in various activities for more than a certain period of time. For example, a charitable trust cannot use more than a fixed percentage of its assets to purchase securities of a business dominated by the founder family.<sup>280</sup> These investments are excessively risky for a variety of reasons. For example, they tie the financial health of the charitable trust to the founding family's private business, and they may allow the founding family to manipulate the private business through their position as trustees of the charitable trust. Furthermore, they impede the ability of the charitable trust to

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277. Bill Gates established the William H. Gates Foundation in 1994 and converted that foundation and two others into the Bill and Melinda Gates Foundation in 2000. *Bill Gates: Philanthropy*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Bill\\_Gates#Philanthropy](http://en.wikipedia.org/wiki/Bill_Gates#Philanthropy) (last visited Dec. 29, 2009). His birthday is October 28, 1955. *Bill Gates Biography*, WHO2?, <http://who2.com/billgates.html> (last visited Dec. 29, 2009).

278. Toobin, *supra* note 4, at 47 (quoting Vartan Gregorian, the president of the Carnegie Corporation).

279. *Id.* (“[O]nce [the government] started giving tax deductions, which amounted to a publicly approved subsidy, [the robber barons] had to prove that the money was going for a philanthropic purpose . . .”).

280. These excess business holding rules are detailed. Briefly, the charitable trust and the founding family may own up to twenty percent of the voting stock of a corporation without triggering the excise tax. I.R.C. § 4943(c)(2)(A) (2006). If the parties can satisfy the Secretary of the Treasury that outsiders have effective control of the corporation, the charitable trust and the founding family may own up to thirty-five percent of the stock. *Id.* § 4943(c)(2)(B). In all situations, a *de minimis* rule allows a charitable trust to own up to “[two] percent of the voting stock and not more than [two] percent in value of all outstanding shares of all classes of stock.” *Id.* § 4943(c)(2)(C).

diversify its investment portfolio. Despite the inherent risks, the statute allows charitable trusts to receive unlimited amounts of these securities by gift or bequest and hold them for up to five years.<sup>281</sup> This allows donors to contribute the securities and allows a reasonable time for the charitable trust to sell or otherwise dispose of the securities. If the charitable trust fails to dispose of the securities within five years,<sup>282</sup> the IRS may seek to collect a ten percent excise tax from the charitable trust.<sup>283</sup> If the charitable trust fails to dispose of the securities after receiving several notices from the IRS,<sup>284</sup> the charitable trust will be liable for an excise tax equal to two hundred percent of the value of the excess securities.<sup>285</sup> This five-year approach eventually forces the charitable trust to either sell the risky assets or pay double the amount involved to the government as an excise tax.

Congress simultaneously enacted excise tax regimes for self-dealing transactions,<sup>286</sup> jeopardizing investments,<sup>287</sup> failures to distribute or spend at least five percent of net assets each year,<sup>288</sup> inappropriate grants, political expenditures, and expenditures to influence legislation.<sup>289</sup>

This statutory scheme creates a ready model for enacting a temporal restriction on surnames. In the same way that a charitable trust can hold certain securities for only five years, this proposal allows charitable trusts to bear a surname for a limited time. When the time expires, the IRS would notify the charitable trust and request documentation verifying completion of the name change within a certain period of time. If the charitable trust fails to timely comply, the charitable trust would be liable for a five percent excise tax. If the charitable trust fails to capitulate after receiving a series of additional IRS notices, the charitable trust would become liable for a one hundred percent excise tax. This one hundred percent excise tax would terminate the charitable trust, and the government would use the funds for the public's benefit.

### *C. Practical Considerations, Special Rules, and Exceptions*

Many gargantuan surnamed charitable trusts have multiple purposes and operate nationally or internationally. How will the trustees of these

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281. I.R.C. § 4943(c)(6) (2006).

282. *Id.* § 4943(c)(6) (the five-year test for securities acquired by gift or bequest).

283. *Id.* § 4943(a)(1).

284. The 200% additional excise tax does not apply unless the charitable trust still has excess business holdings at the close of the taxable period. *Id.* § 4943(b). The "taxable period" does not end until the IRS mails a formal "notice of deficiency" or actually assesses the tax. *Id.* § 4943(d)(2)(A). The IRS cannot mail the notice of deficiency or assess the tax until the IRS has sent several notices to the charitable trust.

