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A Nominal Credit: Why Donor Recognition Should Not Limit the Deductibility of Section 170 Charitable Contributions

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> "The glory of [nobility] is but a nominal credit begged from dead men, a trifling title raked from their graves, who are long since dissolved into dust and ashes."
>
> —George Webbe[1]

> "What's in a name? That which we call a rose
> By any other name would smell as sweet."
>
> —*Romeo and Juliet*[2]

In figuring their federal income tax liability, individuals are generally entitled to deduct from gross income the amount of their charitable contributions. Charities often recognize such donors for their gifts by associating donor names with the projects such donors make possible. In 2015, Lincoln Center made headlines when it recognized David Geffen's $100 million gift by placing his name on what the Center had previously named Avery Fisher Hall. The story renewed a debate over whether donor recognition should affect the amount of such donor's charitable deduction and, if so, how. This article argues that donor recognition should not affect the amount of a taxpayer's charitable deduction. The Internal Revenue Code and regulations promulgated thereunder, common law, and policy all support this treatment because the tangible benefits to society when donors agree to be recognized far outweighs the nominal benefits to the donors receiving such recognition. This article then reviews two proposals to limit the charitable deduction for recognized charitable gifts. The article concludes that these proposals, if adopted, would at best drive perceived abusive donors merely to use alternative vehicles to secure tax-free recognition and, at worst, would chill a centuries-old practice that recognizes and encourages those who would provide voluntary non-governmental response to need and promise in their communities.

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[1] George Webbe, A Posie of Spiritual Flowers 45 (1610).

[2] William Shakespeare, Romeo and Juliet act 2, sc. 2.

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INTRODUCTION

In 2015, New York's Lincoln Center reached a $15 million deal with the Avery Fisher family allowing the Manhattan arts charity to cease recognizing the pioneering acoustical engineer and Center donor with an eponymous concert hall.[3] The concert hall was facing severe challenges.[4] Its forty years showed, especially compared to the newer spaces outcompeting it for audience.[5] Ironically, the hall suffered poor acoustics.[6] Estimates placed a rebuild in the $500 million range[7] and, apparently, the Fisher family declined to provide the charity with such funding.[8] The deal gave the Center express permission to recognize a

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[3] Robin Pogrebin, *Lincoln Center to Rename Avery Fisher Hall*, N.Y. TIMES, Nov. 13, 2014, at A1.

[4] See id.

[5] *See id.* (quoting Nancy Fischer, Avery Fisher's daughter, who likened the hall to "an old slipper.").

[6] *Id*.

[7] Id.

[8] Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002, http://www.nytimes.com/2002/05/13/arts/avery-fisher-hall-forever-heirs-say.html?mtrref=www.nytimes.com&gwh=71F445643DA89CE90886DCB27575BF14&gwt=pay.

new donor whose gift would ensure project completion.[9] Within four months, the charity proudly announced that entertainment mogul David Geffen had pledged $100 million.[10] The Center also announced that it would recognize the donor by styling the rebuilt venue, "David Geffen Hall at Lincoln Center."[11]

"But what's in a name?"[12] Charities have long recognized their most generous donors by including donor names on a host of things, including bronze plaques, programs, buildings, and entire organizations.[13] This practice has not greatly concerned common law judges, or Congress.[14] Under section 170 of the Internal Revenue Code, individual taxpayers are generally entitled to deduct from gross income the amount of their charitable contributions, no matter how a charity recognizes such taxpayers for their gifts.[15] But the David Geffen recognition—and especially the Fisher family acquiescence to it—renewed a debate over whether donor recognition should affect the amount of a donor's charitable deduction.[16] In other words, for the purposes of the

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9 Pogrebin, *supra* note 3 (quoting the orchestra's chairman, Gary Parr, as saying "[b]eing able to do this makes a huge difference in the prospects of raising the funds to be successful.").

10 Robin Pogrebin, David Geffen Captures Naming Rights to Avery Fisher Hall With Donation, N.Y. TIMES, Mar. 4, 2015, at A1.

11 *Id.*

12 SHAKESPEARE, *supra* note 1. Another Elizabethan writer, George Webbe, agreed, calling a name nothing more than a credit robbed from dead men, and a trifle. *See* WEBBE, *supra* note 2. John Locke, too, contrasted the nominal with the real—the substance with the name for the substance. JOHN LOCKE, ESSENCE OF HUMANE UNDERSTANDING iii. vi. 208 (1690) ("I call it by a peculiar name, the nominal Essence, to distinguish it from that real Constitution of Substances, upon which depends this nominal Essence.").

13 *See infra* Part I.A.

14 *See infra* Part I.A.

15 I.R.C. § 170 (a)(1). All references herein to "the Code" are to the Internal Revenue Code.

16 *See, e.g.*, Jack Shakely, *Philanthropic Naming Rights, and Naming Wrongs*, L.A. TIMES, Mar. 10, 2015, http://www.latimes.com/opinion/op-ed/la-oe-0311-shakely-philanthropy-naming-rights-20150310-story.html (discussing how David Geffen became the focus of the naming contribution debate). *See also* William Drennan, *Where Generosity & Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 53 (2012); William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 233 n.65 (2010); Pablo Eisenberg, *Stop Appealing to Billionaire Egos With Naming Rights*, CHRON. PHILANTHROPY, Mar. 12, 2015, https://philanthropy.com/article/Opinion-Stop-Appealing-to/228459?cid=pt&utm_source=pt&utm_medium=en; Peter J. Reilly, *What's in a Name: Should Naming Rights Reduce Charitable Deductions*, FORBES, Nov. 18, 2014, http://www.forbes.com/sites/peterjreilly/2014/11/18/whats-in-a-name-should-naming-rights-reduce-charitable-deductions/; Felix Salmon, *Naming Wrongs*, SLATE, Mar. 6, 2015, http://www.slate.com/articles/business/moneybox/2015/03/david_geffen_gives_100_million_to_lincoln_center_why_the_sale_of_naming.html; Linda Sugin, *Your Name on a Building and a Tax Break Too: Rethinking Taxes and David*

Internal Revenue Code, when a charity recognizes a donor for a gift, is such recognition a "nominal credit" incidental to a gift that furthers its charitable mission, or is recognition a financial return benefit to the donor—ripened into contract—that must limit the amount of a donor's charitable deduction?[17] This article argues that recognition is merely a nominal benefit to the donor that should not affect the amount of such donor's section 170 charitable deduction.

Part One explores whether law and policy support limiting a recognized donor's charitable deduction and concludes that they do not.[18] Part Two explores the proposals of two legal scholars, Professors William Drennan and Linda Sugin, who argue that donor recognition should limit deductibility.[19] Professor Drennan argues that the fair market value of donor recognition should affect deductibility and Professor Sugin argues that the duration of recognition should affect it.[20] Part Three presents the author's disagreement with these arguments.[21] First, as Professor Evelyn Brody has recognized, property, and not contract, is the proper legal doctrine to apply.[22] Second, a reduced deduction is ill-fitting with the legal and theoretical justifications that underlie the charitable gift deduction, especially Professor Henry Hansmann's capital formation theory.[23] Third, the donor recognition question is analogous to corporate sponsorship wherein charities must pay unrelated business income tax on corporate advertising revenue, but not when charities merely recognize their corporate sponsors.[24] Fourth, the way private foundations and donor advised funds recognize their donors, and the fact that public entities recognize non-donors, illustrate how changing the current regime would probably not curb perceived abuses, but would likely create perverse outcomes.[25]

I. Law & Policy Support the Full Deductibility of Recognized Gifts

Analysis of charitable law issues begins with a requisite reference to the 1601 English Statute of Charitable Uses,[26] and the quotations that

Geffen's Gift for Avery Fisher Hall, N.Y. Times, Mar. 11, 2015, http://www.nytimes.com/2015/03/11/opinion/rethinking-taxes-and-david-geffens-gift-for-avery-fisher-hall.html.

17 *See infra* Part II.
18 *See infra* Part I.
19 *See infra* Part II.
20 *See infra* Part II.
21 *See infra* Part III.
22 *See infra* Part III.A.
23 *See infra* Part I.B.
24 *See infra* Part III.C.
25 *See infra* Part III.D.
26 *See infra* text accompanying note 41.

introduce this article derive from that era. Many modern charitable causes would be familiar to early-moderns like Shakespeare and George Webbe, such as religion,[27] education,[28] hospitals,[29] social services,[30] and the care of bridges.[31] Others would appear foreign, including international relief[32] and development,[33] community and private foundations,[34] and United Ways.[35] Unlike the clerics who solicited gifts in the early modern era, the modern solicitor is a lay professional.[36] Their tactics are

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27 *See, e.g.*, Alex Daniels, *Religious Americans Give More, New Study Finds*, CHRON. PHILANTHROPY (Nov. 25, 2013), https://philanthropy.com/article/Religious-Americans-Give-More/153973. Forty-one percent of all charitable gifts from households in 2012 went to congregations, while 32 percent went to other nonprofits with a religious identity and 27 percent went to secular charities.

28 *See, e.g.*, *Zuckerberg, Wife Gift $120M to California Schools*, USA TODAY, May 30, 2014, http://www.usatoday.com/story/news/nation/2014/05/30/zuckerberg-california-schools/9754823/.

29 *See, e.g.*, Molly Gamble, *10 Largest Donations from Individuals to Hospitals in 2013*, BECKER'S HOSP. REV. (Dec. 5, 2013), http://www.beckershospitalreview.com/finance/10-largest-donations-from-individuals-to-hospitals-in-2013.html.

30 *See, e.g.*, David C. Barnett, *Local Social Services Benefit from Higley Fund Donation*, IDEASTREAM (June 5, 2015), http://wcpn.ideastream.org/news/higley_family_makes_major_donation. *See also* Maria DiMento, *Habitat for Humanity Receives $100 Million Pledge*, CHRON. PHILANTHROPY (May 14, 2009), https://philanthropy.com/article/Habitat-for-Humanity-Receives/162601.

31 *See, e.g.*, BRIDGES TO PROSPERITY, http://bridgestoprosperity.org (last visited Mar. 10, 2017) (detailing a charity providing isolated communities with access to essential health care, education and economic opportunities by building footbridges over impassable rivers).

32 *See, e.g.*, Candice Choi, *Chobani CEO to Donate at Least Half of Wealth to Help Refugees*, HUFFINGTON POST (May 28, 2015, 11:17 AM), http://www.huffingtonpost.com/2015/05/28/chobani-ceo-giving-pledge_n_7460734.html.

33 *See, e.g.*, *Heifer International Announces $25.6 Million Gates Foundation Gift*, PHILANTHROPY NEWS DIG. (Jan. 17, 2014), http://philanthropynewsdigest.org/news/heifer-international-announces-25.6-million-gates-foundation-grant.

34 *See generally* CF Insights, *Sustained Growth in an Expanding Field: 2014 Columbus Survey Findings* 4 (2015), http://cfinsights.org/Portals/0/Uploads/Documents/Columbus%20Survey/Columbus_Survey_FY2014_FINAL.pdf (discussing the growing popularity of donor-advised funding as a vehicle for philanthropic giving); FOUND. CTR., *Key Facts on U.S. Foundations* 2 (2014). The full report, discussing giving by private, corporate, and community foundations nationwide, is available for download at http://foundationcenter.org/gainknowledge/research/keyfacts2014/.

35 *See, e.g.*, Jane Watrel, *Bill Gates Local Gift Gets Very Personal*, NBC WASHINGTON (Oct. 13, 2010, 8:04 PM), http://www.nbcwashington.com/news/local/Bill-Gates-Local-Gift-Gets-Very-Personal-104903129.html (describing Gates' gift to the United Way worldwide headquarters to create the Mary M. Gates Learning Center).

36 *See, e.g.,* LILYA WAGNER, CAREERS IN FUNDRAISING (2001); ASS'N OF FUNDRAISING PROF'LS, http://www.afpnet.org/about/?navItemNumber=500 (last visited Mar. 10, 2017). Since 1960, the Association of Fundraising Professionals has supported efforts that generated over $1 trillion. AFP's nearly 30,000 individual and organizational members raise over $100 billion annually, equivalent to one-third of all charitable giving in North America.

effective; in 2015, individual and institutional donors contributed $373.25 billion to U.S. charities.[37] This represents a 2015 federal tax expenditure of $48.80 billion.[38] In 2013, donors made 32 gifts of $100 million or more.[39] In comparison, John Harvard—a contemporary of John Locke—was recognized when an upstart College named itself for him in exchange for his book collection, then valued at £400.[40] Then, as now, such recognition was neither uncommon nor frowned upon.[41] Law and policy justifications illustrate why donor recognition did not negate the charitable nature of a gift then, nor the deductibility of such a gift today.

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37 *Giving USA 2016 Infographic*, GIVING USA (2016), https://givingusa.org/see-the-numbers-giving-usa-2016-infographic/ (last visited Mar. 10, 2017).

38 JOINT COMM. ON INTERNAL REVENUE TAX'N, 114TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015-2019, JCX-141R-15, at 36, 38 (Dec. 7, 2015). This estimate includes $6.5 billion in deductible education contributions, $5.1 billion in deductible health contributions, and $37.2 billion in deductible contributions to other institutions.

39 *2013 Donors of Gifts of $100 Million or Greater*, MILLION DOLLAR LIST, http://www.milliondollarlist.org (follow "The Data" hyperlink; then follow "Custom Data Search" hyperlink; then search "Donation" for "is greater than" 99,999,999 and search "Year Published" for 2013 to 2013; then follow "Search" hyperlink.).

40 Harvard University estimates the value of John Harvard's "extraordinary" 1637 gift in the range of £400, a gift that today would have the purchasing power of approximately $25 million but that today would fail to make the 100 largest gifts in a single year in the United States. *See* JOSIAH QUINCY, THE HISTORY OF HARVARD UNIVERSITY 461-62 (Harvard Library 2006) (estimate of the Harvard gift). *See also* MEASURINGWORTH, http://www.measuringworth.com/ukcompare/ (last visited Mar. 10, 2017) (conversion from 1637 to 2014 purchasing power); MILLION DOLLAR DONOR LIST, *supra* note 39 (counting more than 100 2013 charitable gifts exceeding $25 million). But thanks to Professor James Hines for reminding that Harvard's gift would be worth far more than $25 million today had in been prudently invested in the London Stock Exchange, for instance.

41 RICHARD EDWARDS & NIGEL STOCKWELL, TRUSTS & EQUITY 187 (2007) (Noting that the saying of masses, and the care of tombs and monuments were regularly considered object for a valid trust and a standing exception to dead hand control); *see, e.g.*, QUINCY, *supra* note 40, at 9–10 (describing the naming of Harvard College in 1637); Rupert Holland, *The Modern Law of Charities as Derived from the Statute of Charitable Uses*, 52 AM. L. REG. 201, 202 n.3 (1904) ("A [condition] that the donor's name shall be attached to the gift does not necessarily invalidate it as charity." (citing Vidal v. Girard's Ex'rs, 43 U.S. 127, 175 (1844) (a donor's requirement that a "marble college. . . bear his name forever" did not render a bequest non-charitable))). *But see* MISHNEH TORAH, *Matnot Aniyim,* 10:7–10, (Eliyahu Touger trans.), http://www.chabad.org/library/article_cdo/aid/986711/jewish/Matnot-Aniyim-Chapter-10.htm (preferring one who gives charity without the recipient knowing from whom he received over one who gives charity with the recipient knowing from whom he receives).

A. Statute and Common Law Authorize the Full Deductibility of Recognized Gifts

The charitable gift deduction is a matter of long standing in the federal income tax regime. The Sixteenth Amendment to the United States Constitution authorizes Congress to levy an income tax.[42] Congress may levy such tax on gross income, defined as accessions to wealth, clearly realized, and over which a taxpayer has complete dominion.[43] In calculating the amount of his or her tax, a taxpayer may take only such deductions from gross income as is clear provision therefor, and only as a matter of legislative grace.[44] The Code articulates a clear provision for deductions regarding charitable gifts: first, section 501 generally exempts qualified charities themselves from income taxation.[45] Second, section 170 allows a taxpayer to take as a deduction "any charitable contribution" thereto.[46]

Section 501 generously exempts charitable entities from most income taxation.[47] The section is generous in the sense that Congress has never precisely defined what is charitable and, generally speaking, avoids weighing in on questions of charitable worthiness. This treatment is longstanding.[48] When President Woodrow Wilson signed the United States Revenue Act of 1913 into law, the Act contained the section's precursor.[49] The section reflected the longstanding tradition of

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42 U.S. CONST. amend. XVI; Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 173-74 (1926); Brushaber v. Union Pac. R.R., 240 U.S. 1, 11 (1916). *But see* Pa. Mut. Indem. Co. v. Comm'r, 277 F.2d 16, 19-20 (3d Cir. 1960) (asserting that the 16th amendment only removes the apportionment criterion from a pre-existing Congressional power to levy and collect an income tax).

43 Comm'r. v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

44 New Colonial Ice. Co. v. Comm'r, 292 U.S. 435, 440 (1934).

45 I.R.C. § 501(a).

46 I.R.C. § 170(a), (c).

47 *Compare* Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913) *with* War Revenue Act, ch. 63, 40 Stat. 300, § 1201(2) (1917), *and* I.R.C. § 501(c)(3) (1954) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals"), *and* I.R.C. § 501(c)(3) (1986) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.").

48 *See* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 330 (1976) ("Congress has never seen fit to provide a statutory definition of the term 'charitable.'").

49 Revenue Act of 1913, ch. 16, 38 Stat. 114; *cf.* U.S. CONST. amend. XVI (granting Congress the power to law and collect taxes on income from whatever source derived without apportionment among the several states). Congress had already explicitly exempted charities from taxation under the Corporate Excise Act of 1909 and the Revenue

common law judges in that it contained no precise definition of "charity." Instead, Congress tautologically defined as charitable those entities organized for "religious, charitable, scientific, or educational purposes."[50] This treatment continues today when section 501(c)(3) includes in its exemptive purview an even wider variety of entity types and charitable objects.[51] Although the Internal Revenue Service[52] and the States[53] challenge charitable exemption from time to time, deference and trust are the hallmarks of the Service's approach to charities.[54] This approach is perhaps best evidenced by the exploding and ongoing growth of the number of charities in the United States,[55] and the Service's 2008 decision to grant presumptive public charity status to new applicants for tax-exempt status.[56]

Section 170 enables taxpayers to deduct from income the full value of their charitable contributions.[57] The section permits a taxpayer to deduct from gross income the amount of "any charitable contribution," defined as a "contribution or gift" made within the taxable year and validated under regulations promulgated by the Secretary.[58] The section also requires taxpayers making any contribution of $250 or more to provide the Secretary with a written acknowledgment stating, among other things, the value of any goods or services the recipient provided

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Act of 1913 generally follows that language. Kenneth Liles & Cynthia Blum, *Development of the Federal Tax Treatment of Charities: A Prelude to the Tax Reform Act of 1969*, 39 L. & CONTEMP. PROB. 6, 7 (1975). *See also* Bittker & Rahdert, *supra* note 48, at 301.

50 War Revenue Act § 1201(2).

51 I.R.C. § 501(c)(3)(d).

52 *See, e.g.*, Doug Donovan & Suzanne Perry, *IRS Tea Party Scandal Could Cause Charity Fallout*, CHRON. PHILANTHROPY (May 13, 2013), https://philanthropy.com/article/IRS-Tea-Party-Scandal-Could/154861 (discussing how the I.R.S. singled out applications from conservative advocacy groups seeking tax-exempt status).

53 *See, e.g.*, William C. Smith, *Pole Tax: New York Administrative Law Judge Says Pole Dances Are Exempt from Sales Tax*, 101 A.B.A. J. 11 (2015) (describing a New York Administrative Law Judge's decision in *In re* 677 New Loudon Corp., which denied tax exemption to a "premier adult club" with a non-alcoholic juice bar for lap dances, but granted the exemption for the club's cover charge, which entitled entrants to view nude female pole dancing).

54 Massimo Calabresi, *IRS to Rubber-Stamp Tax-Exempt Status for Most Charities After Scandal*, TIME, July 13, 2014, http://time.com/2979612/irs-scandal-tax-exempt-tea-party-political-groups-john-koskinen/ (discussing IRS decision to no longer screen approximately 80% of the organizations seeking tax-exempt status).

55 Brice McKeever, *The Nonprofit Sector in Brief: Public Charities, Giving, and Volunteering,* URBAN INST. (2015), http://www.urban.org/research/publication/nonprofit-sector-brief-2015-public-charities-giving-and-volunteering.

56 Implementation of Form 990, 76 Fed. Reg. 55746-01 (Sept. 8, 2011) (amending Treas. Reg. § 1.170A-9, § 1.507-2, § 1.509(a)-3, § 1.6033-2, § 1.6043-3, § 602.101).

57 I.R.C. § 170(a).

58 I.R.C. § 170(c).

the donor in consideration in whole or part for the gift.[59] This type of transaction is referred to as a "dual character" transaction because the payment comprises part gift, and part purchase.[60] Although section 170 disallows a charitable deduction when a taxpayer fails to substantiate certain gifts, the statute itself does not itself limit the donor's deductible amount for the value of consideration received.[61] Rather, those rules are contained in various regulations promulgated by the Secretary.[62]

Regulations and guidance promulgated by the Secretary limit the charitable deduction amount when charities provide valuable consideration in exchange for gifts.[63] But some valuable consideration is disregarded in this calculus because it is insubstantial.[64] The Service has long held that, within the meaning of section 170, a charitable contribution or gift must be "a payment of money or transfer of property without adequate consideration."[65] Taxpayers have the burden to show that all or part of a payment is a charitable contribution or gift.[66] Generally speaking, a taxpayer may not deduct the fair market value of goods or services the organization provides in return for a gift.[67] However, the Service carves out an exception for certain goods or services, which are disregarded for the purpose of limiting deductions[68] and need not be included in written substantiations.[69] These goods and services include, among other things, unsolicited low cost items,[70] logoed items, token items, newsletters,[71] and donor recognition.

Even if donor recognition is valuable consideration of some quantum—perhaps as a privilege, a right,[72] or a return benefit—the Service disregards it for the purpose of the charitable gift deduction. At least since 1955, the Service has held that certain rights and privileges do not negate the charitable nature of the contributions for which such rights and privileges are bestowed.[73] For instance, being known as a donor is

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59 I.R.C. § 170(f)(8)(A)-(B), (D).

60 Rev. Rul. 67-246, 1967-2 C.B. 104.

61 *See* I.R.C. § 170(b)(1)(A).

62 *See* Rev. Rul. 67-246, 1967-2 C.B. 104.

63 *See id.* at 105.

64 Id.

65 Id.

66 Treas. Reg. § 1.170A-1(h)(1).

67 Treas. Reg. § 1.170A-1(h)(2).

68 Treas. Reg. § 1.170A-1(h)(3).

69 Treas. Reg. § 1.170A-13(f)(2).

70 Rev. Proc. 92-49, 1992-1 C.B. 987.

71 Rev. Proc. 90-12, 1990-1 C.B. 471.

72 *But see infra* Part III.A (denying that recognition creates a contractual right arising in the donor, ripening upon gift).

73 *See, e.g.*, Rev. Rul. 55-70, 1955-1 C.B. 507, obsoleted by Rev. Rul. 69-227, 1969-1 C.B. 315. If the rights and privileges of membership are incidental to making the organi-

not considered to be a significant return benefit with monetary value.[74] Instead, since the right and privilege of recognition is incidental to the organization's charitable function, the only return benefit of such recognition is the "satisfaction of participating in furthering the charitable cause."[75] Furthermore, when a charity recognizes its benefactor by memorializing her on a plaque or similar commemorative item, such recognition does not disqualify full gift deductibility.[76]

The United States Supreme Court, in *Hernandez v. Commissioner*, stated, although in dicta, that recognized gifts are fully tax-deductible.[77] The Court's matter-of-fact treatment of donor recognition as it relates to tax deductibility is unsurprising when considered alongside the long-standing common law rule that donor recognition does not invalidate a gift's charitable nature. For instance in *Jones v. Habersham*, a case that pre-dates the modern federal income tax, the United States Supreme Court ruled that a donor's insistence on recognition does not invalidate a gift's charitable nature for the purpose of establishing a valid charitable trust.[78] *Habersham*, a rare United States Supreme Court probate case, involved the next of kin of Miss Mary Telfair, who sued the Telfair estate's executor Habersham to set aside certain charitable bequests in their favor.[79] Among those charitable bequests Miss Telfair gave to the Georgia Historical Society her family land and home, along with its fixtures and attachments and significant personal effects.[80] Miss Telfair insisted on prominent perpetual gift recognition and included in her will the following detailed instructions and conditions:

> [T]his devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept, over and against the front porch or entrance of the main building on said lot, a marble slab or tablet, on which shall be cut or engraved the following words, to-wit, 'TELFAIR ACADEMY OF ARTS AND SCIENCES,' the word 'Telfair' being in larger letters and occupying a separate line above the other words . . .