285. I.R.C. § 4943(b) (2006).

286. *Id.* § 4941.

287. *Id.* § 4944.

288. *Id.* § 4942.

289. *Id.* § 4945.

important entities choose a new name when the surname is expunged? The practicalities of public acknowledgement have already forced many of these entities to adroitly synthesize their mission in a snippet. The Bill and Melinda Gates Foundation uses “All Lives Have Equal Value”;<sup>290</sup> the Ford Foundation is “A Partner for Social Change”;<sup>291</sup> the Kaufman Foundation is “The Foundation of Entrepreneurship”;<sup>292</sup> and the George Lucas Foundation is “What Works in Public Education.”<sup>293</sup> Clever trustees and their advisors will find a way to name their foundations.

Wealthy founders may complain that, when contributing millions or billions into the charitable trusts, they relied on current laws which allowed the surname until the end of time. First, as a matter of justice, the government indirectly contributed from forty-five percent to sixty-seven percent of the total amount in these charitable trusts.<sup>294</sup> Second, the United States Supreme Court has held that even when a taxpayer structures a multiyear arrangement in compliance with longstanding tax rules, the government is free to change the tax rules and apply the new rules to continuing arrangements.<sup>295</sup>

The new rules would prohibit the use of any surname after fifty years, regardless of whether the charity bears the founder’s name. This would prevent wealthy donors from colluding to circumvent the rules. In the absence of such an approach, Able might establish the Baker Charitable Trust with \$100, and Baker might establish the Able Charitable Trust for \$100. Immediately thereafter, Able might transfer \$10 million to the Able Charitable Trust, and Baker might transfer \$50 million to the Baker Charitable Trust. Under the proposal, both the Able Charitable Trust and the Baker Charitable Trust would need to drop their surnames within fifty years.

The new rules would not apply to charitable trusts funded exclusively by publicly traded corporations. The trust could maintain the corporate name until the corporation terminates. In the case of a merger or consolidation, the trust could maintain or adopt the name of the surviving entity. This creates a loophole, but a rather narrow one. A wealthy entrepreneur

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290. *About the Foundation*, BILL & MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/about/Pages/overview.aspx> (last visited Dec. 29, 2009).

291. *About Us*, FORD FOUNDATION, <http://www.fordfound.org/about> (last visited Dec. 29, 2009).

292. EWING MARION KAUFFMAN FOUNDATION, <http://www.kauffman.org> (last visited Dec. 29, 2009).

293. EDUTOPIA: THE GEORGE LUCAS EDUCATIONAL FOUNDATION, <http://www.edutopia.org/> (last visited Dec. 29, 2009).

294. *See supra* Part II.A.1.

295. *See generally* *Dickman v. Comm’r*, 465 U.S. 330 (1984) (involving interest-free loans between family members). In *Dickman*, the Court states, “[I]t is well established that the Commissioner [of the Internal Revenue Service] may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner’s prior position.” *Id.* at 343 (citations omitted).

seeking to circumvent the temporal restriction on surnames could surname a for-profit corporation and then cause the corporation to establish a surnamed charitable trust. This is a potential opportunity, but it would make the process significantly more difficult for the founder. First, the scheming founder would need to establish the for-profit corporation. Second, the corporation would need to grow to the point that its securities are actively traded on a public exchange. Third, the founder likely would need to fund the trust<sup>296</sup> over a series of years. Publicly traded entities are taxed as Subchapter C corporations,<sup>297</sup> and a C corporation can only deduct charitable contributions each year to the extent of ten percent of the corporation's taxable income.<sup>298</sup> Fourth, the founder's surname would not only attach to a charitable trust but would also attach to a publicly traded corporation. Robber barons who desire to "cleanse" the family name through the use of a charitable trust may be stymied because the family name would also attach to a business enterprise.

The proposal would not apply to operating charities,<sup>299</sup> entities that are dedicated exclusively to supporting one operating charity that bears the same surname,<sup>300</sup> or trusts that receive substantial support from a wide variety of sources.<sup>301</sup> The proposal would apply only to trusts described as private foundations for tax purposes.<sup>302</sup> As a result, the Bill Clinton Foundation could remain surnamed as long as it continues to receive financial support from many sources.<sup>303</sup> These entities are exempt because they provide public benefits directly through charitable activities or they have outside constituencies that could protest if the surname interferes with the charitable mission.