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zation function according to its charitable purposes, and the benefit to be derived by a member is the personal satisfaction of being in service to others and furthering the charitable cause in which the members share an interest in common, then the membership fee is considered a contribution toward the support of the organization.

74 Rev. Rul. 68-432, 1968-2 C.B. 105.

75 *Id.*

76 I.R.S. Info. 2010-0172 (Sept. 24, 2010), https://www.irs.gov/pub/irs-wd/10-0172.pdf.

77 Hernandez v. Comm'r., 490 U.S. 680, 701 (1989) (citing Foley v. Comm'r., 844 F.2d 94, 96 (2d Cir. 1988)).

78 107 U.S. 174, 189 (1883).

79 *Id.* at 175–76.

80 *Id.* at 186.

> and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking, or smoking, and that no part of the lot or improvements shall ever be sold, alienated, or incumbered, (sic.) but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to.[81]

Notwithstanding these painstaking instructions for memorialization—including the donor's own choice of paint hues and engraving fonts—the court upheld the gift's charitable nature on the grounds that "directions tending to perpetuate the memory of the founder do not impair [a charity's] public character or its legal validity."[82]

Habersham is just one example of the common law rule that donor recognition does not negate the charitable nature of a gift made for public benefit. For instance, in the 1947 California case of *In re Butin's Estate*, the charitable nature of a public memorial was not negated by a donor's insistence that her name be displayed on it.[83] There the court held that when a gift is made for the public benefit, "it is immaterial that the donor may also benefit by his request that the inscription on the monument shall contain his name."[84] In the 1920 Massachusetts case of *Massachusetts Institute of Technology v. Attorney General*, the gift of Boston attorney Charles Herbert Pratt to establish the Pratt School of Naval Architecture and Marine Engineering was charitable despite his requirement that the school bear his name in perpetuity.[85] There the court held that "the direction to erect a memorial of bronze in the interior of the building is a mere incident in the construction of the building; and the testator's motive to commemorate himself and family does not prevent the main purpose from being charitable."[86] In the case of *In re Graves' Estate*, the Supreme Court of Illinois also refused to negate the charitable nature of a bequest providing for construction of a public drinking fountain, even though the fountain recognized the donor and included a full-size bronze statue of his prizewinning horse, along with the horse's celebrated racing record.[87]

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81 *Id.* at 186-87.

82 *Id.* at 189.

83 *In re* Butin's Estate, 183 P.2d 304, 308 (Cal. App. 1947).

84 *Id.*

85 126 N.E. 521, 524 (Mass. 1920). *See also Tech. to Build Pratt School*, HARV. CRIMSON, Nov. 30, 1917.

86 Mass. Inst. of Tech., 126 N.E. at 524.

87 *In re* Graves' Estate, 89 N.E. 672, 674 (Ill. 1909). It is certainly not unusual to find a condition attached to gifts of a public nature—whether it be a monument, a church, a library, or other public building—that the name of the donor shall in some

These cases, among others, rest upon or align with the rationale articulated in the oft-cited[88] case of *Fire Insurance Patrol v. Boyd*.[89] The Fire Insurance Patrol was a late-nineteenth century professional fire brigade organized as a corporation in Philadelphia whose purpose was to protect and save life or property threatened by fire.[90] The Patrol was supported entirely by contributions from different fire insurance companies.[91] However, unlike other paid fire brigades of the time whose purpose or incentive was to protect only insured property,[92] the Patrol was charged with protecting all lives and property regardless of insurance status or private fire marks.[93] Plaintiffs Boyd were the widow and minor child of one decedent Boyd who was killed by negligent Patrol employees.[94] At that time, the doctrine of *respondeat superior* did not apply to public corporations or charities in cases of negligence, but it did apply in negligence cases to private corporations.[95] If the Patrol was a public charity, the Court must hold it harmless in the wrongful death action. If not, the Patrol was liable. The lower court held that, since the Patrol's donors were motivated—if only in part—by self-interest, the Patrol was not a public charity, and it was therefore liable for the wrongful death of Mr. Boyd.[96]

The Supreme Court of Pennsylvania reversed.[97] The court drew considerably upon its ruling two decades earlier in *Miller v. Porter*.[98] In that case the court held that a private university named for its—apparently—quite vain testamentary benefactor was charitable in nature, donor recognition notwithstanding.[99] Said the *Miller* court, "[i]f an act to be a charity must, indeed, be free from *any* taint of selfishness, very much that passes under the name is spurious, whilst the genuine article is so extraordinary a virtue that we ought not to wonder that an inspired

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manner, by inscription or otherwise, be identified with and perpetuated by the gift. It has never been considered that this fact would render such a gift less charitable.

88 *See infra* text accompanying note 110.

89 15 A. 553 (Penn. 1888).

90 *Id.* at 554.

91 Id.

92 *See* Harry M. Johnson, *The History of British & American Fire Marks*, 39 J. RISK & INS. 405, 408 (1972) (Fire marks, mounted on the front of the property, served to identify the property to the fire brigade as one that its company insured.).

93 *Fire Ins. Patrol*, 15 A. at 554.

94 *Id.* at 553.

95 *See generally* Note, *Respondeat Superior in the Case of Charitable Corporations*, 9 HARV. L. REV. 541, 543 (1896) (describing English and United States law on point, including various splits in authority).

96 Fire Ins. Patrol v. Boyd, 15 A. 553, 554 (Penn. 1888).

97 *Id.* at 558.

98 *Id.* at 555.

99 Miller v. Porter, 53 Pa. 292, 299 (Penn. 1866).

Apostle ranked it above the christian (sic.) graces of Faith and Hope."[100] Thus the court reasoned that even if the donor's *sole* intention was to immortalize himself by perpetuating his own name, the university was no less charitable because of it.[101]

In *Fire Insurance Patrol* the Pennsylvania Supreme Court advanced this notion, holding that—at least where donor recognition is concerned—motive is irrelevant to a gift's charitable nature.[102] In language pertinent to the current debate over donor recognition, the court observed that donor motivations are complex—and wholly unselfish gifts rare.[103] Writing for the majority, Judge Edward Paxson[104] personified donor motivation using the image of a serpent "coiled up" within the heart of the donor, and known only to God.[105] Judge Paxson intimates that, as it regards inquiry by a court of law, a donor's "secret motive" is either too difficult to discern with certainty, or, as a matter of personal conscience, is simply inappropriate for profane adjudication.[106] In either case, the court did not apply a motives test, which it feared would result in "serious embarrassment," and possibly even the failure, of some of Philadelphia's "noblest and most useful public charities" whose donors' motives mixed self- and other-regard.[107] Other states widely

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100 *Id.* (emphasis and punctuation in original).

101 *Id.* at 301.

102 Fire Ins. Patrol v. Boyd, 15 A. 553, 556 (Penn. 1888) (citing *Miller*, 53 Pa. 292, 299 (1866)).

103 *Id.* at 554. "Who can say that the millionaire who founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from love to God and love to his fellow, free from the stain of selfishness? Yet is the hospital or the college any the less a public charity because the primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions? There is ostentation in giving as well in the other transactions of life. In some instances donations to public charities may be in part due to this cause. In others there may be the expectation of indirect pecuniary gain or return. The professional man who gives freely to his church may not be insensible to the fact that liberality makes friends, and sometimes increases clientage. Coiled up within many a gift to a public charity there is a secret motive, known only to the searcher of all hearts. It may be to benefit the donor in this world, or to save his soul in the next."

104 For background information on Judge Paxson see 2 THE PROGRESSIVE MEN OF THE PENNSYLVANIA COMMONWEALTH 689 (Charles Blanchard ed., 1900).

105 *Fire Ins. Patrol*, 15 A. at 554.

106 Id.

107 *Id*. The court references the arguments of Horace Binney, whose apparent arguments in *Vidal v. Girard's Executors*, 43 U.S. 127 (1844) are quoted in full in the opinion text of *Miller v. Porter*, 53 Pa. 292 (1866) but are not found in the reporter's text of *Girard's Executors.* Binney, representing Stephen Girard, prevailed over the arguments of Daniel Webster in this seminal case. When Girard died he was considered to be the wealthiest man in the United States at the time and, in 1996, it was estimated that he was the fourth wealthiest man in the history of the United States. *See* MICHAEL KLEPPER & ROBERT GUNTHER, THE WEALTHY 100 (1996).

adopted the general rule in *Fire Insurance Patrol* that the charitable nature of a gift is determined by its purpose, and not the donor's motive.[108]

Regarding the income tax deductibility of charitable gifts under modern tax law, donor motivation does matter—but only to "dual character" transactions.[109] To qualify as a contribution or gift, a payment to a charity must be made without expectation of a "financial benefit commensurate with the amount of the transfer."[110] However, payments to charity oftentimes take on the dual character of part gift and part purchase.[111] Such dual character transactions include, among others, (1)

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108 *See, e.g.*, Union Pac. Ry. Co. v. Artist, 60 F. 365, 370 (8th Cir. 1894) ("[T]he true test of a public charity is not the motive of the donor, but the purpose to which the money given is to be applied."); Neptune Fire Eng. & Home Co. v Bd. of Educ. of Mason Cty., 178 S.W. 1138, 1142 (Ky. Ct. App. 1915) ("The [charity] statute tests the nature and character of the institution by its purpose."); Trs. of Acad. of Protestant Episcopal Church v. Taylor, 25 A. 55, 56 (Pa. 1892) ("[T]he purity and unselfishness of the motive came to be regarded by the courts as important only in the moral aspects of the act, and was not insisted on in determining whether a gift was to a charitable use."); Troutman v. De Boissiere Odd Fellows' Orphans' Home & Indus. Sch. Ass'n, 64 P. 33, 36 (Kan. 1901) (citing Fire Ins. Patrol and Union Pac. Ry. Co. v. Artist) *rev'd on other grounds*, 66 Kan. 1, 71 P. 286 (1903*)*; People ex rel. State Bd. of Charities v. N.Y. Soc'y for the Prevention of Cruelty to Children, 161 N.Y. 233, 247, 55 N.E. 1063, 1067 (1900) ("[A] bequest proceeding from charitable motives is no real test of the class to which the corporation taking it belongs."); Davis v. Gulf, C. & S.F. Ry. Co., 196 S.W. 603, 605 (Tex. Civ. App. 1917) (citing *Fire Ins. Patrol* and *Union Pac. Ry. Co.*) *writ refused* (May 22, 1918); Boyce v. Sumner, 124 A. 853, 854 (Vt. 1924) (citing *Fire Ins. Patrol* and *In re* Graves' Estate, 89 N.E. 672, 674 (Ill. 1909)).

109 *See infra* text accompanying note 118.

110 INTERNAL REVENUE SERVICE, *Special Emphasis Program – Charitable Fundraising* 6 (Jan.1989), http://www.irs.gov/pub/irs-tege/eotopicm89.pdf. *See also* Rev. Proc. 90-12, 1990-1 C.B. 471 (insubstantial value); Rev. Proc. 92-49, 1992-1 C.B. 987 (unrequested items); Rev. Proc. 92-58, 1992-2 C.B. 410 (low cost items).

111 Rev. Rul. 68-432, 1968-2 C.B. 104. "If, however, the rights and privileges of membership are incidental to making the organization function according to its charitable purposes and the only return benefit thereby obtainable is the satisfaction of participating in furthering the charitable cause, the membership fee is considered a contribution toward the support of the organization. Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value within the meaning of this Revenue Ruling. It is recognized, however, that there may be instances where an organization may offer a type of membership for an amount substantially exceeding the value of any benefits or privileges offered. Whenever the discrepancy between the size of the membership contribution and the potential monetary benefit is so great as to make it reasonably clear that the payment is of a dual character, the Internal Revenue Service will give due consideration to the possible separation on a uniform basis of that portion of the total payment that may properly be treated as a charitable contribution under section 170 of the Code."

memberships;[112] (2) "token" goods;[113] and (3) the benefits received at charity fundraising events such as food and beverage,[114] auctioned or sold items[115] and entertainment.[116] The Service allows a portion of such dual character transactions to be deductible, but only if the amount paid is: (1) in excess of the consideration received; and (2) if the excess payment is "made with the intention of making a gift."[117] Thus the Supreme Court held in *American Bar Endowment* that for a dual character transaction to be deductible, a taxpayer must demonstrate to the Service that the excess payment must have been made with charitable intent.[118]

But this narrow holding does not reverse the general rule in *Fire Insurance Patrol* that donor motive is irrelevant to the charitable nature of a gift.[119] First, it is important to distinguish the section 170 charitable giving regime from the section 102 gift and inheritance regime, a distinction that plagued United States Tax Court opinions for a decade.[120] In the 1960 case of *Commissioner v. Duberstein*, the United States Supreme Court established that intent does matter to the determination of a section 102 gift, which "proceeds from a detached and disinterested generosity."[121] The following year, the United States Tax Court in *DeJong v. Commissioner*—a case concerning the non-deductibility of tuition fees to a religious school—extended the *Duberstein* intent standard to section 170 charitable gifts.[122] The *DeJong* opinion inaugurated a decade-long split among those courts that applied the subjective *Duberstein* "disinterested generosity" test to section 170 gifts, on the one hand, and those who applied an objective structural analysis relating to the substantiality of benefits received in exchange, on the other.[123] The issue came to a head in 1971 when the United States Claims Court, in

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112 *Id.*; Treas. Reg. § 1.170A-1(h)(5) (ex. 1); Treas. Reg. § 1.170A-13(f)(8) (ex. 1, 2).