If enacted, founders may create charitable trusts which self-destruct after fifty years by paying all remaining assets to one or more designated

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296. The founder likely would need to make nondeductible capital contributions to provide the corporation with the money needed to fund the charitable trust. *See* I.R.C. § 351 (2006) (providing tax rules for capital contributions to corporations).

297. *See id.* § 7704(a) (even if the owners form an entity as a partnership, it will be taxed as a corporation if its securities are publicly traded).

298. *See id.* § 170(b)(2).

299. Also, the proposal would not apply to exempt operating foundations because those entities directly conduct charitable activities. *See id.* § 4940(d)(2) (describing "exempt operating foundations").

300. The proposal would not apply to supporting organizations. *See id.* § 509(a)(3) (describing "supporting organizations"). As a result, if a separate entity named the ABC Hospital Foundation raises funds and makes grants exclusively for the benefit of the ABC Hospital, the proposal would not apply to either the ABC Hospital Foundation or the ABC Hospital.

301. *See id.* § 509(a)(2).

302. *See id.* § 509(a).

303. The IRS classifies the William J. Clinton Presidential Foundation as a public charity rather than a private foundation. *See* IRS Pub. 78, *supra* note 85, at 3627 (listing the foundation with no "code" number following the foundation's name); *id.* at 1 (explaining the "codes"). In 2008, the Clinton Foundation provided a list of ninety-nine donors who had each contributed at least \$500,000. *See William J. Clinton Foundation*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Clinton\\_Foundation](http://en.wikipedia.org/wiki/Clinton_Foundation) (last visited Dec. 29, 2009).

operating charities. This will benefit society because the funds will assist society sooner. One experienced practitioner suggests that founders design their charitable trusts to self-destruct after the death of the founder and the founder's spouse because their children likely will not have the acumen or enthusiasm to handle the trust administration.<sup>304</sup>

#### *D. Potential Counterarguments and Broader Issues*

Part II.C addresses the objection that the use of a surname is harmless fun that benefits the founder family and has no impact on the public.

Others may argue that founders surname to benefit others. Some surname to inspire their progeny.<sup>305</sup> Others surname to honor a deceased relative or a historical figure and to remind the public of the virtues that person exemplified. While this Article circumscribes surnamed charitable trusts, those who consider its restrictions burdensome will find that naming opportunities abound outside the world of family charitable trusts. Wealthy philanthropists can buy naming rights to school buildings, hospital facilities, church halls, community centers, and other buildings.<sup>306</sup> Less wealthy donors can buy naming rights to windows or bricks in a school or hospital, stained glass windows at a church,<sup>307</sup> a park bench, or a tree. Patrons who desire to establish and surname an endowment that will make grants indefinitely can establish a surnamed donor-advised fund at a public charity,<sup>308</sup> a separate surnamed grant-making fund at a community foundation,<sup>309</sup> or a surnamed account with a commercially affiliated charity such as the Fidelity Investments Charitable Gift Fund.<sup>310</sup> These entities do not allow the donor or the donor's offspring to glom fees from the charity or to maintain absolute control over the grant-making process,<sup>311</sup> but they allow the naming right.

Idealistic reformers may point out that this proposal would not eradicate all the problems identified. Even if the charitable trust changes its

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304. Louis J. Hector, *The Small Private Foundation*, <http://www.dadecommunityfoundation.org/Site/docs/1.2.1.TheSmall.PDF> (last visited Dec. 29, 2009). (Mr. Hector is a partner in the law firm of Steel, Hector & Davis.)

305. See *supra* note 98 and accompanying text.

306. See *supra* Part I.A.

307. See Colombo, *supra* note 57, at 657 n.3.

308. See Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 524 n.170 (2005) (“[C]ommunity foundations and even individual public charities (such as universities) are beginning to offer donor-advised funds.”).

309. See *id.* See also Marsh, *supra* note 141, at 141–42 (describing community foundations).

310. See Marsh, *supra* note 141, at 146–47 (describing the Fidelity Fund and stating that “T. Rowe Price, Vanguard, and Charles Schwab [also] started their own for-profit charitable funds”).