113 Treas. Reg. § 1.170A-1(h)(5) (ex. 3); Rev. Rul. 67-246, 1967-2 C.B. 104 (ex. 4); Rev. Proc. 90-12, 1990-1 C.B. 471.

114 Rev. Rul. 67-246, 1967-2 C.B. 104 (ex. 6, 8).

115 Treas. Reg. § 1.170A-1(h)(5) (ex. 2); Rev. Rul. 67-246, 1967-2 C.B. 104 (ex. 9, 12).

116 Rev. Rul. 67-246, 1967-2 C.B. 104 (ex. 1-3).

117 United States. v. Am. Bar Endowment, 477 U.S. 105, 117 (1986) (citing Murphy v. Comm'r, 54 T.C. 249, 254 (1970) "To prevail petitioners must show that the amount paid in 1966 exceeded the value of the services rendered by the adoption agency and that such excess was intended as a gift."); Arceneaux v. Comm'r, T.C. Memo. 1977-363, 36 T.C.M. (CCH) 1461 (1977); Rev. Rul. 67-246, 1967-2 C.B. 104.

118 *Am. Bar Endowment*, 477 U.S. at 118.

119 *See supra* text accompanying note 91.

120 *Compare* I.R.C. § 170 *with* I.R.C. § 102; *see also* Singer Co. v. United States, 196 Ct. Cl. 90 (1971) (describing a split in authority).

121 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

122 DeJong v. Comm'r, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962). Judge Raum's opinion is one page in length and does not identify the fact that the *Duberstein* case concerns section 102.

123 *Singer Co.*, 196 Ct. Cl. at 104–07 (collecting cases).

Singer Co. v. United States, refused to apply the *Duberstein* test to section 170 charitable gifts, and instead applied an objective test.[124] Although the United States Supreme Court did not directly rule on the holding in *Singer*, Justice Marshall relied considerably on the case's "structural analysis" in his majority opinions in *American Bar Endowment* and, a decade later, *Hernandez*.[125]

Second, *American Bar Endowment* is narrowly focused on business-like dual character transactions[126] and it does not apply more generally to charitable gifts that lack such a dual character. Respondent American Bar Endowment generated a net profit to support its charitable mission by selling insurance to its members above its costs.[127] The question in the case was whether those members were allowed to deduct as a charitable gift the net profit amount of such policies they paid.[128] To answer this question, the threshold inquiry for the court was whether the members' payments exceeded the market value of the insurance they received.[129] Since the individual respondents did not demonstrate that they could have purchased similar policies at a lower cost to them, they did not demonstrate that they had made a transfer of money without adequate consideration and they had not made a charitable gift.[130]

In *American Bar Endowment*, the United States Supreme Court adopted the Service's two-prong test in Revenue Ruling 67-246 for determining when part of a "dual payment" is deductible.[131] The threshold inquiry in this test is whether such payment exceeds the market value of the benefit received.[132] Because the taxpayers in *American Bar Endowment* had not made payments in excess of the benefit received,

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124 *Id.* at 106. "It is our opinion that if the benefits received, or expected to be received, are substantial, and meaning by that, benefits greater than those that inure to the general public from transfers for charitable purposes (which benefits are merely incidental to the transfer), then in such case we feel the transferor has received, or expects to receive, a quid pro quo sufficient to remove the transfer from the realm of deductibility under section 170."

125 United States. v. Am. Bar Endowment, 477 U.S. 105, 117 (1986) (citing Singer Co. v. United States, 196 Ct. Cl. 90 (1971)); Hernandez v. Comm'r. 490 U.S. 680, 690–91 (1989) (citing *Singer Co.*, and describing how the court rejected the objective inquiry in *American Bar Endowment* in favor of the *Singer Co.* structural analysis approach).

126 *Am. Bar Endowment*, 477 U.S. at 106–07.

127 *Id.* at 107–08.

128 *Id.* at 106-07.

129 *Id.* at 117.

130 *Id.* at 118.

131 *Id.* at 117. ("In Rev. Rul. 67-246 the IRS set up a two-part test for determining *when part of a dual payment* is deductible. First, the payment is deductible only if and to the extent it exceeds the market value of the benefit received. Second, the excess payment must be made with the intention of making a gift.") (emphasis added, citations and punctuation omitted).

132 Id.

the court was able to dispose of the matter on the threshold inquiry.[133] If the taxpayers had demonstrated that their payment had been "clearly out of proportion" to the benefit they received, then—and only then—would the court have addressed the question of whether the payment was made with charitable intent.[134] If, in the alterative, the American Bar Endowment had provided its members with no consideration in exchange for their payment, or if such consideration were insignificant or insubstantial, the two-prong test under Revenue Ruling 67-246 would not apply, the intent prong would be unreachable, and the *Fire Insurance Patrol*'s selfish motive rule would apply.

The court's subsequent opinion in *Hernandez v. Commissioner*[135] aligns with the *Fire Insurance Patrol* line of cases and the court's prior holding in *Jones v. Habersham* that donor recognition does not invalidate charitable intent, nor is it a substantial benefit that triggers the *American Bar Endowment* dual character transaction analysis. In *Hernandez*, the issue was the deductibility of payments to the Church of Scientology for auditing services.[136] Unlike the taxpayers in *American Bar Endowment*, the taxpayers in *Hernandez* did not argue that their payments were dual character transactions.[137] Instead, they argued that their entire payment was a charitable gift to which the *quid pro quo* analysis did not apply because the payments were in exchange for religious services.[138] Writing for a divided court, Justice Marshall denied the taxpayer's argument that the Code categorically exempted payments for religious services.[139] Instead he referenced the Second Circuit case of *Foley v. Commissioner* to draw a careful line between those payments for religious services that were non-deductible, such as payments for parochial school tuition, and those that were deductible, such as the saying of masses as a memorial for the deceased, attendance at masses and High Holiday services, and donor memorial plaques.[140] In the latter cases, the recognition benefits to the donor were considered incidental to the primary benefits bestowed upon the members of the faith and the general public.[141]

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133 Id.

134 Id.

135 490 U.S. 680 (1989).

136 *Id.* at 684.

137 *Id.* at 697.

138 *Id.* at 692.

139 Id.

140 *Id.* (citing Foley v. Comm'r. 844 F.2d 94, 96 (2d Cir. 1988), *rev'd on other grounds*).

141 *Foley*, 844 F.2d at 96.

Justice Marshall's interpretation of the legislative history around the "contribution or gift limitation" in *Hernandez*[142] also aligns with a regime in which donor recognition is considered incidental to a gift, and not a good or service made in exchange for it. But the analysis is not incredibly precise. Indeed, section 170 gifts are "contributions" made with "no expectations of a *financial return* commensurate with the amount of the gift"[143] and Congress doubtless had little desire to allow a deduction for payments made to charities in exchange for goods and services. But Justice Marshall probably goes too far when he ascribes to Congress the intent to ban from charitable contributions "*any* quid pro quo."[144] First, the legislative history from which he draws support is related to section 162(b), and not section 170, and it is the section 162(b) trade or business limitation that applies to "payments" when there is "no expectation of any *quid pro quo.*"[145] Second, even if the legislative history for section 162(b) is relevant to section 170, the specific controls the general[146] and since a "financial return" is more specific than a "quid pro quo," Congress was presumably looking to prohibit only financial quid pro quos, and not just *any* of them.[147] Third, the notion that *any* quid pro quo would spoil an otherwise valid charitable gift is baldly inconsistent with Justice Marshall's position in *Hernandez* that some quid pro quos, like the saying of masses, attendance at religious services, and memorial plaques, *are* allowable.[148] In sum, donor recognition has long been treated as incidental to a gift, and even the most

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142 Hernandez v. Comm'r, 490 U.S. 680, 690 (1989). This legislative history may be limited in its application. First, Justice Marshall draws upon the 1954 revisions to section 162(b), and not section 170. Although Justice Marshall selectively quotes from this passage to limit the deduction of charitable gifts by individuals, the Senate report is meant to clarify the intersection of business deductions under section 162, and not personal charitable deductions under section 170. An illustrative example involving hospitals is meant to describe contributions that do not count against the percentage limitation for trade or businesses expenses, and those include contributions with "no expectation of a financial return" and "no quid pro quo." *See* S. Rep. No. 83-1622, at 196 (1954); H.R. Rep. No. 83-1337, A44 (1954). Second, some would argue that legislative history has virtually no place in judicial opinions. *See, e.g.*, Hirschey v. Fed. Energy Regulatory Comm'n, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.").

143 S. Rep. No. 83-1622, at 162; H.R. Rep. No. 83-1337, at A44 (emphasis added).

144 *Hernandez*, 490 U.S. at 690 (emphasis added).

145 S. Rep. No. 83-1622, at 196; H.R. Rep. No. 83-1337, at A44.

146 RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2068 (2012).

147 Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 335 (2002) (in a conflict, the specific controls the general).

148 Hernandez v. Comm'r, 490 U.S. 680, 701 (1989).

narcissistic gifts have been upheld time and again as a charitable object, worthy of full deductibility.

B. Policy Justifications Support the Legal Rule

Policy justifications generally support the rule that donor recognition does not affect the charitable nature of a gift.[149] But just as the arguments supporting the charitable sector's exemption from income taxation are heterodox,[150] a unifying narrative justifying the charitable deduction has proven elusive.[151] For instance, Yale Law School Professor John Simon searched Christian scripture,[152] the Oxford English dictionary,[153] the Charity Commission for England and Wales,[154] United States case law,[155] the Restatement (Second) of Trusts,[156] State law,[157] and the Internal Revenue Code,[158] seeking whether there might be a law of charity, only to reach the conclusion: "Probably not."[159] The quest to define charity is further complicated when one decentralizes Christian and Anglo-American narratives. The Jewish tradition of tzedakah,[160] the Muslim tradition of zakat,[161] the Hindu, Jain, and Bud-

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149 *See supra* Part I.A.

150 JOHN G. SIMON, IS THERE A LAW OF CHARITY? 5 (2002). "The Restatement of the Law of Trusts (Second) . . . concludes that there is no fixed standard to determine which [charitable] purposes are of such social interest to the community . . . The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes . . . As early as 1921 Lord Sterndale stated that he was unable to find any principle which will guide one easily, and safely, through the tangle of cases as to what is and is not a charitable gift." (punctuation and citation omitted).

151 The American Law Institute has embarked on a Restatement of Charitable Nonprofit Organizations. The Restatement will address law for the nonprofit sector, including principles relating to governance and to the duties of governing boards and individual fiduciaries. Its scope will include state, federal, and private regulation, as well as gifts. The project is in its second draft. *See* RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS (AM. LAW INST., Tentative Draft No. 1, 2016), https://www.ali.org/publications/show/charitable-nonprofit-organizations/.

152 SIMON, *supra* note 150, at 1–2.

153 *Id.* at 2.

154 *Id.* at 3.

155 *Id.* at 4.

156 *Id.* at 5.

157 *Id.* at 7.

158 *Id.* at 6.

159 *Id.* at 24.

160 *See* MISHNEH TORAH, *supra* note 41.

161 *See* The Islamic Voluntary Sector in Southeast Asia: Islam and the Economic Development of Southeast Asia 32–39, 74 (Mohamed Ariff ed., 1991).

dhist traditions of dana,[162] and Maori giving circles,[163] among others, all have something unique to say on the matter. In sum, charity is heterodox, non-synchronous, uncoordinated, and even wild.[164]

Given this heterodox American experience of charity, a heterodox policy justification for the charitable sector's exemption from tax is probably to be expected. Although notions of voluntary action for the public good, broadly construed, provide a starting point,[165] theories branch widely from this stump of Jesse.[166] For instance, the exemption helps to correct when the public sector provides suboptimal levels of collective-consumption goods,[167] also referred to as government[168] or regulatory failure.[169] Similarly the exemption helps to provide public goods when the free market fails to provide sufficiently by market forces or contractual devices.[170] Some justify the exemption because charitable giving fertilizes a seed-bed for diverse public policy innovations, all of which balances pluralism and cohesion in the civil society ecosys-

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162 *See, e.g.*, Sharada Sugirtharajah, *Traditions of Giving in Hinduism*, ALLIANCE, http://www.alliancemagazine.org/feature/traditions-of-giving-in-hinduism/ (last visited Mar. 31, 2017) (Hinduism); Fredrich Ulrich, *Dana (Giving)*, MANITOBA BUDDHIST TEMPLE, http://www.manitobabuddhistchurch.org/dana.html (last visited Mar. 31, 2017) (Buddhism); Acharya Mahapragya, *Basic Positivity of Ahimsa*, JAINWORLD, http://www.jainworld.com/philosophy/basic_positivity.asp (last visited Mar. 10, 2017) (Jainism).

163 *See* Lewis Hyde, The Gift: Imagination and the Erotic Life of Property 47–51 (1983).

164 SIMON, *supra* note 150, at 24.

165 *See* ROBERT L. PAYTON, PHILANTHROPY: VOLUNTARY ACTION FOR THE PUBLIC GOOD (1988) (defining philanthropy as "Voluntary Action for the Public Good" thereby enabling the reader to explore for herself the meaning of what is voluntary, public, action, and good). *But see, e.g.*, Henry Hansmann, *Economic Theories of Nonprofit Organizations*, *in* 2 THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 28-29 (Walter W. Powell ed., 1987) (explaining a macro-theory of the nonprofit sector dividing charities into donative, commercial, mutual, and entrepreneurial, and providing a critique of the public goods theory on the basis that many charities provide private goods. Even the most private varieties of commercial nonprofits provide some form of public benefits. For instance, private country clubs preserve green space from development, private social clubs typically curate art collections and patronize contemporary artists, and hospitals and nursing homes often provide medical, nursing, and technical education).

166 SIMON, *supra* note 150, at 19–23 (collecting theories).

167 Burton Weisbrod, Toward a Theory of the Voluntary Non-profit Sector in a Three-sector Economy 14 (1972).

168 *See* JAMES DOUGLAS, WHY CHARITY?: THE CASE FOR A THIRD SECTOR (1983).

169 *Cf.* Joseph Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, *in* GOVERNMENTS AND MARKETS: TOWARD A NEW THEORY OF REGULATION 13–51 (Edward J. Balleisen & David A. Moss eds., 2010) (describing regulatory failure in context of government failure).

170 Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 845 (1980).

tem.[171] Others justify the exemption since it enables citizen self-expression and non-state collective action.[172] And the list goes on.[173]

A unifying narrative for the charitable deduction has proven equally elusive. Various theories have justified the deduction on the definition of the tax base, as a subsidy for nonprofit capital development, as a means of encouraging altruism, and as a subsidy for donative support, among others.[174] With so many different narratives, a complete analysis of policy justifications for the deductibility of the recognized gift would be prohibitively expansive, and simply beyond the scope of this article.[175] However, many of the most significant recognized gifts, like Geffen's, involve non-profit capital development.[176] Therefore Professor Henry Hansmann's capital formation theory deserves special attention.[177] In short, if law and policy have the effect of making capital development for non-profits difficult, and if the charitable deduction is not a sufficient inducement to correct for such difficulty, then donor recognition should be welcome and encouraged if it helps mitigate the difficulties non-profits face in raising capital.

The capital formation theory supports the full deductibility of recognized gifts because recognition can meliorate the capital development incentive limits placed upon non-profits. The Code prohibits tax-exempt organizations from distributing profits to their directors, officers,

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171 *Compare* John W. Gardner, Speech at the Commonwealth Fund Board Retreat (1987) ("The great conservative ideas, the great liberal ideas—and the public policy alternatives based on those ideas—almost invariably nursed to maturity in the nongovernment sector. Both the Reagan Administration and the Kennedy Administration came in with seminal ideas drawn mainly from nongovernmental seedbeds."), *and* Brian O'Connell, *America's Voluntary Spirit*, 3 U.S. SOC'Y & VALUES 4 (1998) ("If volunteers and voluntary organizations were to disappear from our national life, we would be less distinctly American. The sector enhances our creativity, enlivens our communities, nurtures individual responsibility, stirs life at the grass roots, and reminds us that we were born free. Its vitality is rooted in good soil — civic pride, compassion, a philanthropic tradition, a strong problem-solving impulse, a sense of individual responsibility and an irrepressible commitment to the great shared task of improving our life together." (quoting Gardner)) *with* John W. Gardner, Speech to Independent Sector (1983) ("If you can't find a nonprofit institution that you can honestly disrespect, then something has gone wrong with our pluralism."), http://www.pbs.org/johngardner/sections/writings.html#speeches.

172 Alan Pifer, Carnegie Corp. of N.Y., *The Quasi Nongovernmental Organization* 8 (1967), http://files.eric.ed.gov/fulltext/ED018846.pdf.

173 SIMON, *supra* note 150, at 19-22.

174 *Id.* at 21.

175 But see *infra* Part III.B for a review of four policy rationales and their application to recognized gifts.

176 *See* Pogrebin, *supra* note 3, at A1.

177 *See* Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 837 (1980).

and shareholders.[178] Professor Hansmann calls this limitation "the non-distribution constraint."[179] Non-profits tend to proliferate in areas where the market is unable to adequately police producers by means of contractual devices.[180] This contract failure tends to occur in instances where the donor and service recipient are separated from one another,[181] when public goods are at issue,[182] where consumers are willing to pay different amounts for the same services,[183] when such services take the form of implicit loans,[184] and where certain complex personal services are involved.[185] In these areas, people are willing to give because, thanks to the non-distribution constraint, non-profit directors and officers lack the requisite incentives to profiteer.[186]

The non-distribution constraint encourages giving, but it also makes non-profit capital development difficult. Most importantly, the non-distribution constraint prohibits charities from selling equity.[187] So, instead, charities have to rely on donations, retained earnings, and debt financing to expand.[188] Access to tax-exempt private activity bonds helps[189]—along with their corresponding opportunities for arbitrage[190]—as does exemption from income and property tax,[191] and endowment returns.[192] But, as capital development tactics, each has limitations. For instance, borrowing increases long-term debt, risks forfeiture of collateral assets in the case of default, stresses operating budg-

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178 I.R.C. § 501(c)(3) (describing "[organizations] no part of the net earnings of which inures to the benefit of any private shareholder or individual.").

179 Hansmann, *supra* note 177, at 838.

180 *Id.* at 845.

181 *See id.* at 846–48 (describing poor relief and disaster assistance).

182 *See id.* at 849–54 (describing public broadcasting).

183 *See id.* at 855–59 (describing the performing arts).

184 *See id.* at 859–62 (describing higher education).

185 *See id*. at 862–68 (describing nursing home care, day care, educational services, and hospitals).

186 *Id.* at 875.

187 *Id.* at 877.

188 *Id.*

189 I.R.C. § 141(b)(9); *see Tax-Exempt Private Activity Bonds*, I.R.S. Pub. 4078 (2016), https://www.irs.gov/pub/irs-pdf/p4078.pdf.

190 *See generally* Congressional Budget Office, *Nonprofit Hospitals and Tax Arbitrage* 6 (2006), https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-06-hospitaltax.pdf (analyzing tax-exempt bonds and arbitrage profits); Gerard J. Wedig et al., *Tax-Exempt Debt and the Capital Structure of Nonprofit Organizations: An Application to Hospitals*, 51 J. FIN. 1247 (1996) (discussing the availability of tax exemption and indirect arbitrage for non-profit organizations).

191 Hansmann, *supra* note 177, at 882.

192 Garth Heutel & Richard Zeckhauser, *The Investment Returns of Nonprofit Organization, Part I*, 25 NONPROFIT MGMT. & LEADERSHIP 41 (2014).

ets, and can reduce an organization to receivership.[193] Effective arbitrage requires low-interest rates, which are not equally available across charitable subsectors[194] and various anti-abuse rules exist.[195] Endowment returns fluctuate year-to-year since few charities in the post-Uniform Prudent Investor Act era maintain the old orthodoxy of a fixed-rate approach to endowment management.[196] And retained earnings (unrestricted funds)[197] may not be available for organizations whose directors and boards cling inexplicably to the misplaced notion that nonprofits should just break even.[198]

The limits of these tactics illustrate the importance of charitable giving as a capital development tool. Philanthropic development is not without its critics and challenges.[199] But, compared to the other capital development methods mentioned previously, philanthropic development can be relatively cheap,[200] can generate positive and free publicity,[201] is firmly rooted in the culture of non-profit organizations,[202] creates assets, can relieve stress on operating budgets and margins, and

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193 Woods Bowman, *The Price of Nonprofit Debt*, NONPROFIT Q. (Aug. 6, 2015), http://nonprofitquarterly.org/2015/08/06/the-price-of-nonprofit-debt/.

194 *Id.* (demonstrating a more than 6 point spread between the borrowing rates of, for example, health care nonprofits and social service and human welfare nonprofits).

195 *See* I.R.C. § 149.

196 Unif. Prudent Investor Act (Unif. Law Comm'n 1994).

197 Thanks to Professor Andrew Imdieke for pointing out that a non-profit balance sheet would likely reflect this category as "unrestricted funds," and not "retained earnings".

198 *See* Nat'l Council of Nonprofits*, Myths About Nonprofits*, https://www.councilof nonprofits.org/myths-about-nonprofits (last visited Mar. 10, 2017).

199 *See, e.g.*, *America's Worst Charities*, TAMPA BAY TIMES (Dec. 9, 2014) http://www .tampabay.com/americas-worst-charities/ (ranking based on cash paid to solicitors in the past decade); T. Rees Shapiro, *United Way Leader's Fraud Scandal Marred Charitable Legacy*, WASH. POST (Nov. 14, 2011) (United Way's founder jailed for defrauding the organization of more than $1 million); Rebecca R. Ruiz, *Four Cancer Charities Are Accused of Fraud,* N.Y. TIMES, May 20, 2015, at B1 (discussing personal expenditures of nearly $200 million by the family members running the groups); *CharityWatch Hall of Shame*, CHARITYWATCH (Jan. 27, 2016), https://www.charitywatch.org/charitywatch-articles/charitywatch-hall-of-shame/63 (discussing those behind major charity scandals).

200 Fundraising capital campaigns and major gift programs have been attributed with as much as a 1900% return on investment. JAMES GREENFIELD, FUND RAISING: EVALUATING AND MANAGING THE FUND DEVELOPMENT PROCESS (2nd ed. 1999). Another estimate based on tax data suggests this number is closer to 440%. Mark A. Hager & Thomas Pollack, *What We Know About Overhead Costs in the Nonprofit Sector,* URBAN INSTITUTES (2014), http://www.urban.org/sites/default/files/publication/57576/310930-What-We-Know-about-Overhead-Costs-in-the-Nonprofit-Sector.pdf.

201 *See, e.g.*, Stephanie Strom, *Hopes Soar After Record Hospital Gift of $400 Million*, N.Y. TIMES, Feb. 4, 2007, at A25 (describing the recipient hospital system's goal to become "a national institution that will eclipse Johns Hopkins and the Mayo Clinic").