311. “Donor-advised funds . . . are wholly controlled by a community foundation or other charitable organization, and donors and their families are only permitted to make nonbinding recommendations about how monies should be distributed.” Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667, 690 (2005).

name after fifty years, family members could continue to dominate the board of trustees. The charitable trust's board would not instantly represent the diversity of the community or have expertise in making grants. Nepotism and isolationism could continue. A bolder proposal would prohibit family members from serving on the board of trustees.

Reformers previously proposed limiting family participation on boards of trustees, and that proposal failed. The Treasury Department proposed restrictions on the composition of boards of trustees in 1965, and the proposal was annihilated in Congress.<sup>312</sup> The lobbying power of founder families is formidable.

The mandatory name change proposed in this Article will address some problems and set the wheels in motion to address others. The mandatory name change will help grant seekers find the charitable trusts, which will improve the flow of information. The name change will also make the entity more attractive for potential volunteers seeking positions on a board of trustees, and it will encourage outsiders to apply for compensated positions with the charitable trust. Also, the founder's descendants will be more reluctant to abdicate control as long as the trust bears the surname. A surnamed trust's activities reflect on the family. If the law forces the trust to relinquish the surname after fifty years, it provides the family with a sign that familial domination can cease with impunity. Over time, the charitable trust may become more responsive to community needs and provide greater public benefits.

This Article focuses on perpetual naming rights, but the facts explored and the arguments developed raise broader issues about nepotism, grant-making procedures, and the flow of information. Should Congress prohibit charitable trusts from paying fees to family members? Should Congress require that all charitable trusts adopt detailed, written grant-making procedures? Should charitable trusts submit those written procedures to the IRS and obtain approval before the founder can claim a tax deduction for contributions to the charitable trust? Currently, charitable trusts that provide scholarships must submit a description of their grant-making process to the IRS in connection with their initial application for tax-exempt status.<sup>313</sup> Many federal agencies are implementing online grant application processes.<sup>314</sup> Congress could mandate similar processes for charitable trusts and could mandate many procedures that are now considered "best practices" by grant-making entities. These and other reforms may be wor-

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312. *See supra* note 264 and accompanying text.

313. IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, at 25, *available at* <http://www.irs.gov/pub/irs-pdf/f1023.pdf> (Schedule H: Organizations Providing Scholarships, Fellowships, Educational Loans, or Other Educational Grants to Individuals and Private Foundations Requesting Advance Approval of Individual Grant Procedures).

314. *See* Joseph G. Perpich, *Grantmaking's Looming Digital Divide*, 44 FOUND. NEWS & COMMENT. (Nov./Dec. 2003), *available at* <http://www.foundationnews.org/CME/article.cfm?ID=2694>.

thy of study in an attempt to bring greater diversity and community involvement to charitable trusts and to ensure that the taxpaying public receives benefits commensurate to the tax subsidies granted.

#### CONCLUSION: PAY-TO-PLAY CHARITY STYLE

Pay-to-play is a derogatory term for the political practice of doling out government contracts, construction projects, positions of power and influence, lucrative jobs, and other benefits in exchange for campaign contributions.<sup>315</sup> Pay-to-play politics is corrupt and a violation of the public trust.<sup>316</sup> Perpetual naming rights promote charity's version of pay-to-play forever.

The ability to surname in perpetuity can provide substantial private benefits to the founder family and diminish the public benefits. A surnamed charitable trust signals power, privilege, and prestige.<sup>317</sup> Family members can control the charitable trust as trustees. Grant writers, development officers, and others serving operating charities will flatter, cajole, plead, and reward the founding family in hopes of receiving grants from the trust. One charity provides big donors a private audience with the Pope, some create donor walls, and others establish donor parks and fountains and devise different donor appreciation schemes.<sup>318</sup> When a founder surnames a charitable trust, the founder bequeaths some of society's most prized attributes to the family in perpetuity—social status, respect, and admiration. Along with this inefficient behavior, a perpetual naming right diminishes the public benefit in many other ways, from inhibiting diversity and community involvement on the board of trustees to allowing personal relationships to influence grant making. In addition, the taxpaying public covers forty-five percent to sixty-seven percent of the cost of all the donations through tax subsidies.