202 *See* DWIGHT W. BURLINGAME, PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA (2004).

it can send positive signals to the community.[203] Moreover, philanthropic development is not exclusive of other development methods and, when paired with such methods, philanthropy can amplify their benefits.[204]

Recognized donors play a critical role in capital development because they lend credibility, validity, and legitimacy to a non-profit's mission, leadership, and strategic direction.[205] Unlike their Gilded Era antecedents, today's high net worth individuals experience a noteworthy amount of respect and admiration in society, sometimes taking on near-salvific qualities.[206] Thus, when a non-profit secures a note-worthy donor and recognizes her, such recognition sends an important signal to other potential donors, and to the community as a whole, of the merits of the project, and of its momentum.[207] Furthermore, that donor can be especially persuasive in soliciting his or her peers based on the fact of his or her giving, the size of the contribution, and the risk taken in being an early supporter.[208] Conversely, when donors—especially lead donors—eschew recognition, the result is doubly bad.[209] Non-profits with anonymous lead donors forfeit signaling value, and lose out on a lead donor's unique and special power to motivate others.[210] Finally, since donor

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203 *See, e.g.*, Akanksha Jayanthi, *Capital Campaign Fundraising: How Big-Name Donations Can Rally Community Support*, BECKER'S HOSP. REV. (Sept. 5, 2014) http://www.beckershospitalreview.com/finance/capital-campaign-fundraising-how-big-name-donations-can-rally-community-support.html ("When donors [give] . . . that sends a really powerful message to the rest of the community . . . they're endorsing the direction we're moving in.").

204 *See, e.g.*, Robert J. Yetman, *Borrowing & Debt*, *in* FINANCING NONPROFITS: PUTTING THEORY INTO PRACTICE 243, 260 (Dennis R. Young ed., 2007).

205 *See* Strom, *supra* note 201.

206 *Compare, e.g.*, *Compare* WASHINGTON GLADDEN, THE NEW IDOLATRY & OTHER DISCUSSIONS 97 (McClure, Phillips & Co., 1905) (arguing that individuals endowed with large wealth are more dangerous because they are able to use money to corrupt others), *with* MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD AND WHY WE SHOULD LET THEM 1 (A&C Black Pub., 2008) (describing the supportive reaction of others upon seeing wealthy people making charitable donations and the popular view that the wealthy can solve many of the world's problems with charitable donations). Note also that supporters of the presidential campaign for billionaire Donald J. Trump are majority lower income voters. *See* Derek Thompson, *Who Are Donald Trump Supporters, Really?*, THE ATLANTIC (Mar. 1, 2016), http://www.theatlantic.com/politics/archive/2016/03/who-are-donald-trumps-supporters-really/471714/.

207 Strom, *supra* note 201.

208 *Cf.* Diane Reyniers & Richa Bhalla, *Reluctant Altruism and Peer Pressure in Charitable Giving*, 8 JUDGMENT & DECISION MAKING 7, 7 (2013) (social pressure positively affects pro-social behavior, including charitable giving).

209 *See, e.g.*, Drennan, *supra* note 16, at 94-94 (explaining how charities may want to use names in hopes of inspiring others or to show gratitude).

210 *Id.* at 72-73.

recognition has become ubiquitous,[211] donor anonymity may actually de-legitimate a cause's case for support—after all, if the lead donor is unwilling to associate his or her identity with a charity, why should anyone else?

Recognition also matters in pledge fulfillment, and the importance of pledges to accessing debt markets. Donors can pledge (promise)[212] gifts over many years,[213] enabling charities to announce very large gifts for less upfront donor cash and, in return, boosting the charity's signaling, publicity,[214] leverage, and balance sheet.[215] Accounting rules allow charities to recognize at present value unconditional promises to give as long as there is sufficient evidence to support the promise made and received.[216] Risk factors to consider in measuring fair value include a donor's creditworthiness, and other factors specific to the promise.[217] Recognition offers a charity two important benefits in this regard. First, when a charity recognizes its donor before she completes her pledge, the charity applies powerful social pressure that encourages the donor to complete such pledge without incident.[218] Second, a well-recognized donor helps to justify the donor's creditworthiness and supports a robust present valuation, which may increase bond ratings and lower borrowing costs.[219]

Finally, recognition matters because the charitable deduction alone is an insufficient inducement to encourage philanthropic giving at present levels.[220] Literature suggests that as many as eight mechanisms are determinant of individual giving including awareness of need, being asked, cost-benefit analysis, altruism, enhancing social standing, psycho-

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211 *Id.* at 61-64 (demonstrating the prevalence of donor recognition and charitable naming).

212 Fin. Accounting Standards Bd., Statement of Financial Accounting Standards No. 116: Accounting for Contributions Made and Contributions Received, at 6, ¶ 6 (1993), http://www.fasb.org/resources/ccurl/770/425/fas116.pdf.

213 Richard F. Larkin & Marie DiTomasso, WILEY NOT-FOR-PROFIT GAAP 2008, 104 (John Wiley & Sons Inc. 2008).

214 *See* Strom*, supra* note 201.

215 Fin. Accounting Standards Bd., *supra* note 212, at 8, ¶ 18.

216 *Id.* at 6, ¶ 6.

217 Am. Inst. of CPAs, Measurement of Fair Value for Certain Transactions of Not-For-Profit Entities, at 11 ¶ 31 (2011).

218 *See, e.g.*, Emily S. Achenbaum, *Levine Good Example of a Donor Gone Bad: Zoo Took His Name Off Polar Bear Exhibit*, CHI. TRIB., Apr. 17, 2008 (describing instances where recognition was removed where donors failed to complete pledges).

219 *See, e.g.*, KATHERINE G. WILLOUGHBY, PUBLIC BUDGETING IN CONTEXT (John Wiley & Sons Inc. 2014) (higher credit ratings reduce borrowing costs).

220 *Cf.* Hansmann, *supra* note 177, at 883–84 (arguing that the availability of charitable deductions has proven neither necessary nor sufficient for the development of donative non-profits).

logical benefits, pro-social values, and efficiency.[221] Of these, only cost-benefit analysis takes tax benefits into consideration.[222] High net worth individuals and families contribute a significant portion of the total amount of annual gifts to U.S. charities.[223] This group is not much motivated by tax avoidance.[224] Only ten percent of high net worth individuals cite reducing taxes among their motivations for giving.[225] Instead these individuals cite among their motivations being passionate about a cause, having a strong desire to give back, having a positive impact on society and the world, and encouraging charitable giving by the next generation.[226] Charities recognize donors to encourage these pro-social and additive behaviors, to benefit their own capital development strategies, and—in no small part—because society considers recognizing a donor with just a note, or even a name, to be a normal, and nominal, part of every gift exchange.

II. Calls for Reduced Deductibility

A. William Drennan: Where Charity and Pride Abide

A frequently cited[227] scholar in this debate—and one advocating that deductibility should be limited when a charity recognizes a donor—is Professor William Drennan at Southern Illinois University School of Law. In Professor Drennan's 2012 article *Where Generosity & Pride Abide: Charitable Naming Rights*, he argues that the Code should partially disallow an individual income tax deduction for charitable gifts when those gifts result in donor recognition.[228] When a charity names a facility for a donor, it does so "in return" for the gift[229] and although donors typically cannot claim a deduction for "return benefits," a special rule values such naming "rights" as zero.[230] According to Professor

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221 Rene Bekkers & Pamala Wiepking, Generosity & Philanthropy: A Literature Review 21 (2007).

222 *Id.* at 25-27 (analyzing the tax benefit motivation to make philanthropic contributions).

223 *See generally* U.S. Trust & The Philanthropic Initiative, The U.S. Trust Study of the Philanthropic Conversation 12 (2013) (giving, either through a charitable trust, private foundation, or donor advised fund, is nearly universal among high net worth individuals).

224 *Id.* at 49, 52.

225 *Id.* at 49.

226 *Id.*

227 See, e.g., Sarah Murray, Institutional Naming Rights Gaining Favour Among Wealthy Donors, Fin. Times, Sept. 19, 2014; Reilly, supra note 16.

228 80 U. Cin. L. Rev. 45, 69 (2012) (also discussed *supra* note 16).

229 *Id.* at 54.

230 *Id.* at 65-66.

Drennan, this rule creates a significant federal revenue shortfall,[231] and encourages donors to give to less worthy causes.[232] To remedy these problems, whenever a charity recognizes a donor, a related contribution should be allocated for federal income tax purposes as "part gift and part purchase" with the portion of the contribution made "in exchange" for the name rendered non-deductible.[233]

Professor Drennan is concerned by evidence[234] suggesting donor recognition has drastically changed philanthropy,[235] to wit: significant increases in naming opportunity availability and the number and types of organizations offering them corresponds with an equally significant—and problematic—increase in expectations on the part of donors that their names should be recognized in exchange for their gifts.[236] Today donors can put their names on anything,[237] for nearly any charity,[238] and even for certain governmental agencies,[239] so much so that it has become a notable event when a charity elects not to offer naming rights.[240] But in the past, donors were far more modest.[241] Historically such "mega-donors" did not bargain for public monuments to their philanthropy.[242] Today many do.[243] In short, today's mega-donors secure something that is either qualitatively or quantitatively different than their eleemosynary antecedents—naming rights.[244]

Apparently,[245] whenever a charity recognizes a donor, or indicates its plans to do so, a contractual right ripens in the donor's person to enforce a bargain struck between her and the charity: gift for publicity.[246] This right, styled a "naming right," has intrinsic and extrinsic value. Naming rights have intrinsic value because named recognition signals a donor's position in the social hierarchy of wealth holders, ap-

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231 *Id*. at 55.
232 *Id.* at 55-56.
233 Id.
234 *Id.* at 59, 65.
235 *Id.* at 60.
236 *See id.* at 61-64 (demonstrating the different naming opportunities and availability).
237 Id.
238 *Id*. at 64.
239 Id.
240 *Id*. at 61.
241 *Id.* at 60.
242 Id.
243 *Id*.
244 Id.
245 Professor Drennan does not define "naming rights" in his scholarship, leaving the reader to infer the meaning of the legal concept at the heart of his argument. *See infra* Part § III.A. *See also* William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts*, 2016 Mich. St. L. Rev. 1267 (2016).
246 Drennan, *supra* note 16, at 57.

pears to endorse a donor's beneficence, and thereby increases social status.[247] Named recognition also has extrinsic value, as illustrated by the proliferation of lucrative sports stadium naming deals, a value attributed to advertising impressions and other public relations benefits.[248] When a charity provides such intrinsic and extrinsic value to donors by recognizing them, Professor Drennan asserts that the charity has made a return benefit of monetary value made in exchange for a gift.[249]

Since the Service generally disallows gift treatment for the portion of a transfer made to charity in exchange for a return benefit of monetary value, Professor Drennan views full gift treatment of donor recognition as a "special rule" exempting such naming.[250] After all, if the value of a rubber chicken dinner, a "Car Talk" coffee mug, or a charity auction item is not deductible, how can a $10 million perpetual naming deal be?[251] Professor Drennan is concerned that this special rule exempting recognized donors from taxation creates a host of problems. Among other things, the practice is costly,[252] it subsidizes elite personal consumption at the expense of the public,[253] violates horizontal equity,[254] decreases tax compliance,[255] induces charitable mission drift,[256] and encourages charities to commit fraud.[257] These negative consequences justify ending the deduction for the naming portion of recognized gifts.

As a corrective, Professor Drennan calls to limit the deductibility of charitable gifts when a naming component is involved.[258] Specifically, he wishes to see either a market rate appraisal or a uniform fractional disallowance applied to naming rights to reduce the value of the allowed

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247 *Id.* at 55 n.7. Professor Drennan draws on Professor Eric Posner's work on altruism, gift law, and status to suggest that donor recognition may have increasing marginal utility, an assertion that has some merit. Since Bill Gates and Warren Buffet launched the Giving Pledge in 2010, only 141 individuals have been recognized for making a moral commitment to give away the majority of their net worth to philanthropy during life or at death. Membership in the pledge is by invitation only. *See* GIVING PLEDGE, http://www.givingpledge.org (last visited Mar. 10, 2017).

248 Drennan, *supra* note 16, at 109–11.

249 *Id.* at 55.

250 *Id*. at 67. Professor Drennan describes the apparent rationale as follows: (1) naming is incidental to the mission of a charity; (2) naming rights are not significant return benefits; and (3) naming rights have no "monetary value."

251 *Id*. at 87.

252 *Id*. at 68.

253 *Id.* at 80-81.

254 *Id*. at 75.

255 *Id.* at 76.

256 *Id.*

257 *Id.* ("[T]he current practice forces charitable administrators and fundraisers into duplicative behavior, and requires that charities issue dubious documents.")

258 *Id.* at 85.

deduction.[259] Under a market rate appraisal approach, charities would be required to provide the donor with an estimated market value of the naming portion of a gift.[260] The charity would base that value on advertising impressions or other correlates in the for-profit marketing world.[261] Smaller levels of recognition would be covered by an expanded exemption for such recognition benefits.[262] Under a uniform fraction approach donors would be disallowed deductibility for a uniform fraction of their gift based on construction costs and advertising values.[263] In either approach, the recognized portion of the total gift would be disallowed a deduction, with the difference between approaches simply being how to measure the value of the donor recognition.

Professor Drennan finds support for his proposal in four major policy justifications for the charitable deduction: altruism, subsidy, definition of income, and pluralism.[264] First, Professor Rob Atkinson's altruism rationale[265] argues that the Code should encourage selfless behaviors.[266] Anonymous gifts are selfless, ego-denying, and humble.[267] Recognized gifts are selfish, ego enhancing, and proud.[268] Since recognized gifts are selfish, argues Professor Drennan, the altruism rationale suggests that the charitable deduction should not apply to them.[269]

Second, according to the subsidy rationale,[270] the charitable deduction is rationally set at a Goldilocks-optimal level. Too little deduction and the public donates sub-optimally.[271] Too much deduction creates waste.[272] The subsidy theory argues that—at least at the Goldilocks-optimal level—the charitable deduction will generate sufficient levels of

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259 *Id.*

260 *Id.* at 87.

261 *Id.* at 88. To apply advertising value as a benchmark, one must believe on some level that donor recognition is analogous to advertising. However, if the naming portion of such a gift were advertising, then presumably the charity must pay unrelated business income tax on such advertising value sold, thereby decreasing the amount of the gift available to accomplish the organization's charitable purpose, but increasing tax revenue. *See infra* Part III.C.

262 Drennan, *supra* note 16, at 92.

263 *Id.* at 95-96.

264 *Id.* at 78-82.

265 Id. at 77, n.153 (citing Rob Atkinson, Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Synthesis, 27 STETSON L. REV. 395 (1997)).

266 *Id.* at 78 (emphasis added).

267 *Id.* at 79.

268 *Id.*

269 *Id.* at 79-80.

270 *Id.* at 80-81.

271 *Id.* at 80.

272 *Id.* at 80-81.

public goods, in part by imposing a higher tax rate on free riders.[273] When a charity interferes with the rational rate of subsidy—for instance, by providing additional compensation in the form of donor recognition—the subsidy value is lessened by the amount the charity has "compensate[d] the philanthropist."[274] Donor recognition makes the porridge a little too hot, Professor Drennan argues, and so the Code must readjust its temperature, in the present case by reducing the recognition tax subsidy amount.[275] Thus, only the unrecognized portion of the gift may be subsidized without violating the theory and inappropriately taking from the public.[276]

Third and fourth, Professor Drennan finds support in the proper measure of taxable income theory and the pluralism theory. The proper measure of taxable income includes only those amounts available for personal consumption.[277] Since donor recognition is personal consumption, a taxpayer must include in income the portion of any charitable gift that is recognized.[278] The pluralism theory suggests that charitable giving encourages pluralism by facilitating the choice preferences of minorities who, by definition, cannot harness the political will to do so.[279] Since anonymous donors can still enact minority preferences, Professor Drennan believes his proposal does not threaten pluralism or minority rights and, contrariwise, his proposal may actually encourage pluralism by penalizing oligarchs.[280]

B. Linda Sugin: Your Name on a Building and a Tax Break, Too

Fordham University Law School Professor Linda Sugin has also been critical of unlimited gift deductibility when charities recognize donors.[281] In a 2015 New York Times Op-Ed., Professor Sugin called on

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273 *Id.* at 80.

274 *Id.* at 81.

275 *Id.*

276 Id.

277 Id.

278 *Id.* at 81–82. Professor Drennan acknowledges that if the consumption analysis focuses on those who consume the benefits resulting from the gift, e.g., service recipients, this rationale fails.

279 *Id.* at 82.

280 *Id*. Elsewhere, Professor Drennan addresses two additional critiques of his proposal. First, he believes that naming should be differentiated from warm-glow and other benefits because the naming can be avoided through anonymous giving, and since it is voluntary. Second, Professor Drennan suspects that his proposal may result in a decline in charitable giving; however, he feels that such a decline could be met with a corresponding increase in government support.

281 Linda Sugin, Opinion, *Your Name on a Building and a Tax Break, Too*, N.Y. TIMES, Mar. 11, 2015, http://www.nytimes.com/2015/03/11/opinion/rethinking-taxes-and-david-geffens-gift-for-avery-fisher-hall.html?_r=0.

Congress to enact an eighty-five percent limit in the amount of a taxpayer's charitable deduction when that taxpayer "insist[s]" on perpetual recognition, and to allow a full charitable deduction to those donors who agree to recognition lasting fifty or fewer years.[282] The David Geffen recognition at Lincoln Center concerns Professor Sugin. She believes that "naming rights" are burdensome, and that they arise in response to increasing demands levied by powerful donors against relatively powerless charities.[283] Her proposal is intended to remedy these concerns.

Professor Sugin also suggests that discouraging perpetual gifts may generate additional philanthropic support.[284] She agrees with Professor Drennan that donor recognition is externally valuable.[285] When a charity's most valuable assets—like the name of its concert hall—are perpetual, lock-in results.[286] The charity is charged with maintaining the facility, but it lacks valuable opportunities to recognize new donors, making such maintenance doubly difficult, as was the case with Avery Fisher Hall. According to Professor Sugin, a donor who limits recognition to fifty years creates new opportunities for future donors to give generously, and avoids lock-in.[287] The Code should therefore encourage donors to decline perpetual recognition in favor of a quantum of fewer than fifty years.[288]

III. Critiques of Reduced Deductibility

A. Property, Not Contract, Is the Proper Body of Law

Professors Drennan and Sugin join others[289] when they draw upon contract law and style donor recognition to be a "naming right."[290] The "naming" aspect relates to the identity association that occurs when a charity links its services with the donor who made such services possible. Charities place a donor's name on a building or smaller part thereof,[291] allow a donor to place language on a facility, e.g., a men's room,[292] or tie

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282 Id.

283 Id.

284 Id.

285 *See* Linda Sugin, *Encouraging Corporate Charity* 16 (Fordham L. Legal Studies Research Paper No. 887354, Feb. 28, 2006), *available at* http://ssrn.com/abstract=887354 (describing the benefits of corporate charitable efforts).

286 *See* Sugin, *supra* note 281.

287 Id.

288 Id.

289 See Evelyn Brody, From the Dead Hand to the Living Hand: The Conundrum of Charitable-Donor Standing, 41 Ga. L. Rev. 1183, 1188-89 n.6 (2007).

290 *See supra* text accompanying notes 243-44, 279.

291 Drennan, *supra* note 16, at 62-63.

292 *Id.* at 61.

the donor's name to the organization in other ways, e.g., with a "named" professorship.[293] The "rights" aspect of donor recognition describes the donor's status with the charity arising from a gift. In one sense, the concept is akin to a gratuitous option—i.e., the donor has a "right" of first refusal to pick how that charity will recognize her.[294] Professor Drennan goes farther and asserts a donor's standing to enforce a valid agreement arising from an offer,[295] acceptance,[296] and valuable consideration.[297] Professor Sugin takes a weaker stance, denying the idea that charities actually "sell" recognition, but she nevertheless encourages Congress to treat a perpetually recognized transaction as a fictional purchase to the extent of fifteen percent,[298] similar to Professor Drennan's uniform fraction approach.[299]

As Professor Evelyn Brody has illustrated, property, not contract, offers the relevant legal doctrine for such gift transactions.[300] First, donors have traditionally had considerable difficulty on the basis of lack of standing to access the courts and enforce charitable gifts.[301] Those who secure standing typically do so with the partnership of their state's Attorney General.[302] For this reason, and for the chilling effects of negative publicity on the charity, these cases often settle.[303] Second, charitable gifts are subject to the equitable doctrine of *cy pres*, which

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293 *Id.* at 63.

294 *See id.* at 62 (describing the common practice of charities publishing a list of naming opportunities).

295 *Id.* at 56, 59, 64 (rights are "advertise[d], market[ed], and s[old].").

296 *See id.* at 60 (rights are bargained for).

297 *See id.* at 70 n.105. Drennan supports his argument with a single 1927 Benjamin Cardozo opinion that Drennan himself recognizes has been described as "contrived," "artificial," and comparable to "the misdirection of a three-card monte pitchman on the New York City subway." Drennan's more recent writing has referred to this opinion as a "landmark" and identified additional case law. Drennan (2016) *supra* note 245, n. 222.

298 Sugin, *supra* note 281.

299 Drennan, *supra* note 16, at 95.

300 *See generally* Brody, *supra* note 289, at 1192, 1225 (noting an apparent asymmetry that enables a recipient (promisee) to seek specific performance under a quasi-contract theory while at the same time denying the donor similar remedies).

301 *See, e.g.*, Carl J. Hertzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 996 (Conn. 1997) (defendant moved to dismiss on the ground that the plaintiff had lack of standing); *see generally* Brody, *supra* note 289, at 1187 ("The traditional legal bar to donor standing forces the charitable donor to make the case to the person traditionally granted standing to sue: the state attorney general").

302 *See, e.g.*, Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426, 435-36 (N.Y. App. Div. 2001) (granting co-existent standing to a donor's widow and the New York Attorney General). Note that it was only after New York Attorney General Elliot Spitzer removed his objection to the donor's standing that the suit moved forward.

303 Brody, *supra* note 289, at 1187-88; *see, e.g.*, Princeton Univ., *Robertson Lawsuit Overview*, PRINCETON, http://www.princeton.edu/robertson/about/ (last visited Mar. 10, 2017) (discussing the settlement agreement in the *Robertson v. Princeton* lawsuit, reached

places in a judge's hands the power to redirect the proceeds of a charitable gift if the purpose for which the gift was originally made becomes impracticable or wasteful.[304] In such case, gifts are not returned to the donor or her family, but instead applied to a charitable object reasonably close or similar to the donor's intended purpose, even it that involves a charity whose identity the donor never knew, or a cause the donor could not have anticipated.[305] The Uniform Prudent Management of Institutional Funds Act makes clear that this doctrine also applies to funds held by non-profit corporations, and grants charities the authority to modify such funds merely by providing "notice" to remove a restriction on a donor fund if such fund is old and small.[306] Finally, and perhaps most relevant, many recognized donors sign a statement explicitly allowing the charity to discard the donor's recognition if such recognition is no longer in the charity's best interest.[307] However, even absent such agreement, charities have often removed recognition when the donor's money, activities, or persona become socially unacceptable due to scandal.[308] In short, a donor seeking to enforce her recognition "rights" may find such rights to be flimsy indeed, and appealing to contract doctrine to insist that donor recognition is valuable consideration to the donor is a relatively novel argument the widespread success of which remains to be seen.

B. A Reduced Deduction is Ill-fitting With Policy Justifications

Professor Drennan spends much of his argument defending its fit with theoretical justifications for the charitable deduction.[309] Equally persuasive arguments could be made to support the contrary position.

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on Dec. 9, 2008, giving Princeton University full control of the endowment associated with the Robertson Foundation).

304 Restatement (Third) of Trusts § 67 (Am. Law Inst. 2003).

305 Restatement (Third) of Trusts § 67 cmt. d. *See also* Restatement (Third) of Trusts § 66 (deviation).

306 UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(d) (UNIF. LAW COMM'N 2006) (defining "old" and "small" as a fund valued less than $25,000 that has been held for at least 20 years).

307 UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 6(a). If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

308 *See, e.g.*, Paul Dunn, *When a Donor Becomes Tainted*, NONPROFIT Q. (Mar. 21, 2010), http://nonprofitquarterly.org/2010/03/21/when-a-donor-becomes-tainted/ (discussing Queens University's announcement to return a pledged gift of $1 million from David Radler and remove his name because the integrity of the gift was compromised when Radler pled guilty to mail fraud and sentenced to a $250,000 fine).

309 *See supra* text accompanying notes 262-78.

For instance, if donor recognition is not an insubstantial benefit—as he would have us believe—then the subsidy theory and definition of income theory support total, and not partial, disallowance. Professor Drennan asserts that the "naming portion" of a contribution can be separated from the "gift portion"[310] and that the fair market value of the "naming portion" would be the amount that the willing buyer would pay the willing seller, based on advertising value.[311] But so long as no charity is in the business of selling its recognition opportunities absent the "additional" charitable gift, his analysis is inapposite. Charities are generally unwilling to sell donor recognition for any less than the full ask amount.[312] Therefore, if recognition has any value at all, then the fair market value must be the full gift amount. In this case the subsidy and definition of income theories both require the entire payment to be nondeductible, since the subsidy would be inefficient and the gift entirely personal consumption.