This Article proposes that after fifty years a charitable trust must change its name to delete the surname. Fifty years of adulation, along with the forty-five percent to sixty-seven percent tax subsidy on all donations, is sufficient recognition for a contribution. A perpetual naming right

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315. See Bruce E. Cain, *Cheap Talk Citizenship: The Democratic Implications of Voting with Dollars*, 37 U. RICH. L. REV. 959, 965 n.26 (2003) (“[P]ay to play’ politics . . . is essentially the practice of paying to gain access to politicians . . . .”); see also *Pay to Play*, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Pay\\_to\\_play](http://en.wikipedia.org/wiki/Pay_to_play) (last visited Dec. 29, 2009) (“The phrase [is] almost always used in criticism . . . .”).

316. See *Pay to Play*, *supra* note 315.

317. These are admired characteristics in our society. See Colombo, *supra* note 57, at 671–72 n.66 (“[L]arge capital gifts . . . can be viewed largely as purchases of status and may have little or nothing to do with how the gift affects the recipient or any kind of altruistic behavior.”); see also Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 574–77 (1997); see generally Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

318. Representatives of grant-seeking charities highly value access and influence with the founding family. See *supra* Part II.C.2.

grants an excess private benefit to the founding family at a disproportionate cost to society.

#### APPENDIX A – EMPIRICAL RESEARCH COMPENDIUM

##### *Survey of Private Foundations Beginning with the Letter “P”*

The research reviewed pages 2602 to 2783 of IRS Publication 78 (revised on September 30, 2007), which included the names from Paact Inc. (on page 2602) to the P-47 Foundation (on page 2783). The research tabulated only the names of private foundations.<sup>319</sup> The pages included the names of approximately 3,000 private foundations. The chart below divides the names into five categories: (i) those including a surname but no functional or geographic designation; (ii) those which appear to have been established by a corporation or other commercial enterprise; (iii) those with a functional or geographic designation but no surname; (iv) those with both a surname and a functional or geographic designation; and (v) others—those for which it was not apparent whether the name included a surname, a functional designation, or a geographic designation, and which did not appear to have been founded by a corporation or other commercial enterprise.

For purposes of the chart, entity names including the word “scholarship” have a functional designation; entity names including the word “charitable” do not have a functional designation unless other words in the entity name provide a functional designation.

Breakdown among the five categories:

Number Percentage of Total

(i) Surname and no functional or geographic designation: 2,044; 67.84%

(ii) Corporate founder: 153; 5.08%

(iii) Functional or geographic designation but no surname: 424; 14.07%

(iv) Both a surname and a functional or geographic designation: 195; 6.47%

(v) Other: 197; 6.54%

Total 3,013 100.00%

Key Statistics:

In calculating the following statistics, the total number of entities is reduced from 3,013 to 2,663 by eliminating the “corporate founder” category and “other” category:  $3,013 - 153 - 197 = 2,663$

*Percentage of entities with a surname:*

The total number of entities with a surname is the sum of row (i), which is 2,044 names, plus row (iv), which is 195 names, for a total of

319. Private foundations are designated with the numeral four following the entity’s name in IRS Publication 78. IRS Pub. 78, *supra* note 85, at 1.

2,239 entities. The percentage of entities with a surname is then calculated by dividing that total by the total number of entities:  $2,239/2,663 = 84.08\%$

*Percentage of entities with a surname and no functional or geographic designation:*

The total number of entities with a surname and no functional or geographic designation is the number of entities in row (i), which is 2,044 names. The percentage of entities with a surname and no functional or geographic designation is then calculated by dividing that total by the total number of entities:  $2,044/2,663 = 76.76\%$

*Percentage of entities with a functional or geographic designation:*

The total number of entities with a functional or geographic designation is the sum of row (iii), which is 424 names, and row (iv), which is 195 names, for a total of 619 entities. The percentage of entities with a functional or geographic designation is then calculated by dividing that total by the total number of entities:  $619/2,663 = 23.24\%$

*Percentage of entities with a functional or geographic designation but no surname:*

The percentage of entities with a functional or geographic designation but no surname is calculated by dividing row (iii), which is 424 names, by the total number of entities:  $424/2,663 = 15.92\%$

*Percentage of entities with both a surname and a functional or geographic designation:*

The percentage of entities with both a surname and a functional or geographic designation is calculated by dividing row (iv), which is 195 names, by the total number of entities:  $195/2,663 = 7.32\%$