Second, Professor Drennan does not explain why anonymous giving is a better policy choice.[313] The altruism rationale leads him to discount the value of a charitable deduction when recognition is involved since anonymous giving is more altruistic than recognized giving, which he views as selfish and ego-centric.[314] In a narrow sense he may be right, since identity edification is presumptively ego-enhancing and anonymity presumptively ego-negating. But, Professor Drennan does not provide a coherent policy reason for this preference.[315] The problem may be one of definition. If altruism means being "selfless," then encouraging anonymous gifts may encourage altruism.[316] But if altruism means helping others for its own sake, then insisting on recognition may actually be more altruistic. For instance, if recognized gifts encourage others to give, send strong signals to the community about the value and importance of a charity, and endorse its good works, such recognition is altruistic. If eschewing recognition sends no such positive messages, and creates questions as to the willingness of a charity's donors to stand alongside the object of their benevolence, then such behavior may actually be misanthropic.

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310 Drennan, *supra* note 16, at 56.

311 *Id.* at 91.

312 The author does not suggest that no charity ever accepts less than the full ask amount for a gift. However, charities do tend to accept the largest gift available from their donor base at the time in order to make their campaign goals, and they are unlikely to base the amount they are willing to accept on the advertising value it generates.

313 *Id.* at 79-80.

314 *Id*. at 79.

315 *Id.* at 58 n.24.

316 *Id.* at 79.

C. The Corporate Sponsorship Regime Cuts Against Reduced Deductibility

Another critique levied against donor recognition is that it looks like corporate sponsorship and, since corporate sponsorship is taxable, individual donor recognition should be taxable too.[317] However, when it discusses corporate sponsorship, the Code carves out a specific area of tax-free recognition by distinguishing between charitable advertising and recognition. For instance, when a charity sells advertising to a corporation, that activity is generally considered to be unrelated to its charitable mission and is therefore taxable as unrelated business income.[318] However, "qualified" corporate sponsorship payments made to charities are different.[319] Qualified corporate sponsorship payments are those made without an arrangement or expectation of "substantial return benefit."[320] Under Treasury regulations, the mere use or acknowledgment of a name, logo, or product lines of a trade or business is not considered to be a substantial return benefit.[321] Only when such use or acknowledgement contains advertising messages does a substantial benefit accrue.[322] Contrariwise, "exempt organization donor recognition is not advertising."[323] Examples of such recognition include "naming a university professorship, scholarship or building after a benefactor."[324] Qualified sponsor payments recognized in these ways qualify as support under section 170[325] and as gifts and contributions under section 509(a)(2)[326] This language lends strong authority to the argument that individual donor recognition must be treated in the same way.

D. Reduced Deduction Unlikely to Curb Abuses, But May End Honorary Recognition

Finally, neither Professor Drennan nor Professor Sugin considers what to do with private foundations, charitable trusts, and donor ad-

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317 *Id.* at 74-75.

318 United States v. Am. Col. of Physicians, 475 U.S. 834, 834 (1986).

319 *See* Treas. Reg. § 1.513-4(a) ("Under section 513(i), the receipt of qualified sponsorship payments by an exempt organization which is subject to the tax imposed by section 511 does not constitute receipt of income from an unrelated trade or business.").

320 Treas. Reg. § 1.513-4(c)(1).

321 Treas. Reg. § 1.513-4(c)(2)(iv).

322 Treas. Reg. § 1.513-4(c)(2)(v) ("Advertising includes messages containing qualitative or comparative language, price information or other indications of savings or value, an endorsement, or an inducement to purchase, sell, or use any company, service, facility or product.").

323 I.R.S. News Release IR-92-04 (Jan. 17, 1992).

324 *Id.*

325 Treas. Reg. § 1.170A-9(f)(6) (defining what constitutes support).

326 Treas. Reg. § 1.509(a)-3(f).

vised funds. First, should the deductibility of gifts made to charitable trusts, private foundations, and donor advised funds be similarly limited when a name is attached to them (in perpetuity)? Private Foundations, charitable trusts, donor advised funds, and even LLCs have become increasingly frequent vehicles for charitable giving and family legacy planning over the past few decades.[327] Donor advised funds, for instance, allow donors to contribute to public community foundations or similar entities and receive many of the same benefits as they would if they created a trust or private foundation, but generally with fewer overhead costs, more administrative support, and fewer contribution limitations.[328] Donor advised funds also enable their contributors to name their funds.[329] Although some donors establish funds with names intended to mask the identities of their contributors, the apparently more common practice is for donors to name their funds after themselves.[330] In addition to receiving recognition from the community foundation for the initial gift and any subsequent gifts, the donors are often recognized when the donor advised fund makes the gifts to a secondary charity.[331] If recognition limits deductibility, why not would the gifts establishing or contributing to named donor advised funds, private foundations, and charitable trusts also be subject to reduced deductibility?

Second, how should we treat the gifts such entities make when charities recognize the entity—or the family that created it? What, for instance in Professor Sugin's proposal, would stop David Geffen from using a donor advised fund or family foundation as a pass-through instead of making the gift directly, as Avery Fisher had done in the first place?[332] Take for instance the Kresge Foundation, which for eight decades offered an extremely popular challenge grant to help conclude capital campaigns.[333] The foundation, established in 1924 with an initial

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327 *See generally* Nat'l Phil. Tr., *2016 Donor-Advised Fund Report* (2016), https://www.nptrust.org/daf-report/index.html (last visited Mar. 10, 2017) (analyzing charitable contributions and trends).

328 Nat'l Phil. Tr., *Donor-Advised Fund Program Guide* 6, http://www.nptrust.org/daf-forms/Donor-Advised-Fund-Program-Guide.pdf.

329 See id.

330 *See id.* at 7 (explaining options for naming funds).

331 *See id.* at 1.

332 Professor Brody notes that the original Avery Fisher gift was made in this way, "by [a] family foundation . . . with no natural life." The Hall was not named "The Avery Fisher Family Foundation Hall" but instead was named merely for Avery Fisher. Unless the tax code somehow retroactively limited the family's charitable deduction when such donors were recognized for the gifts of their foundations or advised funds, neither Professor Sugin's proposal nor Professor Drennan's would have any deterrent value. *See* Brody, *supra* note 289, at 1271.

333 The Kresge Found., *A Guide to the Challenge Grant* 2 (2011), http://kresge.org/sites/default/files/GuidetoChallengeGrant.pdf.

gift of $1.6 million from K-Mart founder Sebastian Kresge, is headquartered in Troy, Michigan.[334] The Kresge Foundation issued challenge grants to charities to help them complete capital projects, especially in a campaign's final stages when charities feared donor fatigue would prevent successful completion.[335] Kresge challenge grants were vigorously advertised to donor constituencies and charities often recognized the Kresge Foundation for their support.[336] If such contribution were treated as part gift and part purchase, the non-deductible portion would have no effect on Sebastian Kresge or his family, the former of whom is long dead, and the latter whose tax deductions had already been fully claimed decades ago.

This analysis leads to one final, though perhaps more existential, concern—what about honorary recognition when no gift has been given? If donor recognition is indeed a financial benefit—and one significant enough to limit deductibility—would it not also be properly considered income in the year it was received? After all, living recipients of honorary naming have the right to refuse the use of their name or image, which would also mean refusing receipt of the recognition's monetary value. Those who accept such recognition would presumably accept the value of the naming received and, subsequently, should pay tax on that income.[337] It is reasonable to assume that no person, even the most narcissistic, would choose to pay income tax to ensure that their name would be attached to some bridge, freeway, or naval vessel. Thus such a policy would presumably curtail honorary recognition as well as donor recognition.

Conclusion: A Nominal Benefit

American society has long been described as comprising three sectors in equipoise, one private, one public and one called voluntary, charitable, non-profit, or independent. From an economic normative position this is a compromise between those who desire near-complete government redistribution and those who would prefer near-complete free market rule. From a politically normative position this is a compromise between those who would prefer basic majoritarian democracy and

334 Press Release, Mt. Holyoke, *MHC Awarded $1 Million Kresge Challenge Grant* (Sept. 25, 2001) https://www.mtholyoke.edu/media/mhc-awarded-1-million-kresge-challenge-grant [hereinafter *Kresge Challenge Grant*].

335 The Kresge Found., *supra* note 333, at 2.

336 See, e.g., Kresge Challenge Grant, supra note 334.

337 *See, e.g.*, Richard Simon, *Whopper Highway? Virginia Considers Selling Road Rights*, L.A. Times, Jan. 23, 2012, http://latimesblogs.latimes.com/nationnow/2012/01/virginia-considers-selling-naming-rights-to-roads.html (informing how the governor of Virginia proposed to sell the naming rights of state bridges and highways to raise funds for road maintenance).

those would rule by consensus or tyrannical minorities. Our current system, balances between these—and other—tensions and creates space to innovate, to serve, to educate, to play, and to dream. This article takes the positions that—generally speaking—our current system is better than the alternatives, that the strength of the independent sector is an important national resource, and that its health needs promotion.

Under the Code, all exempt public charities are considered equally worthy of support. This article does not take issue with that policy choice. As Professor Simon aptly remarks, we are left to "muddle through" and such is probably the best approach anyway at least in a heterodox society that takes minority rights seriously but without granting minorities' voices too much power over the majority will. We all have preferences about which charities are best, and which should probably not exist, but the best way to promote those views is not by changing the Code, but by advocating for the worthiness of those charities one himself finds valuable, by giving generously, and by encouraging others to give—possibly even at the expense of those he finds distasteful.

Indeed the Code generously supports the independent sector with a tax expenditure valued in the $44.8 billion range. But despite the tactics of an increasingly sophisticated fundraising community, giving as a percentage of gross domestic product has remained nearly flat at 2.20 percent for more than four decades.[338] Even if the methods of recognizing donors have evolved somewhat over time, the cost of the tax expenditure as it relates to the overall economy is not any more expensive today than it was in the heyday of anonymous noble donors who gave with little regard for their own recognition.[339] Even if such a heyday exists—and this author is skeptical indeed—a return to it could result not only in a raw dollar decline, but potentially a decline in giving as a percentage of GDP. But so long as donor advised funds and private foundations exist under the current tax regime, the worst perceived abusers of the recognition "loophole" could escape the limitation anyway.

Throughout this same time, the Code has when appropriate identified exchanges that are more sale than gift and disallowed such mixed transactions to the extent of the return benefit. But benefits disallowed in such cases represent real and tangible sale items like dinners, tote bags, and coffee cups. In short, if you can buy it in the gift shop or the cafeteria—or in the free market from a for-profit establishment—a do-

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338 Suzanne Perry, *The Stubborn 2% Giving Rate*, CHRON. PHILANTHROPY (June 17, 2013), https://philanthropy.com/article/The-Stubborn-2-Giving-Rate/154691.

339 *See* Drennan, *supra* note 16, at 60 (explaining the comparative modesty between historically mega-donors and modern donors).

nor probably cannot deduct it as a gift.[340] But even when an exchange is less tangible—as when recognition passes into advertising—the charity is disallowed from considering such to be an exempt function and must instead pay unrelated business income tax on the revenue. Should donor recognition pass into advertising, a remedy remains to contain and tax it as unrelated business income—although on the charity's side, and not the donor's. Although the line between recognition and advertising may be cloudy, it exists nonetheless as a potential remedy for the most extreme cases.

And what we are really talking about here are extreme cases. As anyone who has raised money for charity knows, donors oftentimes have to be begged and coaxed into recognition. A final anecdote is illustrative. A prominent Chicago donor known personally to the author has a bit of a reputation in the community for wanting recognition and—fair enough—is an excellent negotiator for it. But this was not always the case. The donor had long and faithfully followed Maimonides' command and gave anonymously, refusing all recognition. But once, on a trip to Israel, his rabbi chided him for so vehemently avoiding recognition. The rabbi told him that—given the donor's position in the community as a wealthy man and as someone who had not been recognized—many believed he had not given, and such feelings were causing others to hold back from giving more generously. The talk was a revelation for the donor, who thereafter became more public with his philanthropy, and went on to raise record amounts of money for worthy charities in the United States and abroad. To those charities and the recipients of their services, allowing recognition proved invaluable. But to him, it was simply a nominal credit, and so it should remain for the Internal Revenue Code.

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340 Thanks to Professor James Hines for recognizing that these items are more likely to be whipsawed if the Code allowed charities to give them away with no value to donors. If the cost of these items were not removed from the calculation of a gift, then for-profit coffee mugs simply wouldn't exist, for example. Contrariwise, there is no whipsaw effect for donor recognition. Allowing a full deduction for donor recognition is not about to shut down a recognition industry in the same way that potters and tote-makers would suffer, absent such a provision.